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Manuel Farach

Internaves de Mexico S.A. de C.V. v. Andromeda Steamship Corporation, Case No. 17-12164 (11th Cir. 2018).

Contracts, including arbitration agreements, are interpreted according to five basic principles: the actual language used is the best evidence of the intent of the parties, a contract should be read to give effect to all of its provisions, a contract's internal conflict resolution method should be employed if provisions conflict with each other, specific provisions generally control over general provisions, and contracts must be interpreted with sensitivity to the reality that parties occasionally err or misprint in the course of contract drafting.

Jackson v. Bank of America, N.A., Case No. 16-16685 (11th Cir. 2018).

Eleventh Circuit precedent holds that a trial court may strike a shotgun pleading and impose sanctions if the deficiencies are not cured by the amended pleading.

Taylor, Bean & Whitaker Mortgage Company v. Wright, Case No. 1D17-1432 (Fla. 1st DCA 2018).

A successor-in-interest plaintiff may dismiss a lawsuit without a court order substituting itself as the plaintiff, and if so, will not be responsible for any suit fees.

Iezzi Family Limited Partnership v. Edgewater Beach Owners Association, Inc., Case No. 1D16-5878 (Fla. 1st DCA 2018).

Members of not-for-profit condominium associations may not avoid pre-suit requirements for derivative actions.

DePrince v. Starboard Cruise Services, Inc., Case No. 3D16-1149 (Fla. 3d DCA 2018).

On rehearing, the Third District holds that a party seeking rescission of a contract based on a unilateral mistake does not have to prove that she was induced into making the mistake by the other party.

Rahimi v. Global Discoveries, Ltd., LLC, Case No. 3D16-2756 (Fla 3d DCA 2018).

The determination of who is entitled to a tax deed sale surplus is made at the time of the tax deed sale.

Gonzalez v. Federal National Mortgage Association, Case No. 3D17-1246 (Fla. 3d DCA 2018).

A foreclosing lender may recover payments due outside of the five-year statute of limitations.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12164

D.C. Docket No. 9:16-cv-81719-DMM

INTERNAVES DE MEXICO S.A. DE C.V.,

Plaintiff - Appellee,

versus

ANDROMEDA STEAMSHIP CORPORATION,
AMERICAN NAVIGATION, INC.,
PEGASUS LINES, LTD. S.A., PANAMA,
JAMES KARATHANOS,

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 1, 2018)

Before MARCUS, FAY, and HULL, Circuit Judges.

MARCUS, Circuit Judge:

This case arises out of a battle over where the parties have agreed to arbitrate this admiralty and maritime dispute. Andromeda Steamship Corporation and Internaves de Mexico s.a. de C.V. entered into a shipping contract (the "Contract") whereby Andromeda agreed to furnish Internaves with a vessel to transport an electric transformer from Brazil to Mexico. Internaves claimed that Andromeda failed to tender the vessel on the agreed-upon date, while Andromeda countered that Internaves never delivered the transformer to the vessel. The Contract unambiguously required the parties to submit their dispute to arbitration. However, the Contract contained conflicting provisions regarding *where* the parties agreed to arbitrate. The district court could not ascertain the site of arbitration from the agreement itself and, therefore, resorted to the statutory default forum, compelling arbitration in its own district -- the Southern District of Florida.

Andromeda appealed, arguing that the district court had erred in proclaiming the Contract hopelessly ambiguous as to the selection of a forum. Had the court waded through the Contract's interpretive tangles, Andromeda says, it would have discovered the parties' mutually agreed-upon intent to arbitrate in London, where it claims the arbitration must be held. Internaves suggests, however, that due to the Contract's murkiness, the district court properly ordered arbitration in Miami.

The Contract hardly represents a model of clarity. Nevertheless, we agree with Andromeda and discern from the document an agreement to arbitrate in

London. Accordingly, we reverse the judgment of the district court and remand with instructions to compel arbitration in London under English law.

I.

A.

Andromeda and Internaves entered into the Contract, a charter party agreement, in June 2016. A "charter party" is simply a contractual arrangement whereby a ship owner agrees to lend a ship to a charterer for the transportation of goods from one port to another. *See Hawkspere Shipping Co. v. Intamex, S.A.*, 330 F.3d 225, 228 (4th Cir. 2003); *see also* Soumyadipta Chanda, *A Comparison of Rights and Liabilities Under a Charter Party and a Bill of Lading*, 24 U.S.F. Mar. L.J. 65, 67–68 (2011).

The Contract is divided into two parts. Part I contains terms specific to the parties' particular transaction. Part II includes general boilerplate terms that are typically incorporated into shipping contracts of this kind. Part I includes Box 25, labeled "Law and Arbitration." Box 25 instructs, "[S]tate 19(a), 19(b) or 19(c) of Cl[ause] 19; if 19(c) agreed also state Place of Arbitration (if not filled in 19(a) shall apply)." Clause 19, in turn, also labeled "Law and Arbitration," appears in Part II of the agreement. Clause 19 is divided into sub-clauses 19(a) through 19(d). Affixed to each sub-clause is an asterisk, and the asterisk notation reads, "(a), (b) and (c) are alternatives; indicate alternative agreed in Box 25." Clause 19(a)

provides for arbitration in London under English law and imposes additional terms, including a scheme for appointing arbitrators. Clause 19(b) calls for arbitration in New York under U.S. law and prescribes similar supplemental conditions. Clause 19(c) reads this way: "Any dispute arising out of this Charter Party shall be referred to arbitration at the Place indicated in Box 25, subject to the procedures applicable there. The laws of the place indicated in Box 25 shall govern this Charter Party." Finally, 19(d) explains that if Box 25 is not filled in, then 19(a) governs. In sum, Clause 19 of the Contract, located in Part II, provides a list of forum alternatives and instructs the parties to indicate their selection among those alternatives in Box 25. Box 25, located in Part I, also directs the parties to write their selection among Clause 19's options within that space.

Inside Box 25, the parties clearly wrote these words: "London arbitration, English Law." However, in Clause 19, the parties crossed out 19(a), 19(c), and 19(d), leaving only 19(b) -- New York arbitration under U.S. law -- unstruck. Thus, while the parties wrote in the words "London arbitration, English Law" in Box 25 in Part I, they signaled some desire to arbitrate in New York under U.S. law in Part II. Finally, above the signature page, the Contract reads, "It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter Party which shall include PART I as well as PART II. In the event of a

conflict of conditions, the provisions of Part I *shall* prevail over those of Part II to the extent of such conflict" (the "Conflict Clause") (emphasis added).

B.

In October 2016, Internaves sued Andromeda in the Southern District of Florida for breach of contract, conversion, and fraud. Internaves claimed that, although it prepaid Andromeda, Andromeda failed to tender the vessel on the agreed-upon date, in violation of the Contract. Andromeda moved to compel arbitration of the dispute in London under English law pursuant to the selection the parties made in Part I, Box 25. The district court granted Andromeda's motion in part, compelling arbitration, but concluded that it could not ascertain from the terms of the agreement where the parties had agreed to arbitrate the dispute. The court observed that, because Part I stipulated "London arbitration, English Law," while Part II indicated a contrary agreement to arbitrate any dispute arising from the Contract in New York under U.S. law, the Parts were hopelessly in conflict. The court continued this way: "This conflict is compounded by ambiguities in the very provisions ostensibly designed to resolve internal inconsistencies." Elaborating, the court recognized that, under the Conflict Clause, in the event of conflict, Part I superseded Part II. However, the court also observed that 19(c), "which also provide[d] for the supremacy of Part I," was crossed out. In light of that puzzle, the district court could not determine whether the Conflict Clause

remained applicable to the instant dispute. Accordingly, it held that the parties had failed to provide for a specific arbitral forum and, therefore, it could compel arbitration only within its own district pursuant to 9 U.S.C. § 4.

While Andromeda does not dispute its obligation to arbitrate, it contends that the district court should have compelled arbitration in London, as the parties had written into Box 25.

Andromeda timely appealed to this Court.

II.

Plainly, the site of arbitration turns on interpretation of the Contract's arbitration clauses, which we review *de novo*. *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1350 (11th Cir. 2014) ("This Court reviews *de novo* questions of law, such as a district court's interpretation of an agreement to arbitrate . . . ."). After thorough review, we hold that, despite the Contract's apparent conflict about choice of forum, under the Conflict Clause, the parties provided for arbitration in London, under English law, and the district court should have upheld the parties' forum selection under 9 U.S.C. § 206.

A.

Issues arising out of arbitration agreements are generally resolved by contract-law principles, pursuant to which we attempt to ascertain the parties' intent through the words they use. The Federal Arbitration Act (FAA) provides that

written arbitration agreements in "any maritime transaction" "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "This provision reflects both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." *Inetianbor*, 768 F.3d at 1349 (quotation omitted and alteration adopted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id*. (quotation omitted); *see also Am. Express Co. v. Italian Colors Rest*., 570 U.S. 228, 233 (2013) ("[The FAA] reflects the overarching principle that arbitration is a matter of contract. And consistent with [its] text, courts must rigorously enforce arbitration agreements according to their terms . . . ." (quotations and citation omitted)).

International arbitration agreements are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention," which the United Nations Economic and Social Council adopted in 1958. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1262 (11th Cir. 2011). In 1970, the United States joined, by treaty, the New York Convention. 21 U.S.T. 2517; *see also Lindo*, 652 F.3d at 1262. Thereafter, Congress implemented the New York Convention into the United States Code as Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq*., thereby

supplementing the original codification of the FAA contained in Chapter 1. The New York Convention requires that courts, *inter alia*, recognize written arbitration agreements and uphold freely negotiated forum-selection provisions. *Lindo*, 652 F.3d at 1262, 1266; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Specifically, under Chapter 2 of the FAA, courts "may direct that arbitration be held in accordance with the [arbitration] agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206. By contrast, under Chapter 1, courts may compel arbitration only within their own districts. 9 U.S.C. § 4. Chapter 2 also applies Chapter 1 to all actions arising under Chapter 2 to the extent that the two Chapters do not conflict. 9 U.S.C. § 208. Therefore, if the parties to an international arbitration agreement "provided for" a forum, Chapter 2 establishes a "strong presumption" in favor of compelling arbitration in that forum. *Mitsubishi Motors Corp.*, 473 U.S. at 631. However, if the parties agreed to arbitrate, but failed to "provide[ ] for" a forum, then the court must compel arbitration, but only within its own district pursuant to the provisions found in Chapter 1. 9 U.S.C. § 4 ("The hearing and proceedings, under [an arbitration] agreement, shall be within the district in which the petition for an order directing such arbitration is filed."); *see also Jain v. de Mere*, 51 F.3d 686, 690 (7th Cir. 1995) ("[9 U.S.C.] § 4 not only permits but requires a court to compel arbitration in its own district when no other forum is specified.").

Notably, "[w]hen a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22–23 (2004). Specifically, our interpretation of maritime contracts sounds in federal common law, so we look to the general common law of contracts. *See AIG Centennial Ins. Co. v. O'Neill*, 782 F.3d 1296, 1302 (11th Cir. 2015); *Interface Kanner, LLC v. JPMorgan Chase Bank, N.A.*, 704 F.3d 927, 932–33 (11th Cir. 2013); *Begner v. United States*, 428 F.3d 998, 1005 (11th Cir. 2005).

Five general principles of contract interpretation apply here. First, "[i]t is well settled that the actual language used in the contract is the best evidence of the intent of the parties and, thus, the plain meaning of that language controls." *Rose v. M/V "GULF STREAM FALCON"*, 186 F.3d 1345, 1350 (11th Cir. 1999). Additionally, "a [contract] should be read to give effect to all its provisions and to render them consistent with each other." *In re FFS Data, Inc.*, 776 F.3d 1299, 1305 (11th Cir. 2015) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)). Moreover, if contractual provisions conflict, but, significantly, the contract itself provides means for reconciling the conflict, we are obliged to apply the contract's internal conflict-resolution mechanism. *See Columbia Cas. Co. v. S. Flapjacks, Inc.*, 868 F.2d 1217, 1221 n.1 (11th Cir. 1989). Indeed, where a contract contains a conflict, but also includes a clause that expressly resolves the conflict,

"there is no ambiguity." *Lathem v. Sentry Ins.*, 845 F.2d 914, 916–17 (11th Cir. 1988). Further, "[w]hen general propositions in a contract are qualified by the specific provisions, the rule of construction is that the specific provisions in the agreement control." *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1421 (11th Cir. 1990). Finally, contracts must be interpreted with sensitivity to the reality that parties occasionally err or misprint in the course of contract drafting. *See Georgia R.R. Bank & Tr. Co. v. Fed. Deposit Ins. Corp.*, 758 F.2d 1548, 1551 (11th Cir. 1985) ("However unskillfully prepared a particular instrument or agreement may be, the courts are to discover and give effect to the intent of the parties if possible."); *see also Begner*, 428 F.3d at 1006 (noting that an apparent contractual error did not render the contract ambiguous).

Thus, when interpreting an international arbitration agreement, we ascertain the parties' intent through plain contractual language; we work to interpret the contract harmoniously to avoid conflict and give meaning to all of the provisions; we are obliged to apply any contractual clauses designed to resolve intra-contractual conflicts; we favor the specific terms over the more general language; and we strive to give the contract coherent meaning if we can, rather than capitulate in the face of apparent ambiguity.

B.

As we see it, application of these principles yields the conclusion that the parties agreed to arbitrate their dispute in London. The Conflict Clause unambiguously establishes the superiority of Part I's enumeration of "London arbitration, English Law" over Part II's manifestation of the parties' preference for a New York forum. Moreover, Box 25's heading and instructions, coupled with Clause 19's asterisks, render Box 25 the Contract's authoritative forum-selection clause. Insertion of the written words "London arbitration, English Law" within that provision further evinces the parties' intent to arbitrate in London. The parties specifically wrote "London arbitration, English Law" into the Contract, whereas any indication of the parties' willingness to arbitrate in New York appears only among boilerplate script, and in that regard only by striking a provision with a line. The rule of construction subordinating general terms to specific ones also supports the selection of the London forum.

In Part I, the parties demonstrated their mutual desire to arbitrate in London by writing in their selection of "London arbitration, English Law" in Box 25, labeled "Law and Arbitration." In Part II, the parties indicated some inclination toward arbitrating in New York by crossing out all of Clause 19's sub-clauses except for 19(b), which, as we have already noted, provides for New York arbitration under U.S. law. Plainly, by choosing different arbitral forums in Parts I

and II -- by writing in "London" in Part I and leaving 19(b) operative in Part II -- the parties created an inter-Part conflict. Yet these parties anticipated and sought to resolve any such conflict by including a Conflict Clause, which, again, reads this way: "In the event of a conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict." When parties author conflicting contractual provisions, but expressly provide for a contractual mechanism to resolve any conflict, we are bound by the mechanism they have chosen. *See Columbia Cas.*, 868 F.2d at 1221 n.1; *Lathem*, 845 F.3d at 916–17. Thus, under the Conflict Clause, Part I's designation "London arbitration, English Law" necessarily prevails over Part II.

Additionally, Box 25's heading and instructions, along with Clause 19's asterisks, militate in favor of London arbitration. Box 25, labeled "Law and Arbitration," instructs, "[S]tate 19(a), 19(b) or 19(c) of Cl. 19; if 19(c) agreed also state Place of Arbitration (if not filled in 19(a) shall apply)." Turning to Clause 19, also labeled "Law and Arbitration," an asterisk appears alongside sub-clauses 19(a) through 19(d), and the asterisk notation explains, "(a), (b), and (c) are alternatives; indicate alternative agreed in Box 25." The parties have designated in the Contract that Box 25 is the authoritative space within which to ascertain their forum selection. And inside that space, the parties wrote their preference. Box 25's "London arbitration, English Law" supersedes Clause 19's indication of their

preference of a forum. It is true that the parties neglected to stipulate one of "19(a)," "19(b)," or "19(c)" in Box 25, as the Contract had instructed. Nonetheless, the parties' omission essentially amounts to a small error that cannot undermine their manifest intent, as they wrote it, to arbitrate in London under English law. *See Georgia R.R. Bank & Tr. Co.*, 758 F.2d at 1551; *see also Begner*, 428 F.3d at 999–1000, 1006.

The canon of contract interpretation elevating specific terms over the more general ones also supports the selection of London. The parties' particular insertion of "London arbitration, English Law" prevails over the crossed-out boilerplate terms. *See United States v. Pielago*, 135 F.3d 703, 710 (11th Cir. 1998); *Faez v. Wells Fargo Bank, N.A.*, 745 F.3d 1098, 1106 n.4 (11th Cir. 2014); *McKinney Drilling Co. v. Collins Co.*, 701 F.2d 132, 135 (11th Cir. 1983). Internaves argues, nevertheless, that the specific-general canon is inapposite here because the parties also "specifically" crossed out 19(a), 19(c), and 19(d), thereby creating a conflict not between specific and general conditions, but rather between two specific terms. We are unpersuaded. As we see it, the specific written insertion of "London" entailed far greater specificity and particularity -- and constitutes a far more powerful expression of intent -- than striking 19(a), 19(c), and 19(d) from boilerplate script.

Internaves advances several additional objections. First, it claims that, by crossing out 19(c), the parties rendered Box 25 ineffective, arguing that "[i]f the parties chose Paragraph 19(c), it would have provided for the selection in [B]ox 25 to prevail over the selection of London or New York. By striking out Paragraph 19(c) of Part II, [Andromeda] affirmatively rejected the effect of any designated forum within Part I and thereby exalted its choice in Part II over Part I and undermined the [Conflict Clause]." The district court agreed, similarly reasoning that, because 19(c) "provide[d] for the supremacy of Part I," having struck 19(c), the parties suggested that the Conflict Clause was inapplicable and Box 25 irrelevant.

Again, 19(c) reads, "Any dispute arising out of this Charter Party shall be referred to arbitration at the Place indicated in Box 25, subject to the procedures applicable there. The laws of the place indicated in Box 25 shall govern this Charter Party." Clause 19(c) does not "provide[ ] for the supremacy of Part I." Rather, what 19(c) does is offer a "write-in" forum option. Since parties to charter party agreements typically choose to arbitrate in London or New York, 19(a) and 19(b) provide shortcuts for selecting those forums. *See* Gu Weixia & Joshua A. Lindenbaum, *The NYPE 93 Arbitration Clause: Where Ends the Open-End?*, 37 J. Mar. L. & Com. 245, 259 (2006) ("The vast majority of charterparties contain arbitration clauses that call for arbitration in London or New York."). However,

since an alternative is occasionally preferred, 19(c) permitted the parties to insert a forum of their choosing. Clause 19(c)'s purpose, thus, was not to ensure Part I's primacy, but rather to afford a forum option other than London or New York. Meanwhile, none of the provisions that *do* establish Part I's supremacy are crossed out. The Conflict Clause expressly calls for Part I's terms to prevail over Part II's in the event of conflict. Likewise, Box 25's labeling and Clause 19's asterisk notation instructed the parties to insert their forum selection among Clause 19's alternatives -- 19(a), 19(b), or 19(c) -- in Box 25. Each of those provisions was left intact, thereby rendering Box 25 the superseding and definitive forum-selection clause irrespective of the fact that the parties struck 19(c). Clause 19(c) does not implicate the Contract's inter-Part hierarchy, and striking 19(c) did not undermine either Part I's predominance over Part II or Box 25's status as the Contract's authoritative forum-selection clause.

Internaves also points to *Bauhinia Corp. v. China National Machinery & Equipment Import & Export Corp.*, 819 F.2d 247 (9th Cir. 1987). In *Bauhinia*, the parties entered into an arbitration agreement in which the only language pertaining to forum selection was the following:

> In case an arbitration is necessary and is to be held in Peking, the case in dispute shall then be submitted for arbitration to the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, Peking . . . .

> In case the Arbitration is to take place at [BLANK] either party shall appoint one arbitrator, and the arbitrators thus appointed shall nominate a third person as umpire, to form an arbitration committee. . . . .

Id. at 248. Because the agreement said nothing more about forum selection, the Ninth Circuit concluded that the agreement was ambiguous: "The clauses d[id] not expressly choose a forum" and "[t]he document lack[ed] any indication what forum the parties intended to select." *Id*. at 249. As a result, it determined, "The record permits only one conclusion, that the parties intended to leave the issue open." *Id*. at 249–50. Because the parties failed to provide for a forum in their agreement, the provisions of 9 U.S.C. § 206 were inapplicable and, pursuant to 9 U.S.C. § 4, the court could compel arbitration only within its own district. *Id*. at 250.

This case is different. Here, rather than providing *no* forum selection, the parties provided *conflicting* forum selections. But here, the parties created a contractual mechanism to resolve any ambiguity or conflict by declaring Part I superior to Part II in the event of conflict, and by designating Box 25 the conclusive forum selection provision. Thus, unlike in *Bauhinia*, in this case the parties provided for an arbitration forum by writing "London arbitration, English Law" in the Contract's superseding and authoritative forum-selection clause.

Finally, Internaves argues for the first time on appeal that the Contract retains some ambiguity because Part I includes an internal inconsistency.

Specifically, in Box 22, which is located in Part I and labeled "General Average to be adjusted at (Cl. 12)," the parties wrote "NEW YORK – USA." Clause 12, in turn, labeled "General Average and New Jason Clause," provides that "[g]eneral average shall be adjusted, stated and settled according [to] York-Antwerp rules 1994 or any subsequent modification thereof." Therefore, Internaves reasons, even if the Conflict Clause resolves conflicts between the Parts, the Contract still contains an intractable conflict within Part I itself, between Box 25 (which calls for London arbitration) and Box 22 (which provides for general-average adjustment in New York).

Again, we are unpersuaded. First, Internaves did not raise the argument in the district court, and we need not consider it on appeal. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) ("This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court. . . . If we were to regularly address questions -- particularly fact-bound issues -- that district[ ] court[s] never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court." (quotation and citations omitted)). To be sure, an appellate court may consider an issue not raised in the district court if it "involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice." *Id*. at 1332 (quoting *Wright v.*

Hanna Steel Corp., 270 F.3d 1336, 1342 (11th Cir. 2001). Although the argument raises a pure question of law, *see Inetianbor*, 768 F.3d at 1350, our failure to address it here would hardly create a miscarriage of justice. *See Blue Martini Kendall, LLC v. Miami Dade Cty.*, 816 F.3d 1343, 1349–50 (11th Cir. 2016).

But even if we were to consider the claim for the first time on appeal, it still would not help Internaves. The "ancient maritime doctrine" of general average holds that, if goods are thrown overboard in order to save a ship from impending catastrophe, the passenger who sacrificed his property for the common good is entitled to reimbursement by pro rata contributions from the other passengers onboard. *See Orient Mid-E. Lines, Inc. v. Shipment of Rice on Bd. S.S. Orient Transporter*, 496 F.2d 1032, 1034 (5th Cir. 1974).[1] General-average disputes are often resolved under the York-Antwerp Rules, which were designed to resolve issues stemming from general-average adjustment. *See Eagle Terminal Tankers, Inc. v. Ins. Co. of U.S.S.R.*, 637 F.2d 890, 894 (2d Cir. 1981).

The parties' insertion of "NEW YORK – USA" in Box 22 does not create an inconsistency within Part I. Mindful of our obligation to "give effect to all [the Contract's] provisions," and to discern incompatibility among them only if they cannot be construed harmoniously, we read Part I as requiring general-average

[1] "[T]he decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit." *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

adjustment in New York under York-Antwerp Rules pursuant to Box 22, and arbitration of all other disputes in London under English law pursuant to Box 25. *See In re FFS Data, Inc.*, 776 F.3d at 1305; *Pielago*, 135 F.3d at 710; *Merrill Stevens Dry Dock Co. v. M/V YEOCOMICO II*, 329 F.3d 809, 814 (11th Cir. 2003). Indeed, the parties' use of separate Boxes -- one labeled "Law and Arbitration" (Box 25) and the other labeled "General Average to be adjusted at (Cl. 12)" (Box 22) -- strongly suggests that the parties sought to adjust general average in a location distinct from their arbitral forum. Those conditions are entirely compatible, and, as we see it, create no ambiguity. Moreover, this case does not in any way relate to general-average adjustment; the parties must arbitrate in London.

The only remaining question is which terms will govern the parties' arbitration. Recall that sub-clause 19(a) provides for arbitration in London under English law and prescribes supplemental conditions, including arbitration "in accordance with the arbitrations Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force," and rules controlling the appointment of arbitrators. Yet the parties did not write "19(a)" in Box 25. Rather, they wrote only "London arbitration, English Law." "[C]ourts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself." *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d

Cir. 1999). Thus, we bind the parties only to the terms on which they agreed -- "London arbitration, English Law" -- and do not impose 19(a)'s supplemental conditions. Rather, any terms governing the parties' arbitration that are not stipulated in the Contract must be supplied by English arbitration rules.

In short, because the parties' intention to arbitrate in London is discernible from the very terms they wrote into the Contract, the parties "provided for" a forum, which the district court was obliged to recognize and uphold. Accordingly, we reverse and remand with instructions to compel arbitration in London under English law.

REVERSED AND REMANDED

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16685

D.C. Docket No. 1:16-cv-00062-CG-M

KARUN N. JACKSON,
URSULA D. JACKSON,

Plaintiffs – Appellants,

versus

BANK OF AMERICA, N.A.,

Defendant,

SPECIALIZED LOAN SERVICING LLC,
BANK OF NEW YORK MELLON,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants – Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(August 3, 2018)

Before TJOFLAT and JULIE CARNES, Circuit Judges, and BLOOM,[*] District Judge.

TJOFLAT, Circuit Judge:

This appeal involves an abuse of process engineered to delay or prevent execution of a foreclosure judgment on a residence and the consequent eviction of its occupants. The homeowners' counsel effectuated this scheme by filing a multi-count, incomprehensible complaint that flouted the Federal Rules of Civil Procedure and this Circuit's well-established precedent. The District Court gave counsel an opportunity to file an amended complaint that comported with the requirements of the Federal Rules of Civil Procedure.[1] Counsel amended the complaint. He made no effort to correct its deficiencies, however, choosing to stand on his deficient pleading. The District Court nonetheless accepted the amended complaint, going to great lengths to sort it out.

After spending fifty-four pages unpacking the pleading just to determine whether the amended complaint presented a cognizable basis for relief, the District Court dismissed the case with prejudice for failure to state a claim. We affirm the

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[*] Honorable Beth Bloom, United States District Judge for the Southern District of Florida, sitting by designation.

[1] Federal Rule of Civil Procedure 8 requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As interpreted by the Supreme Court, this requirement means a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

District Court's judgment, but we do so on an alternative ground. By attempting to prosecute an incomprehensible pleading to judgment, the plaintiffs obstructed the due administration of justice in the District Court. And they are doing the same here in urging this Court to uphold the sufficiency of their amended complaint.

I.

A.

The facts of this case demonstrate the scheme's operation. Karun and Ursula Jackson, represented by Kenneth Lay, a Birmingham, Alabama lawyer,[2] brought this action against Bank of America, N.A., Specialized Loan Servicing LLC ("SLS"), Bank of New York Mellon ("Mellon"), and Mortgage Electronic Registration Systems, Inc. ("MERS") in the Circuit Court of Baldwin County, Alabama on January 12, 2016, one day after the foreclosure sale of their residence. The Jacksons' complaint alleged fourteen causes of action under Alabama and federal law in separate counts, spanned twenty pages, and contained 109 paragraphs of allegations. The causes of action were not defendant-specific, all were based on all of the complaint's twenty-four introductory paragraphs, and all fourteen causes of action incorporated all previous allegations. This made it impossible for any Defendant to reasonably frame an answer. The crux of the

[2] Mr. Lay is a partner in Hood & Lay, LLC.

complaint appears to be that Defendants[3] classified their home mortgage as in default, accelerated their loan, turned over their account for foreclosure, and reported the foreclosure to the credit reporting agencies without any legitimate basis for doing so.

Specifically, the Jacksons alleged that they purchased a house in Daphne, Alabama on August 28, 2006. To finance the purchase, they executed a mortgage and a promissory note with First Residential Mortgage Network, Inc. for $139,040.00. As specified in the mortgage agreement, MERS acted as the servicer for the loan. First Residential later sold and assigned the note and mortgage to Mellon.

The Jacksons further alleged that from the date they bought the house until September 2012, Defendants accepted and cashed their monthly mortgage payments, but did not apply the payments to the Jacksons' account. Then, in November 2012, Defendants rejected a check from the plaintiffs without explanation. The Jacksons alleged that when they called to find out what happened, Defendants told them that "they were in default for failure to make payments, but could not explain why they were allegedly in default." According to

[3] In their complaint, the Jacksons referred to all Defendants collectively, rather than specifying which Defendant(s) committed which alleged wrongful act(s). Accordingly, we too refer to Defendants collectively for purposes of the recitation of facts, except when the complaint referenced a specific Defendant.

the Jacksons, Defendants further announced that they would no longer accept any mortgage payments and that their mortgage would be turned over for foreclosure.

The complaint avers that, in accordance with this statement, Defendants returned all of the monthly payments made from November 2012 to January 2014. Then, on June 12, 2015, Defendants accelerated the mortgage and demanded payment. On November 8, 2015, Defendants initiated foreclosure proceedings in Baldwin County, Alabama. They published notice of the default and foreclosure sale in the local newspaper in both November and December of 2015. The foreclosure sale occurred on January 11, 2016, and the property was sold to Mellon, the highest bidder at the sale. The foreclosure was reported to the national credit bureaus.

Based on these allegations, the Jacksons presented fourteen counts: (1) negligence; (2) wantonness; (3) unjust enrichment; (4) wrongful foreclosure; (5) slander of title; (6) breach of contract; (7) fraud; (8) false light; (9) defamation, libel, and slander; (10) violations of the Truth in Lending Act; (11) violations of the Real Estate Settlement Procedures Act; (12) violations of the Fair Credit Reporting Act; (13) violations of the Fair Debt Collection Practices Act; and a (14) claim for declaratory relief. According to the complaint, Defendants' conduct caused the Jacksons "to have negative credit reports" and to be "denied

homeowners insurance, held up to public ridicule or shame, humiliated, made to suffer physically and mentally, and endure anguish."

The Jacksons sought "(1) [a]n Order declaring that they are not in default of their mortgage agreement and declaring the notice of default is null and void," "(2) [a]n order declaring that Defendants have no right or authority to foreclose on the Jacksons' property," "(3) [a]n Order prohibiting Defendants from foreclosing on the Jacksons' property," and (4) compensatory and punitive damages for the various forms of financial, emotional, and defamatory harm alleged. The request for declaratory and injunctive relief, which if granted would undo the foreclosure sale and restore the Jacksons' mortgage on the home, made the suit the functional equivalent of a collateral attack on the validity of the foreclosure proceedings.

B.

On February 12, 2016, Defendants removed the case to federal court pursuant to 28 U.S.C. § 1331. On February 19, all Defendants moved for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e), with Bank of America filing its own, separate motion and the other Defendants filing their motion jointly. Defendants identified three problems with the complaint: first, the complaint was a shotgun pleading that incorporated all of its factual allegations into each count; second, the complaint failed to identify the specific Defendant(s) to which each count pertained; and third, the complaint "omit[ted] key facts such

as relevant dates and the particular nature of the violations that [Defendants] allegedly committed." The motion was referred to a Magistrate Judge on February 22. The Jacksons responded that they did not oppose the motion and were willing to file an amended complaint, but moved the District Court for twenty-one days to prepare a revised pleading. The District Court granted the motion, giving the Jacksons twenty-one days to file an amended complaint.

On March 29, 2016, the day the amended complaint was due, Mr. Lay moved the District Court for an extension of the deadline to file the revised pleading. Mr. Lay stated that he had been out of the office due to illness and asked for seven more days. The Magistrate Judge, on referral, granted the motion and gave the Jacksons until April 5 to file their amended complaint. On April 10, five days after the expiration of the extended deadline, and without having filed the amended complaint, Mr. Lay requested another extension. This time, he stated that he had been out of the office due to illness and a death in his family and asked for an additional seven days. Defendants did not oppose his request. The Magistrate Judge granted the motion and extended the deadline to April 12.

The Jacksons filed their amended complaint on April 12. The amended complaint swelled to twenty-three pages and 123 paragraphs, made minor changes

to a number of the factual allegations, added two new counts,[4] and listed one or more Defendants in parentheses under the heading of each count—presumably to clarify which count(s) applied to which Defendant(s). Counts (1) through (14) alleged the same injuries and requested the same forms of relief as those contained in the initial complaint.

The amended complaint was, like its predecessor, a shotgun pleading: it incorporated all of the factual allegations into each count without delineating which allegations pertained to each count. On April 29, Bank of America answered the amended complaint, denying its purported wrongdoing and asserting as a sixth affirmative defense that the amended complaint failed to state a claim for relief. The other Defendants moved collectively to dismiss the complaint on the same failure-to-state ground. The District Court ordered the Jacksons to respond to the motion to dismiss by May 13.[5] On May 13, the day the response was due, Mr. Lay moved for a seven-day extension to the deadline to file the Jacksons' response. As the reason for the extension request, he stated that he was out of town for hearings in other counties. The motion was unopposed. Accordingly, the

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[4] The amended complaint included all of the same counts contained in the original complaint and added two additional counts: (15) violations of the Telephone Consumer Protection Act and (16) violations of the Equal Credit Opportunity Act.

[5] The Court's order should have required the Jacksons to respond to Bank of America's sixth affirmative defense, which was the functional equivalent of the other Defendants' motion to dismiss. Because it did not, the Magistrate Judge, in his Report and Recommendation, did not pass on the legal sufficiency of the claims against Bank of America.

Magistrate Judge granted the motion and gave the Jacksons until May 20 to respond.

The Jacksons responded to the motion to dismiss on May 20, 2016. On May 23, the District Court referred the motion to dismiss to the Magistrate Judge for a report and recommendation. On July 19, the Magistrate Judge issued his Report and Recommendation ("R&R"), which recommended dismissal of the amended complaint as against MERS, SLS, and Mellon for failure to state a claim. The R&R comprehensively analyzed each of the Jacksons' sixteen causes of action and determined that none made out a legally cognizable claim.[6] The Jacksons objected to the R&R on the ground that their claims were sufficient.

On September 2, just before the District Court was set to rule on the Jacksons' objections to the R&R, the Jacksons moved the Court for leave to amend their amended complaint, submitting with their motion a proposed Second

[6] In referring the motion to dismiss to the Magistrate Judge, the District Court determined, albeit tacitly, that the amended complaint was sufficiently comprehensible to enable the Magistrate Judge to identify with confidence the Jacksons' causes of action with respect to each named Defendant and to determine whether any of the sixteen counts stated a claim for relief. The Magistrate Judge, lacking the Article III dispositive power of a district judge, was therefore precluded from striking the amended complaint and ordering the Jacksons to file a complaint that comported, at bottom, with Rule 8(a) and the Supreme Court's *Iqbal* decision. *See supra* note 1. Instead, the Magistrate Judge had to give the amended complaint a reading most favorable to the Jacksons, i.e., effectively redraft its counts, and then decide whether any of them stated a claim for relief.

The amended complaint is incomprehensible. Were we to parse the amended complaint in search of a potentially valid claim, we would give the appearance of lawyering for one side of the controversy and, in the process, cast our impartiality in doubt.

Amended Complaint. On September 7, Bank of America moved the Court for judgment on the pleadings.

On September 15, the District Court denied the Jacksons' motion for leave to amend, adopted the R&R, and dismissed the amended complaint with prejudice as to MERS, Mellon, and SLS. On October 3, the Jacksons stipulated to the dismissal of their claims against Bank of America with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1). The next day the District Court terminated the lawsuit with the entry of final judgment.

On October 16, the Jacksons appealed the Court's judgment. From that point on, Mr. Lay's delay tactics continued. He moved this Court to extend the deadline to file the Jacksons' opening brief six times. On December 5, Mr. Lay sought and obtained an extension by phone. On December 19, Mr. Lay requested a second extension. He stated that though he had "been working diligently on the brief," he had "had unexpected medical problems recently and ha[d] only been able to work part time recently." On January 31, 2017, Mr. Lay requested a third extension. This time, he stated that while he was still "working diligently on the brief," he had been forced to travel out of town because his brother "was hospitalized in intensive care with a life threatening illness." Moreover, he stated, his "work load" was "heavier than normal." On March 2, he requested a fourth extension, again citing his brother's medical emergency and his workload

consisting of "multiple appeals pending in this Court, the Alabama Supreme Court, and the Alabama Court of Civil Appeals." On March 7, he requested a fifth extension, stating that he had "just got back into town on March 7" after tending to his brother's illness. On March 14, Mr. Lay sought a sixth extension, again citing his brother's illness as the reason for his being "significantly behind schedule." We granted each of the motions.

The final due date of the brief was set to March 16. Then, Mr. Lay encountered technical difficulties in uploading the brief and was unable to meet that deadline. As a result, he filed the Jacksons' opening brief on March 22, 2017, more than three months after its original due date of December 5, 2016.

Defendants filed their brief in response.[7] Afterwards, Mr. Lay asked for four extensions of the deadline to file the Jacksons' reply brief. On June 16, he requested an additional twenty-one days. He stated that his medical issues, his "heavier than normal" workload, and his being "out of town and out of the office on other business" had prevented him from working on the reply brief. On July 7, the final day of the twenty-one day extension, he asked for a second extension of ten days on account of the same reasons stated in his previous extension request. On July 17, the last day of the ten-day extension he received, Mr. Lay requested a third, seven-day extension. He cited verbatim the same reasons as those listed in

[7] All Defendants were represented by one lawyer and filed one joint brief.

his prior two extension requests. On July 24, the day of the revised deadline, Mr. Lay filed a fourth extension request, seeking eight additional days to file the Jacksons' reply brief. He stated the same reasons a fourth time. The Court granted these motions. All told, Mr. Lay sought and obtained ten extension requests from this Court. He filed the Jacksons' reply brief on July 25, 2017.

II.

A.

In his R&R, which the District Court adopted, the Magistrate Judge conducted a lengthy, comprehensive review of each of the Jacksons' sixteen counts and concluded that none stated a cognizable claim. Rather than reviewing the District Court's comprehensive analysis of each of the Jacksons' causes of action, we affirm the District Court's dismissal with prejudice on slightly different grounds. "[W]e may affirm the district court's judgment on any grounds supported in the record." *Koziara v. City of Casselberry*, 392 F.3d 1302, 1306 n.2 (11th Cir. 2004).

The amended complaint is an incomprehensible shotgun pleading. It employs a multitude of claims and incorporates by reference all of its factual allegations into each claim, making it nearly impossible for Defendants and the Court to determine with any certainty which factual allegations give rise to which claims for relief. As such, the amended complaint patently violates Federal Rule

of Civil Procedure 8, which requires a plaintiff to plead "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). At twenty-eight pages long and having incorporated all 123 paragraphs of allegations into all sixteen counts, it is neither "short" nor "plain."

This Court has filled many pages of the Federal Reporter condemning shotgun pleadings and explaining their vices:

> Shotgun pleadings, whether filed by plaintiffs or defendants, exact an intolerable toll on the trial court's docket, lead to unnecessary and unchannelled discovery, and impose unwarranted expense on the litigants, the court and the court's parajudicial personnel and resources. Moreover, justice is delayed for the litigants who are "standing in line," waiting for their cases to be heard. The courts of appeals and the litigants appearing before them suffer as well.

Cramer v. Florida, 117 F.3d 1258, 1263 (11th Cir. 1997).[8] This case is illustrative. In ruling on the sufficiency of the Jacksons' sixteen claims, the Magistrate Judge was put in the position of serving as the Jacksons' lawyer in rewriting the complaint into an intelligible document a competent lawyer would

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[8] *See also Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1321 (11th Cir. 2015) (canvassing this Court's "thirty-year salvo of criticism aimed at shotgun pleadings" and observing "there is no ceasefire in sight"); *Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, 1125 n.2 (11th Cir. 2014) (citing twenty-one published opinions condemning shotgun pleadings); *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 979 n.54 (11th Cir. 2008) ("[S]ince 1985 we have explicitly condemned shotgun pleadings upward of fifty times."); *Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 n.9 (11th Cir. 2002) ("This court has addressed the topic of shotgun pleadings on numerous occasions in the past, often at great length and always with great dismay.").

have written.[9] It took fifty-four pages and untold hours of the Magistrate Judge's time to do so. And, in conducting a *de novo* review of the complaint after the Jacksons objected to the R&R, the District Court devoted a considerable amount of its time as well. Absent the dismissal of the amended complaint, the Defendants, in framing their answer, would likely have responded in kind, with a multitude of affirmative defenses bunched together applying to each of the amended complaint's counts. Put colloquially: garbage in, garbage out. Hence, the final resolution of the Jacksons' claims would have been time-consuming and even more of an undue tax on the Court's resources. Tolerating such behavior constitutes toleration of obstruction of justice.[10] This is why we have condemned shotgun pleadings time and again, and this is why we have repeatedly held that a District Court retains authority to dismiss a shotgun pleading on that basis alone.

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[9] *See Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 367 (11th Cir. 1996) ("Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice.").

[10] In *Byrne v. Nezhat*, 261 F.3d 1075 (11th Cir. 2001), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 128 S. Ct. 2131 (2008), we explained:

> Shotgun pleadings, if tolerated, harm the court by impeding its ability to administer justice. . . . Wasting scarce judicial and parajudicial resources impedes the due administration of justice and, in a very real sense, amounts to obstruction of justice. Although obstruction of justice is typically discussed in the context of criminal contempt, the concept informs the rules of law—both substantive and procedural—that have been devised to protect the courts and litigants (and therefore the public) from abusive litigation tactics, like shotgun pleadings. If use of an abusive tactic is deliberate and actually impedes the orderly litigation of the case, to-wit: obstructs justice, the perpetrator could be cited for criminal contempt.

Id. at 1131–32 (quotations and citations omitted) (alterations accepted).

See, e.g., *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1320 (11th Cir. 2015) (explaining that the district court retains "inherent authority to control its docket and ensure the prompt resolution of lawsuits," including, under proper circumstances, "the power to dismiss a complaint for failure to comply with Rule 8(a)(2)").

We have explained that in a case in which a party, plaintiff or defendant, files a shotgun pleading, the district court "should strike the [pleading] and instruct counsel to replead the case—if counsel could in good faith make the representations required by Fed. R. Civ. P. 11(b)." *Byrne*, 261 F.3d at 1133 n.113 (quoting *Cramer*, 117 F.3d at 1263).[11] This is so even when the other party does not move to strike the pleading. *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1295 (11th Cir. 2018). Implicit in such a repleading order is the "notion that if the plaintiff fails to comply with the court's order—by filing a repleader with the same deficiency—the court should strike his pleading or, depending on the

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[11] Rule 11(b) states, in relevant part:

> (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, *such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation* . . . .

Fed. R. Civ. P. 11(b), (b)(1) (emphasis added).

circumstances, dismiss his case and consider the imposition of monetary sanctions." *Byrne*, 261 F.3d at 1133.

This authority makes clear that dismissal of a complaint with prejudice is warranted under certain circumstances. Such circumstances existed in this case. In dismissing a shotgun complaint for noncompliance with Rule 8(a), a district court must give the plaintiff "one chance to remedy such deficiencies." *E.g.*, *Vibe Micro*, 878 F.3d at 1295. The Jacksons had that opportunity. Defendants moved for a more definite statement on the ground that the complaint was a shotgun pleading and it could not reasonably be expected to frame a responsive pleading. Its motion fully explained the complaint's defects. Bank of America stated, accurately, "The pleading is vague and ambiguous such that Bank of America has to guess as to the particular claims to which it individually should respond, and the facts upon which Plaintiffs rely in support." It further stated, correctly, that "the first sentence of each count adopts and re-alleges all prior paragraphs." It observed that "Count Fourteen . . . 'simply amounts to an amalgamation of all counts of the complaint.'" (Quoting *PVC Windoors, Inc. v. Babbitbay Beach Constr.*, 598 F.3d 802, 806 (11th Cir. 2010)). And, it explained, "With this type of drafting, Bank of America cannot know which factual allegations pertain to which of Plaintiffs' claims." This was as complete an explanation of the defects in their complaint as the Jacksons could have asked for.

The Jacksons did not oppose Defendants' motions for a more definite statement; their failure to oppose operated as an acknowledgement of these defects. Accordingly, the District Court granted the motions and ordered them to file a sufficient complaint. This was their opportunity. A chance to amend a complaint does not need to come in the form of a dismissal without prejudice or the striking of a portion of the complaint's allegations. It can also be accomplished by ordering the party to file a more definite statement. *See* Fed. R. Civ. P. 12(e) ("If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order."). What matters is function, not form: the key is whether the plaintiff had fair notice of the defects and a meaningful chance to fix them. If that chance is afforded and the plaintiff fails to remedy the defects, the district court does not abuse its discretion in dismissing the case with prejudice on shotgun pleading grounds.

Here, after being put on notice by Defendants of the specific defects in their complaint, the Jacksons filed an amended complaint afflicted with the same defects, attempting halfheartedly to cure only one of the pleading's many ailments by naming which counts pertained to each Defendant. The District Court should have dismissed the amended complaint with prejudice because, as we have

concluded, the amended complaint was incomprehensible.[12] Instead, the Court dismissed the amended complaint on the merits.

As we explained in *Vibe Micro*, in striking a complaint on shotgun pleading grounds and affording the plaintiff with another opportunity to file a complaint that passes muster, the District Court should point out the defects in the complaint. *Vibe Micro*, 878 F.3d at 1295. The District Court did not do so here because it elected to consider the merits of each claim despite the complaint's shotgun nature and dismiss each claim on that basis. However, in light of the Jacksons' non-opposition to Defendants' motions for a definite statement, which fully explained the defects in the Jacksons' complaint, the Court would not have abused its discretion if it had dismissed the amended complaint with prejudice without further elaborating on its deficiencies—especially considering that the Jacksons agreed to file an improved complaint yet did not do so. This basis alone is sufficient grounds for affirming the District Court's dismissal of the complaint with prejudice.[13]

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[12] *See supra* note 6. The Second Amended Complaint proposed by the Jacksons fared no better: it swelled to thirty-five pages and 141 paragraphs; it still contained sixteen counts; and it, too, reincorporated all of the allegations into each count.

[13] The District Court also had the authority to dismiss the complaint under Rule 41(b), which allows for dismissal for failure to obey a court order. *See Weiland*, 792 F.3d at 1321 n.10. And given Mr. Lay's willful disregard of the Court's order to file a more definite statement and this Circuit's voluminous precedent decrying shotgun pleadings, dismissal *with prejudice* pursuant to Rule 41(b) was appropriate. *See Betty K Agencies, Ltd. v. M/V MONADA*, 432 F.3d 1333, 1338 (11th Cir. 2005) (observing that dismissal with prejudice is proper "when: (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice." (quotations omitted)).

B.

Federal Rule of Appellate Procedure 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." We have imposed sanctions under Rule 38 when plaintiffs brought RICO claims with no underlying factual basis to support them, yet persisted in pursuing the case and appealing the district court's rulings to harass the defendants into settling the case.[14] *See Pelletier v. Zweifel*, 921 F.2d 1465, 1523 (11th Cir.1991), *abrogated on other grounds by Bridge*, 553 U.S. at 639, 128 S. Ct. at 2131. We have also awarded sanctions under Rule 38, in the form of reasonable attorney's fees and double costs, when a party ignored the governing law and relied on "clearly frivolous" arguments. *See United States v. Single Family Residence & Real Prop.*, 803 F.2d 625, 632 (11th Cir. 1986); *see also Sun-Tek Indus., Inc. v. Kennedy Sky-Lites, Inc.*, 865 F.2d 1254, 1255 (Fed. Cir. 1989) (awarding, pursuant to Rule 38, attorney's fees and costs actually incurred).

Defendants' motions for a more definite statement cited our precedent decrying shotgun pleadings and made clear that filing a shotgun pleading is

[14] In *Pelletier*, a portion of the sanctions we imposed was pursuant to Federal Rule of Civil Procedure 11. 921 F.2d at 1465. We imposed those sanctions in reversing the district court's refusal to do so. *Id.*

grounds for dismissal in this Circuit. If Mr. Lay was not aware of this precedent when he filed the Jackson's initial complaint, Defendants' motion told him all he needed to know. Nevertheless, in responding to the District Court's order requiring a repleader, he stood fast, brazenly filing a facsimile of his initial pleading. That the Magistrate Judge and the District Court examined the merits of Mr. Lay's new pleading does not change the fact that the appeal of the dismissal of the amended complaint was doomed from the start.

Mr. Lay does not dispute that the amended complaint is an impermissible shotgun pleading that obstructs the administration of justice. Indeed, at oral argument before this Court, he stated, "I understand [the Court's] problem with the shotgun pleadings, and I'm not gonna argue about that." After acknowledging that shotgun pleadings are "an issue in federal court," he stated, as an excuse for his behavior, that his use of shotgun pleadings had "never been an issue before" and that "they are not disfavored in Alabama courts." In other words, Alabama's state courts readily accept the sort of pleadings he files. This is no excuse here. When he brought this lawsuit in the Baldwin County Circuit Court, Mr. Lay knew that the case would be removed to federal district court because the complaint

contained causes of action based on federal statutes.[15] And he knew the District Court would require a repleader, which would inexorably lead to additional delay.

In light of this Circuit's precedent, Mr. Lay's appeal of the dismissal of his incomprehensible amended complaint is frivolous. The prosecution of an incomprehensible amended complaint with repeated requests for extensions in the District Court and the prosecution of a frivolous appeal with repeated requests for extensions in this Court, taken together, reveal Mr. Lay's motive in filing this lawsuit. His motive was, and is, to delay or prevent the completion of Mellon's foreclosure.[16] This constitutes an abuse of judicial process, a "deliberate use of a legal procedure, whether criminal or civil, for a purpose for which it was not designed." *Dykes v. Hosemann*, 776 F.2d 942, 950 (11th Cir. 1985). The procedures of the federal courts were not designed for the purpose of accommodating Mr. Lay's objective.

We accordingly affirm the judgment of the District Court. We also instruct Mr. Lay to show cause why we should not order him to pay the Appellees double

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[15] Prior to filing the instant lawsuit, Mr. Lay filed numerous cases, each with a shotgun complaint like the one here, in the state courts of Alabama. Each included all or most of the same boilerplate counts against different defendants as those alleged against Defendants in this case. Each was removed to federal district court. *See, e.g.*, *Hill v. Wells Fargo Bank N.A.*, No. 2:16-cv-1591 (N.D. Ala. Sept. 26, 2016); *Turner v. Bank of N.Y. Mellon*, No. 2:16-cv-1520 (N.D. Ala. Sept. 13, 2016); *Nelson v. Wells Fargo Bank, N.A.*, No. 2:16-cv-841 (N.D. Ala. May 20, 2016).

[16] Counsel's firm, Hood & Lay, LLC, states on its website, "We maintain a heavy volume of wrongful foreclosure cases and creditor abuse cases in the State of Alabama, litigating in state court, federal court and bankruptcy court." Hood & Lay, LLC, http://www.whlfirm.com/ (last visited Apr. 11, 2018).

costs and their expenses, including the attorney's fees they incurred in defending these appeals. *See Pelletier*, 921 F.2d at 1523; *Cramer*, 117 F.3d at 1265 & n.17. He shall show such cause in the form of a letter addressed to the Clerk of this Court within twenty-one days of the issuance of this opinion.

SO ORDERED.

BLOOM, District Judge, specially concurring:

I concur in the Court's judgment but I write separately to provide guidance to the district courts when faced with a shotgun pleading following a grant of leave to replead and resurrection of a similarly improper pleading. Here, the amended complaint fared no better than the initial pleading, and counsel took no action to remedy the deficiencies pointed out in either the unopposed motion for a more definite statement or the motion to dismiss. At that point, if Rule 8(a) and *Iqbal/Twombly* are to have meaning, the district courts have the authority to strike the pleading, dismiss the case with prejudice, and reserve jurisdiction to award the defendant's attorney fees and costs. There is simply a point in litigation when a defendant is entitled to be relieved from the time, energy, and expense of defending itself against seemingly vexatious claims, and the district court relieved of the unnecessary burden of combing through them.

Perhaps the Plaintiff's attorney engineered a scheme, perhaps not. It would be unfortunate, indeed outrageous, if Mr. Lay's pleas for extensions, both at the district and appellate levels (due to travel, workload, repeated illness, hospitalization and death in the family) were not made in good faith and one large ruse. We may never know his true motivation. I write separately, however, to emphasize the crux of the majority's holding today: Neither Mr. Lay's numerous extensions nor the reasons behind them are the source of the Court's finding of

frivolity. Indeed, the Court and counsel entertained his requests for extensions of time with the record before them. Rather, it is his plainly deficient pleading, refiled and appealed, that marshalled substantial unnecessary resources and that leads to the Court's finding today.

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

KARUN N. JACKSON,	)	
URSULA D. JACKSON,	)	
	)	
PLAINTIFFS,	)	
	)	
v.	)	**CIVIL ACTION NO.:**
	)	**CV-2016-0062**
BANK OF NEW YORK MELLON	)	
BANK OF AMERICA, N.A.	)	
SPECIALIZED LOAN SERVICES	)	
MERS		
DEFENDANTS.		

AMENDED COMPLAINT

Come now, the Plaintiffs, Karun Jackson and Ursula Jackson, by and through their attorney of record and file their complaint against Bank of New York Mellon[1], Bank of America, N.A., Specialized Loan Services, and Mortgage Electronic Registration Systems in accordance with the Federal Rules of Civil Procedure, and in support of said complaint states as follows:

PARTIES

1. The Defendants, Specialized Loan Services, Bank of America, and Bank of New York Mellon[2] in this action are foreign corporations doing business in Baldwin County Alabama, and are "debt collectors" as that term is defined by 15 U.S.C. § 1692a(6).

[1] The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificate Holders of the CWABS, Inc., ASSET-BACKED CERTIFICATES, SERIES 2006-17

[2] The Bank of New York Mellon's complete and full listing as a Defendant is actually: The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificate Holders of the CWABS, Inc., ASSET-BACKED CERTIFICATES, SERIES 2006-17.

2. The Plaintiffs, Karun Jackson and Ursula Jackson, in this action are adult resident of Baldwin County, Alabama, and are "consumers" and/or persons affected by a violation of the FDCPA.

JURISDICTION

3. Jurisdiction is proper in this Court as the underlying action is based upon a contract executed in Baldwin County, Alabama. The action is brought regarding an attempted foreclosure instituted in Baldwin County, Alabama, and is in the nature of a complaint regarding that attempted foreclosure action. The action is brought to enforce the contractual remedies allowed in the mortgage document. The action seeks damages in contract and tort for the actions of the Defendants with respect to their servicing and attempted foreclosure on the loan in question.

VENUE

4. Venue is proper in this Court as the Plaintiffs are citizens of Baldwin County, all or substantially all of the wrongs complained of occurred in this county, and the property is situated in this county.

STATEMENT OF FACTS

5. Karun Jackson and Ursula Jackson bought the property located at 26235 Jackson Circle extension Daphne AL 36526. On August 28, 2006, the Jacksons bought their property and executed a mortgage loan and received and executed a mortgage with First Residential Mortgage Network Inc. and also signed a promissory note with First Residential Mortgage Network Inc. The Mortgage contract provides for an escrow account for the taxes and insurance. The mortgagee is required to pay for the insurance and taxes from the escrow account.

6. The Jacksons currently reside at 26235 Jackson Circle extension Daphne AL 36526.

7. The loan was allegedly later transferred and sold to Specialized Loan Services and Bank of New York Mellon although the Plaintiffs dispute the validity of the alleged transfer.

8. On November 8, 2015, Defendants improperly and wrongfully began foreclosure proceedings on the Jacksons property. The mortgage governs acceleration and sets for the lenders remedies and provides that Lender shall give notice to the borrower prior to acceleration following borrower's breach of any covenant or agreement in this Security Instrument. The Defendants or their agents[3] refused to engage in a legitimate and good faith mortgage foreclosure avoidance workout, accept the proper payments, inflated the amount due, and have threatened to foreclose on Plaintiffs without any basis to do so

9. The Jauregui Law Firm handled the attempted foreclosure sale.

10. The Defendants began foreclosure proceedings on Plaintiffs' property on November 8, 2015 despite knowing that the Plaintiffs, the Jacksons claimed that they were not in default and that the attempted foreclosure sale was wrongful and invalid.

11. The foreclosure sale date was reported to the national credit bureaus and the Jacksons' credit was damaged as a result of the reporting of the foreclosure sale date which was invalid and wrongful.

12. The Jacksons, upon information and belief, contend that the alleged Assignments of the note and mortgage is defective, void, or otherwise unenforceable as to the security instrument in question in this case. None of the Defendants are the original lender. Federal law 1641(g)(1)(B) requires a new creditor to provide the date of transfer, which has not occurred.

13. The Jacksons contend that the attempted sale was wrongful, illegal, in violation of law and the documents governing the relationship between the Jacksons and the owners of the note and mortgage. Furthermore, the Jacksons allege that they were not behind in their

[3] Agency is a set of contractual, quasi-contractual and non-contractual fiduciary relationships that involve a person, called the agent, that is authorized to act on behalf of another (called the principal) to create legal relations with a third party

payments on the mortgage and that they were improperly defaulted and that the note was improperly accelerated.

14. The Jacksons contend that the foreclosing entity lacked standing or authority to initiate foreclosure proceedings on his property.

15. The Jacksons allege that the actions of the Defendants and its agents, employees and servants were wrongful and tortious.

16. The Jacksons allege that the actions of Defendants by improperly attempting foreclosure on their property is a violation of law, wrongful and tortious and that the Defendants had no authority to foreclose on his home or property, and that its actions constitute negligence, wantonness, abuse of process and slander of title.

17. As a direct result of the acts complained of the Jacksons have suffered great mental anguish, damage to his reputation, economic and emotional damages and claims from Defendants all damages allowable under the law.

18. In November 2012, the Jacksons sent a monthly payment to Defendants; however, Defendants refused the payment and returned it to the Jacksons without explanation. After, the Jacksons called and inquired as to the returned payment, Defendants advised Jacksons that they were in default for failure to make payments, but could not explain why they were allegedly in default. Moreover, Defendants advised the Jacksons that it would no longer accept payments from them and that Defendants would be turning over their account for foreclosure. Prior to September 2012 Defendants accepted and cashed Plaintiffs monthly payments, but failed to properly apply them to his account pursuant to paragraph 2 of the mortgage contract. From October 2012 until January 2014, Defendants returned payments to the Jacksons again also in violation of the mortgage contract.

19. Specifically, the July 2011, May 2012, August 2012, and September 2012 payments, as well as others, were cashed by Defendants but not applied at all to the Jacksons' account.

20. On November 8, 2015, Defendants improperly and wrongfully began foreclosure proceedings on the Jacksons' property.

21. The Defendants purportedly began foreclosure proceedings on Plaintiff's property on November 8, 2015 despite knowing that the Plaintiff, the Jacksons, claimed that the attempted foreclosure sale was wrongful and invalid, and that they were not in default at the time of the acceleration.

22. The foreclosure sale date which included false information related to the alleged default on the indebtedness was published in the newspaper in November 2015 and December 2015. Furthermore, said false and inaccurate information related to the Jacksons' alleged default was reported to the national credit bureaus and the Jacksons' credit and reputation were damaged as a result of the reporting of the foreclosure sale date and default which was invalid and wrongful.

23. The Jacksons contends that the attempted sale was wrongful, illegal, in violation of law and the documents governing the relationship between the Jacksons and the owners of the note and mortgage. Furthermore, the Jacksons alleges that they were not behind in their payments on the mortgage and that they were improperly defaulted and that the note was improperly accelerated.

24. The Jacksons alleges that the actions of Defendants by improperly attempting foreclosure on their property is a violation of law, wrongful and tortious and that the Defendant had no authority to foreclose on their home or property, and that its actions constitute negligence, wantonness, abuse of process and slander of title. As a direct result of the acts complained of the Jacksons has suffered great mental anguish, damage to his reputation, economic and emotional damages and claims from Defendants all damages allowable under the law.

25. In January 2013, the Consumer Financial Protection Bureau issued a number of final rules concerning mortgage markets in the United States, pursuant to the DFA, Public Law No. 111-203, 124 Stat. 1376 (2010). Specifically, on January 17, 2013, the CFPB issued the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) Mortgage Servicing Final Rules, 78 F.R. 10901 (Regulation Z) (February 14, 2013) and 78 F.R. 10695 (Regulation X) (February 14, 2013), which became effective on

January 10, 2014. The Jacksons' mortgage loan in the instant matter is a "federally related mortgage loan" as said term is defined by 12 C.F.R. § 1024.2(b). The Defendants are subject to the aforesaid Regulations and do not qualify for the exception for "small servicers" as defined in 12C.F.R. § 1026.41(e)(4) or the exemption for a "qualified lender" as defined in 12 C.F.R. § 617.700. The Jacksons are asserting a claim for relief against Defendants for breach of the specific rules under Regulation X as set forth below. The Jacksons has a private right of action under RESPA pursuant to 12 U.S.C. §2605(f) for the claimed breaches and such action provides for remedies including actual damages, costs, statutory damages, and attorneys' fees.

COUNT ONE
NEGLIGENCE
(BANK OF NEW YORK MELLON)
(SPECIALIZED LOAN SERVICES)

26. The Plaintiffs re-allege all prior paragraphs as if set out here in full.

27. The Defendants negligently serviced the loan made the basis of this suit, negligently attempted to collect sums not owed by the Plaintiff, negligently caused his property insurance to be canceled, negligently defaulted the Plaintiff, negligently attempted a foreclosure sale on Plaintiff's property, were negligent by failing to make sure that information disseminated to others (including the national credit bureaus and those credit grantors likely to use the information provided by those bureaus) was not false, neither libelous nor slanderous, and rose to the level of maximum accuracy; negligent by failing to properly train their employees on the thorough investigation of disputed accounts; negligent by failing to properly train, and/or supervise their employees and agents with regard to the handling of Plaintiff's loan account and failing to remove the adverse reporting from Plaintiff's credit once he disputed the same.

28. As a direct result of the said negligence, the Plaintiff was injured and damaged as alleged above and has suffered mental anguish, economic injury and all other damages allowed by law.

29. As a result thereof, the Defendant is liable for all natural, proximate and consequential damages due to their negligence.

COUNT TWO
WANTONNESS
(BANK OF NEW YORK MELLON)
(SPECIALIZED LOAN SERVICES)

30. The Plaintiff re-alleges all prior paragraphs as if set out here in full.

31. The Defendant acted with reckless indifference to the consequences, and consciously and intentionally wrongfully serviced the loan made the basis of this suit, attempted to collect sums not owed by the Plaintiff, caused his property insurance to be canceled, defaulted the Defendant, attempted to conduct a foreclosure sale on Plaintiff' property, failed to make sure that information disseminated to others (including the national credit bureaus and those credit grantors likely to use the information provided by those bureaus) was not false, neither libelous nor slanderous, and rose to the level of maximum accuracy; failed to properly train their employees on the thorough investigation of disputed accounts; failed to properly train, and/or supervise their employees and agents with regard to the handling of the Jacksons' loan account and failing to remove the adverse reporting from the Jacksons' credit once he disputed the same.

32. These actions were taken with reckless indifference to the consequences, consciously and intentionally in an effort to increase profits for the Defendant.

33. The Defendant knew that these actions were likely to result in injury to the Plaintiff including financial and emotional injuries and mental anguish.

34. As a proximate result of the Defendant's wantonness the Plaintiff was injured and harmed and suffered financial injury and emotional damage.

35. As a result thereof, Defendant is liable for all natural, proximate and consequential damages due to its wantonness as well as punitive damages upon a proper evidentiary showing.

COUNT THREE
UNJUST ENRICHMENT
(BANK OF NEW YORK MELLON)
(SPECIALIZED LOAN SERVICES)

36. The Plaintiff adopts and re-alleges all prior paragraphs as if set out here in full.

37. The actions of the Defendant in attempting foreclosure on the home of the Plaintiff in violation of law resulted in Defendant being unjustly enriched by the payment of fees, insurance proceeds and equity in the home.

38. As a result of the Defendant's unjust enrichment, the Plaintiff has been injured and damaged in that the Plaintiff has been forced to pay charges that were illegal, wrong in character, wrong in amount, unauthorized, or otherwise improper under threat of foreclosure by the Defendant.

39. The Plaintiff claim all damages allowable under law as a result of the Defendant's wrongful conduct and unjust enrichment.

COUNT FOUR
WRONGFUL FORECLOSURE
(BANK OF NEW YORK MELLON)
(SPECIALIZED LOAN SERVICES)

40. The Plaintiff re-alleges all prior paragraphs as if set out here in full.

41. Defendants wrongfully initiated and conducted a foreclosure proceeding against the Plaintiffs in violation of law.

42. The foreclosure proceeding conducted on January 11, 2016 by the Defendants were either negligent, wanton or intentional, depending on proof adduced at Trial. The power of sale was exercised for a purpose other than to secure the debt owed by plaintiff, as the plaintiff was current on the debt at the time of the default and acceleration.

43. As a result thereof, the Defendants are liable for all natural, proximate and consequential damages due to their actions including an award of punitive damages upon a proper evidentiary showing.

COUNT FIVE
SLANDER OF TITLE

(BANK OF NEW YORK MELLON)
(SPECIALIZED LOAN SERVICES)

44. The Plaintiff re-alleges all paragraphs as if set out here in full.

45. Defendant, in attempting foreclosure has caused a cloud to be placed on the title of the property of the Plaintiff.

46. As the proximate cause of the Defendant's said slandering of the Plaintiff's title, he was caused to suffer injuries and damages and claims all damages allowable under law.

COUNT SIX
BREACH OF CONTRACT
(ALL DEFENDANTS)

47. The Plaintiff adopts and re-alleges all prior paragraphs as if set out here in full.

48. The Plaintiff and his Lender entered into the standard Fannie Mae/Freddie Mac Uniform Instrument" mortgage agreement.

49. The Defendants serviced the loan and breached the agreement by failing to comply with essential terms in paragraph 2 regarding the

application of payment and the notice requirements of paragraph 22 of the agreement.

50. As a result of the defendant's breach of the mortgage contract, the Plaintiff was caused to suffer injuries and damages and claims all damages allowable under law.

51. That paragraph 2 of the terms of the agreement entered into between Plaintiff and with First Residential Mortgage Network Inc. detail the application of payments. That, as more fully described above, Defendants failed to apply regular monthly payments, supplemental monthly payments, in the proper manner according to the terms of the note and mortgage. More specifically, Defendants never applied some payments at all to Jacksons' account even though Jacksons sent in the payment and it was deposited by Defendants. Apparently, Defendants have misplaced or is unable to account for the funds from payments made or sent by Jacksons. Moreover, numerous other payments made by Jacksons were returned to him by Defendants without reason or without explanation. More specifically, for example, in November 2013, the Jacksons' payment was returned to them.

52. That this misapplication of funds constitutes a breach of the mortgage contract and thus entitles the Jacksons to damages.

53. In addition, Defendants failed to send proper notices to the Jacksons as required by the mortgage contract. Even if the Jacksons are in default, Defendants failed to send a proper notice of default, a proper notice of intent to accelerate, and a proper notice of acceleration. The contract terms related to notice are as follows:

> Lender shall give notice to Borrower **prior to acceleration** following Borrower's breach of any covenant or agreement in this Security Instrument . . . The notice shall specify (a) the default; (b) the action required to cure the default; (c) a date not less than 30 days from the date the notice is given to Borrower by which the default must be cured; and (d); that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform the Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of

> Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument….

Accordingly, Defendants failed to comply with this provision of the mortgage contract and has therefore breached the contract.

54. Moreover, Paragraph 22 of the mortgage document gives the Plaintiff the right to bring an action to dispute the existence of a default and raise defenses thereto. Accordingly, the Plaintiff exercises his right pursuant to paragraph 22 of the mortgage document and hereby challenges the existence of a default on his mortgage indebtedness. As previously, discussed, the Plaintiff is not in default, has made payments every month as required by the mortgage and note and is not behind on his mortgage payments.

COUNT SEVEN
FRAUD

(BANK OF NEW YORK MELLON)
(SPECIALIZED LOAN SERVICES)
(MERS)

55. The Plaintiff adopts and re-alleges all prior paragraphs as if set out here in full.

56. The Defendant misrepresented that the loan was in default. Further, the Defendant made false and misleading representations, to wit: dissemination of inaccurate information regarding the loan account as being in default and dissemination of inaccurate information regarding the credit history and credit of the Plaintiff that was known to be false. Defendants also falsified documents and records related to the Jacksons mortgage loan and attempted to fraudulent transfer, sale or assign the loan by illegal and fraudulent means.

57. Said misrepresentations were made negligently and/or willfully and/or wantonly and/or fraudulently, and/or recklessly with the intent to induce the Plaintiff to act thereon and upon which the Plaintiffs did in fact act to their detriment.

58. Plaintiff justifiably relied upon said representations made by Defendant and as a result of said reliance proceeded with the execution of the loan; at the time said representations were made the same were false and known by the Defendant to be false and/or were false and made by mistake with the intent for Plaintiff to rely thereon.

59. As a proximate cause of the aforementioned fraudulent misrepresentations made by the Defendant, Plaintiff was proximately caused to suffer injury and damage.

COUNT EIGHT
PLACED IN A FALSE LIGHT
(BANK OF NEW YORK MELLON)
(SPECIALIZED LOAN SERVICES)

60. Plaintiff adopts the above paragraphs as if fully set forth herein.

61. In association with the servicing of the loan account Defendants held Jacksons up in a false light and made undesirable and negative character and credit reputation remarks on or about the Jacksons by either speaking or writing undesirable and negative character and reputation remarks about Jacksons which was offensive, untrue, and inaccurate, and which alleged Jacksons was behind on his debt serviced by Defendants, has a bad debt with Defendants.

62. Defendants knew Jacksons was not in default on the account, as it was paid to date and as such, that there existed no basis in law or fact, for the Defendants to make offensive, untrue, and inaccurate reports regarding Jacksons. Defendants knew this at the times they were reporting such information.

63. Defendants held Jacksons up in a false light and made undesirable and negative and credit reputation remarks on or about Jacksons in the national credit reporting media and to his homeowner insurance carrier. Defendants provided this false information to third parties.

64. The conduct Defendants was objectionable to the Jacksons and to any reasonable person. Defendants' action was willful, reckless, wanton

and/or made with malice and resulted in Jacksons being unreasonably placed in a false light.

65. Due to Defendants' conduct, the Jacksons were caused to have negative credit reports, denied homeowners insurance, held up to public ridicule or shame, humiliated, made to suffer physically and mentally, and endure anguish.

WHEREFORE, PREMISES CONSIDERED, the Jacksons Pray for Judgment against Defendants in an amount to be determined by trier of fact.

COUNT NINE

DEFAMATION, LIBEL, SLANDER
(BANK OF NEW YORK MELLON)
(SPECIALIZED LOAN SERVICES)

66. Plaintiff adopts the above paragraphs as if fully set forth herein.

67. The Defendant willfully, wantonly, recklessly and/or maliciously published and communicated false and defamatory statements regarding the Plaintiff and said statements have subjected the Plaintiff to the denial of credit by third parties, resulted in homeowner's insurance cancellation and harmed the Plaintiff's credit reputation. As previously stated, the Plaintiff was current on his mortgage account and has made payments each and every month. Accordingly, he was not in default. Despite the Jacksons' account being current, Defendants published in the newspaper false information regarding his account being in default and false information regarding its right to conduct a foreclosure sale on the Jacksons' property.

68. Said false and defamatory statements have harmed the reputation of the Jacksons and/or deterred third persons from associating with the Jacksons.

69. The Defendant communicated to credit reporting agencies and/or other third parties, false information that Jacksons defaulted on the loan and was in foreclosure, disseminated and imputed false and

misleading credit history and worthiness information concerning the Jacksons.

70. Defendants published such defamatory and libelous information in the Northport Gazette newspaper.

71. Said communications were false in that Plaintiff was not indebted to the Defendant in the amount reported, and Plaintiff was not delinquent as reported by the Defendant, and Plaintiff is the legal and rightful owner of the mortgage note.

72. At the time said communications were made, Defendants knew, or should have known, of the falsity of the communication or recklessly disregarded the potential inaccuracy of the information, yet knowingly, willfully, and maliciously communicated the falsity.

73. As a result of the intentional communication to third parties of false information, the Jacksons were caused to suffer injury to his reputation in the eyes of the community and the public and was subject to ridicule.

74. Said communications were oral and/or written.

75. As a proximate consequence of the Defendants' acts, the Jacksons were caused to be injured and damaged.

76. Defendants published such defamatory and libelous information. Defendants knew the Jacksons were not in default on the account, as it was paid to date and as such, that there existed no basis in law or fact, for the Defendants to make offensive, untrue, and inaccurate reports regarding the Jacksons. Defendants knew this at the times they were reporting such information. Furthermore, Defendants published in the local newspaper in Baldwin County Alabama the false information of the default on the loan in the foreclosure sale notice. This foreclosure sale notice states that the Jacksons' loan is in default and in foreclosure. Defendants knew this information was inaccurate at the time it published this notice in the local paper, and the published false information harmed the Jacksons' reputation and character. As a result, the Jacksons' suffered damages of their reputation which

negatively affected their credit and their business causing monetary losses.

77. Said communications were false in that Plaintiff were not indebted to the Defendant in the amount reported, Plaintiff was not delinquent as reported by the Defendant, and Defendant is not the legal and rightful owner of the mortgage note.

78. At the time said communications were made, Defendants knew, or should have known, of the falsity of the communication or recklessly disregarded the potential inaccuracy of the information, yet knowingly, willfully, and maliciously communicated the falsity.

79. As a result of the intentional communication to third parties of false information, the Jacksons were caused to suffer injury to their reputation in the eyes of the community.

COUNT TEN:
VIOLATIONS OF TRUTH IN LENDING
(SPECIALIZED LOAN SERVICES)

80. The Jacksons re-allege and adopt the above paragraphs as if fully set forth herein and also asserts the following:

81. Defendants violated the Federal Truth in Lending Act.

82. The Jacksons institute this action for actual damages, statutory damages, attorney's fees, and the costs of this action against Defendants for multiple violations of the Truth in Lending Act, 15 U.S.C. §1601et seq. , (hereinafter TILA),and Federal Reserve Board Regulation Z, 12 C.F.R. § 226,promulgated pursuant thereto.

83. This complaint is solely for monetary damages pursuant to15 U.S.C. § 1640. Under 15 U.S.C. § 1640(a), it is not necessary to allege or to prove actual damages to recover statutory damages.

84.Defendants, are covered by the Act as it regularly extended or offered to extend consumer credit for which a finance charge is or may be imposed or which, by written agreement, is

payable in more than four installments, and is the person to whom the transaction which is the subject of this action is initially payable, making defendant a creditor within the meaning of TIL, 15 U.S.C. § 1602(f) and Regulation Z § 226.2(a)(17).

85. Defendants did not provide a proper copy of the notices required by the Act to the Jacksons. The disclosure statement issued in conjunction with this consumer credit transaction violated the requirements of Truth in Lending and Regulation Z in the following and other respects: (a). By failing to provide the required disclosures prior to consummation of the transaction in violation of 15 U.S.C.§ 1638(b) and Regulation Z § 226.17(b). (b). By failing to make required disclosures clearly and conspicuously in writing in violation of 15 U.S.C. § 1632(a)and Regulation Z § 226.17(a). (c). By failing to include in the finance charge certain charges imposed by defendant payable by plaintiff incident to the extension of credit as required by 15 U.S.C. § 1605and Regulation Z § 226.4, thus improperly disclosing the finance charge in violation of 15 U.S.C. § 1638(a)(3) and Regulation Z § 226.18(d). Such amounts include, but are not limited to the attorney fees and late fees, 15 U.S.C. § 1605(a), Regulation Z§ 226.4(a).

86. The regulations require that the notice shall identify the transaction or occurrence and clearly and conspicuously disclose the following: The retention or acquisition of a security interest in the consumer's principal dwelling. The consumer's right to rescind, as described in paragraph (a)(1) of this section. How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business. The effects of rescission, as described in paragraph (d) of this section. The date the rescission period expires. (See Reg. Z §§ 226.15(b)(5) and 226.23(b).

87. By charging "attorney fees" and other "fees" not authorized by the mortgage contract, Defendants has made unauthorized charges and failed to disclose these charges in violation of the Act. In this case, Defendants added fees to the Jacksons' account in September 2011 which are referenced in the notice of default. Moreover, once the account was turned over to the attorney for foreclosure in October 2013, additional fees were improperly added to the account. Each

time the sale was published in the newspaper up to and including December 2015, Defendants added additional and unauthorized fees to the Jacksons' account balance.

88. By calculating the annual percentage rate (APR) based upon improperly calculated and disclosed finance charges and amount financed, 15 U.S.C. § 1606, Regulation Z§ 226.22, Defendants understated the disclosed annual percentage rate in violation of 15 U.S.C. § 1638(a)(4) and Regulation Z § 226.18(c).

89. That the Defendants have been improperly amortizing the loan, and has failed to provide proper disclosures to the Jacksons. Defendants failed to send proper monthly statements to the Jacksons in violation of the Act.

90. By reason of the aforesaid violations of the Act and Regulation Z, Defendants is liable to Jacksons in the amount of twice the finance charge, actual damages to be established at trial, and attorney's fees and costs in accordance with 15U.S.C. § 1640 for violations of Federal Truth in Lending Act.

COUNT ELEVEN:
VIOLATIONS OF REAL ESTATE SETTLEMENT PROCEDURES ACT (RESPA)
(SPECIALIZED LOAN SERVICES)

91. The Jacksons re-allege and adopts the above paragraphs as if fully set forth herein and also asserts the following:

92. Defendant, SLS, is a loan "servicer"[4] of the Plaintiff's "federally related mortgage loan" as those terms are defined in the RESPA, 12 U.S.C. § 2602(1) and 12 U.S.C. § 2605(i)(2). Defendants violated the Real Estate Settlement Procedures Act (REPA) by failing to acknowledge or respond to Jacksons' Qualified Written Request (QWR). Defendant violated the Real Estate Settlement Procedures Act (REPA) by failing to acknowledge or respond to Jacksons'

[4] A servicer of the loan collects payments from the borrower, sends payments to the lender and handles administrative aspects of the loan.

Qualified Written Request (QWR) within in the time provided by federal law.

93. The Jacksons made a Qualified Written Request pursuant to RESPA to Defendants on October 29, 2015 and December 15, 2015 which was sent by certified mail. It was signed for by Defendants acknowledging receipt of the QWR. Defendants never acknowledged receipt of the QWR request and never responded to it. Defendants' failure to acknowledge and properly respond to the QWR request is a violation of RESPA or the Dodd-Frank Act. Because of said violations of said acts, the Jacksons were damaged because they were not informed of the information regarding their loan. Because the Defendants failed to give this information to the Jacksons, they were not able to stop the foreclosure on their home. Accordingly, the Jacksons are entitled to damages from the Defendants. Plaintiffs suffered damages by Defendants' failure to comply with the RESPA law because they were unable to get a proper accounting of the fees and charges owed on the account to cure any alleged default and as a result a foreclosure sale was set.

COUNT TWELVE
FAIR CREDIT REPORTING ACT

(SPECIALIZED LOAN SERVICES)

94. The Jacksons re-allege and adopts the above paragraphs as if fully set forth herein and also asserts the following:

95. The Jacksons disputed the account and false credit reporting. Defendants were inaccurately reporting that the Jacksons were delinquent in their mortgage loan and in Default. The Jacksons repeatedly contacted Defendants from September 2012 until January 11, 2016 and informed Defendants regarding ITS INACCURATE REPORTING. Moreover, the Jacksons contacted the credit national bureaus and informed them of the inaccurate information and disputed same. Nonetheless the credit reports were never changed because Defendants kept reporting the account as delinquent and in foreclosure.

96. Despite receipt of the dispute, defendants failed to properly investigate and respond, failed to make any effort to verify the complaints of plaintiff and reported the false, derogatory information to the consumer reporting agencies in violation of their duties as a furnisher of credit.

97. According to the national consumer reporting agencies' reports the defendants falsely reported about plaintiff's disputed debt.

98. Defendants likewise willfully, or alternatively, negligently, violated the Fair Credit Reporting Act by failing to properly conduct a reasonable investigation and by failing to supply accurate and truthful information.

99. Rather, defendants reported false and inaccurate information and failed to retract, delete and suppress false and inaccurate information it reported about the plaintiff.

100. Defendants failed to conduct a reasonable investigation with respect to consumer credit data it reported about the plaintiff.

101. Defendants failed to review all relevant and pertinent information provided to it regarding the debt.

102. As a proximate result of the Defendants' fraudulent conduct the Plaintiffs have been injured and damaged.

103. Defendants' violations and false credit reporting about plaintiff have been a substantial factor in causing credit denials and other damages.

104. Defendants are liable unto plaintiff for all actual, statutory, exemplary and punitive damages awarded in this case, as well as other demands and claims asserted herein including, but not limited to, out-of-pocket expenses, credit denials, costs and time of repairing their credit, pain and suffering, embarrassment, inconvenience, lost economic opportunity, loss of incidental time, frustration, emotional distress, mental anguish, fear of personal and financial safety and security, attorneys' fees, and court costs, and other assessments proper by law and any and all other applicable federal and state laws,

together with legal interest thereon from date of judicial demand until paid.

105. WHEREFORE PLAINTIFF, PRAYS that after all due proceedings be had there be judgment herein in favor of Plaintiff and against Defendants. 1) That there be Judgment in favor of Plaintiff and against Defendants, for all reasonable damages sustained by Plaintiff including but not limited to actual damages, statutory damages, compensatory damages, out-of-pocket expenses, credit denials, adverse action, lost credit opportunities, costs and time of repairing his credit, pain and suffering, embarrassment, inconvenience, lost economic opportunity, loss of incidental time, frustration, emotional distress, mental anguish, fear of personal and financial safety and security, and for punitive/exemplary damages, attorneys' fees, and court costs, and other assessments proper by law and any and all other applicable federal and state laws, together with legal interest thereon from date of judicial demand until paid; and 2) That this Honorable Court order Defendants to reinvestigate and correct the credit report(s), data emanations, and credit histories of and concerning Plaintiff or any of plaintiff's personal identifiers.

COUNT THIRTEEN

VIOLATIONS OF THE FAIR DEBT COLLECTION PRACTICES ACT 15 U.S.C. § 1692 et seq.

(SPECIALIZED LOAN SERVICES)

106. The Jacksons re-incorporate by reference all of the above paragraphs of this Complaint as though fully stated herein.

107. Defendant servicer, Specialized Loan Services (SLS) is considered a "debt collector" under the FDCPA as when it each began servicing the loan, the loan was in default and it was serviced as a defaulted loan. SLS has attempted to collect the debt. The debt is the loan for the Plaintiffs' house and thus qualifies as a consumer or personal debt under the FDCPA. SLS violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA"), committed state law violations in attempting

to collect the debt and invaded Plaintiff's personal and financial privacy by its illegal efforts to collect a consumer debt from the Jacksons.

108. The acts and omissions of counter-defendant as more specifically stated in the facts constitutes numerous and multiple violations of the FDCPA including, but not limited to, §1692e(2), §1692e(8), and §1692f(1), with respect to the Jacksons. As a result of Defendants' violations of the FDCPA, the Jacksons are entitled to actual damages pursuant to 15 U.S.C. § 1692k(a)(1); statutory damages in an amount up to $1,000.00 pursuant to 15 U.S.C. § 1692k(a)(2)(A); and, reasonable attorney's fees and costs pursuant to 15U.S.C. § 1692k(a)(3) from Defendants.

109. Within the last 12 months, Defendants attempted to collect amounts not owed under the mortgage contract. Within the last 12months, Defendants sought unjustified amounts, which would include demanding any amounts not permitted under an applicable contract or as provided under applicable law in violation of the Act §1692f(1). Within the last 12 months, Defendants threatened legal action that was either not permitted or not actually contemplated in violation of the Act §1692 e. Within the last 12 months, Defendants communicated with third parties: revealing or discussing the nature of debts with third parties in violation of the Act §1692 c. Defendants within the last 12 months, failed to identify themselves and notify the Jacksons in every communication, that the communication was from a debt collector in violation of the Act §1692e(11). Within the last 12 months Defendants falsely stated the amount of the debt owed in violation of §1692e2a.

110. Congress found it necessary to pass the FDCPA due to rampant abusive practices by dishonorable debt collectors. 15 USC § 1692 is entitled "Congressional findings and declaration of purpose" and it states as follows: (a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy. (b) Existing laws and procedures for redressing these injuries are inadequate to

protect consumers. (c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts. (d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce. (e) It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

111. SLS as the servicer violated the FDCPA, 15 U.S.C. § 1692f, by using unfair and unconscionable means to collect the debt owed by the Morris, including the collecting and attempting to collect of interest and other charges, fees and expenses not authorized by the original Loan and/or Modification Agreement, or otherwise legally chargeable to the Jacksons as more fully set forth above. SLS violated the FDCPA, 15 U.S.C. § 1692e(2), by misrepresenting the character, amount and legal status of the Plaintiffs' debt. For example the default notices contained the incorrect amount owed on the loan and included incorrect amount of past due payments as well as incorrect amounts needed to bring the loan current. SLS violated the FDCPA, 15 U.S.C. §§ 1692e(5)and 1692f(6), by threatening to foreclose on the Jacksons' home even though it has no present right to possession of the property under the security agreement, and by threatening to take other action prohibited by law. SLS violated the FDCPA, 15 U.S.C. § 1692g(a)(1), by failing to accurately and fully state in communications to the Plaintiffs "the amount of the debt."

112. SLS by overcharging Plaintiffs' escrow account, falsely represented the amount of the debt necessary to cure the deficiency of the escrow account in violation of 15 U.S.C. § 1692e(2)(A). SLS also falsely represented the character, amount, or legal status of the debt in violation of 15 U.S.C. § 1692e(2)(A). SLS by failing to report the disputed debt as disputed to credit reporting bureaus, communicated credit information which was known or which should have been known as false in violation of 15 U.S.C. §

1692e(8). SLS by continuing to charge late fees and interest, and by holding the Jacksons' payments in a suspense account, failed to cease collection on a disputed debt in violation of 15 U.S.C. § 1692g(b).

113. As a result of SLS's unlawful debt collections practices, the Jacksons have suffered and continue to suffer financial harm including but not limited to:

a. Increased interest expenses on their mortgage;

b. Improperly charged late fees on their mortgage;

c. Damage to their credit report and credit score; and

d. Attorney's fees and costs associated with attempting to correct this dispute.

114. The acts and omissions of Defendant as more specifically stated in the Facts constitutes numerous and multiple violations of the FDCPA including, but not limited to, §1692e(2), §1692e(8), and §1692f(1), with respect to Plaintiff.

115. As a result of the violations of the FDCPA, Plaintiff is entitled to (1) statutory damages; (2) actual and compensatory damages; and, (3) reasonable attorney's fees, costs, and expenses from Defendants. As a result of SLS's violations of the FDCPA, Counter-Plaintiff is entitled to actual damages pursuant to 15 U.S.C. § 1692k(a)(1); statutory damages in an amount up to $1,000.00 pursuant to 15 U.S.C. § 1692k(a)(2)(A);and, reasonable attorney's fees and costs pursuant to 15 U.S.C. § 1692k(a)(3), from Defendant.

COUNT FOURTEEN

VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT (SPECIALIZED LOAN SERVICES)

116. The Plaintiffs re-incorporate by reference all of the above paragraphs of this Complaint as though fully stated herein.

117. The acts and omissions of Defendant as more specifically stated in the facts constitutes numerous and multiple violations of the TCPA including, but not limited to 47 USC § 227(b)(1) Restrictions on use of automated telephone equipment. **It shall be unlawful for any person** within the United States – (A) to make any call **(**other than a call made for emergency purposes or made with the prior express consent of the called party)**using any automatic telephone dialing system** or an artificial or prerecorded voice -(iii) **to any … cellular telephone service…**47 USC § 227(b)(1) *(B) an action to recover for actual monetary loss from such a violation, or to receive**$500 in damages for each such violation**, whichever is greater, If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an **amount equal to** not more than **3 times ($1,500) the amount available under subparagraph (B)** of this paragraph.*

118. The Defendants used automatic telephone dialing systems to call the Plaintiffs' cell phones numerous times from June 2013 until December 2015. The Plaintiffs have never given the Defendant permission to call their cell phones with automated dialing systems. As a consequence of said acts, the Defendant has violated the TCPA and is liable for damages pursuant to federal law.

COUNT FIFTEEN:

VIOLATION OF THE EQUAL CREDIT OPPORTUNITY ACT

(SPECIALIZED LOAN SERVICES)

119. The Plaintiff makes a claim under ECOA, which makes it illegal "for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of race, color, religion, national origin, sex or marital status, or age." 15 U.S.C. § 1691(a)(1). One way that ECOA effectuates this goal is through its notice requirement, which states: "Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor." Id. § 1691(d)(2). ECOA defines an "adverse action" as a: denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested.

120. When a creditor takes an adverse action against an applicant without giving the required notice, the applicant may sue for a violation of ECOA. § 1691e ("Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant"); see also Thompson v. Galles Chevrolet Co., 807 F.2d 163, 166 (10th Cir. 1986) (quoting Sayers v. Gen. Motors Acceptance Corp., 522 F. Supp. 835, 840 (W.D. Mo. 1981)).

121. Plaintiffs contend that the Defendant's acceleration of his debt constituted a "revocation of credit" for purposes of the definition of "adverse action." ECOA defines "credit" to mean "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." 15 U.S.C. § 1691a(d).

122. On June 12, 2015, Plaintiffs received a notice from the Jauregui Law Firm informing them that, "due to the default under the terms of the mortgage or deed of trust, the entire balance is due and payable." Plaintiffs made diligent efforts to determine whether SLS's default notices were mere clerical errors or represented SLS's termination of the loan modification agreement. Based on SLS's prolonged non-responsiveness, and its affirmative statements regarding loan acceleration and default, SLS terminated the loan modification agreement and thereby revoked the Plaintiffs' credit for purposes of § 1691(d)(6).

123. When SLS informed the Plaintiffs that it had accelerated his loan and was commencing foreclosure proceedings, its statements communicated the bank's refusal to abide by the terms of the loan modification agreement entered into on August 29, 2013, which had given Plaintiffs a longer period to repay the loan. On its face, this communication revoked the prior credit arrangement. Because the Defendants failed to send an adverse action notice, the Defendants took an adverse action without complying with ECOA's notice requirements and have violated the terms of the EOCA and owe damages for said violations to the Plaintiffs.

COUNT SIXTEEN:
CLAIM FOR DECLARATORY RELIEF
(ALL DEFENDANTS)

124. The Jacksons re-allege and adopts the above paragraphs as if fully set forth herein and also asserts the following:

125. Defendants breached the contract with the Jacksons by failing to follow the terms for notice requirements agreed to in the mortgage contract as well as payment application. Defendants never sent the Jacksons the required notices and failed to properly apply their payments. As a result the Jacksons are entitled to the following declaratory relief: (1) An Order declaring that they are not in default of their mortgage agreement and declaring the notice of default is null and void.

(2) An order declaring that Defendants have no right or authority to foreclose on the Jacksons' property. (3) An Order prohibiting Defendants from foreclosing on the Jacksons' property.

PLAINTIFFS (THE JACKSONS) DEMAND A TRIAL BY JURY.

WHEREFORE, the Plaintiffs having set forth their claims for relief against the Defendants respectfully pray of the Court as follows:

a. That the Plaintiffs have and recover against the Defendants, a sum to be determined by this Court and their peers in the form of actual damages.

b. That the Plaintiffs have and recover against the Defendants a sum to be determined by this Court in the form of compensatory and punitive damages.

c. That Plaintiffs, the Jacksons, be awarded attorney fees and court cost.

d. That the Plaintiffs have such other and further and proper relief as the Court may deem just and proper:

RESPECTFULLY SUBMITTED:

/s/ Kenneth James Lay
HOOD & LAY, LLC
1117 22nd Street South
Birmingham, Alabama 35205
Tel: (205) 323-4123
Fax:(205) 776-2040
Attorney for Plaintiffs

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-1432

TAYLOR, BEAN &
WHITAKER MORTGAGE
COMPANY and GOSHEN
MORTGAGE, LLC, as
successor in interest to
Taylor, Bean & Whitaker
Mortgage Company,

Appellants,

v.

JOSEPH M. WRIGHT and
MEGAN L. WRIGHT,

Appellees.

On appeal from the Circuit Court for Nassau County.
Steven Fahlgren, Judge.

August 3, 2018

WINOKUR, J.

Appellant, Taylor, Bean & Whitaker Mortgage Company (Taylor), appeals the trial court's entry of Final Judgment, which awarded attorney's fees and costs against Taylor's successor-in-interest, Goshen Mortgage, LLC (Goshen). Florida Rule of Civil Procedure 1.260(c) requires that the substitution of parties occur upon motion to the trial court, which never occurred here. As a

result, the lower court erred by *sua sponte* substituting Goshen as the Plaintiff.*

I.

Joseph and Megan Wright entered into a mortgage with Taylor for a property located in Yulee. The Wrights defaulted and Taylor filed a complaint against them. Later in the litigation, Taylor went into bankruptcy and their interest in the Wrights' mortgage was assigned to Goshen. Goshen's counsel filed a Notice of Appearance as Taylor's co-counsel. Goshen, as "successor-in-interest" to Taylor, moved to dismiss the case and to cancel notice of *lis pendens*, and requested the original mortgage documents back from the court file, which the trial court granted. In turn, the Wrights then moved for a Judgment Awarding Costs and Attorney's Fees.

One of the primary issues at the hearing on the Wrights' motion was whether Goshen was the proper plaintiff in this action, subject to attorney's fees. Goshen and Taylor both argued that Taylor was the proper plaintiff, because Goshen was never substituted as plaintiff, in spite of the fact that it filed a motion to dismiss. The trial court found that Goshen's dismissal of the foreclosure suit as successor-in-interest made Goshen the "de facto" plaintiff. Accordingly, the trial court on its own motion substituted Goshen as the Plaintiff.

After the hearing, the trial court entered the Final Judgment Awarding Attorney's Fees and Costs Against Goshen.

II.

When a trial court's decision is based, in part, on factual findings, it presents a mixed question of law and fact. *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 283 (Fla. 1st DCA 2003). The trial court's factual findings are reviewed under a competent, substantial evidence standard. *Id*. However, the trial court's application of the law to the facts is reviewed *de novo*. *Id*.

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* We reject other issues raised in this appeal.

Florida Rule of Civil Procedure 1.260(c) governs substitution of parties to an action:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

We find that the trial court did not comply with the requirements of Rule 1.260(c). As such, Goshen was never properly substituted as Plaintiff in this case.

III.

Goshen became Taylor's successor-in-interest when it acquired the Wrights' mortgage. Under this authority, Goshen voluntarily dismissed Taylor's foreclosure action against the Wrights. Rule 1.260(c) permits Goshen to seek dismissal on behalf of Taylor. Moreover, the rule makes clear that a successor-in-interest may continue an action of the original plaintiff "unless the court upon *motion"* substitutes the successor-in-interest as the plaintiff. Fla. R. Civ. P. 1.260(c) (emphasis added). This never occurred here.

As a result, this case is similar to *Tinsley v. Mangonia Residence I, Ltd.*, 937 So. 2d 178 (Fla. 4th DCA 2006). In *Tinsley*, the original plaintiff, Vikar Associates, instituted foreclosure proceedings against Mangonia Residence. *Id.* During the litigation, Vikar assigned its interest in the mortgage to Tinsley. *Id.* Vikar later moved to substitute Tinsley as the plaintiff, but the trial court never heard the motion. *Id.* Eventually, the foreclosure proceedings were dismissed. *Id.* Mangonia then sought attorney's fees from both Vikar and Tinsley, and the trial court awarded them fees from Tinsley. *Id.* The district court reversed the fee order based on Rule 1.260(c), holding that "[b]ecause no party obtained a court order substituting Tinsley for Vikar, Vikar, as the rule permits, remained as the party pursuing the action, and the court was without jurisdiction to award fees or costs against Tinsley, a non-party." *Id.* at 180. The

same analysis applies here. Taylor remained the proper plaintiff and the court could not order Goshen to pay attorney's fees.

The Wrights attempt to distinguish this case by asserting that, unlike Tinsley, Goshen acted to voluntarily dismiss the action, which had the effect of substituting itself for Taylor and made it the "de facto" plaintiff here. Indeed, the trial court also used this reasoning in its ruling. We disagree. Rule 1.260(c) provides that a party to whom the plaintiff's interest has been transferred can continue an action on behalf of the original plaintiff, including filing a voluntary dismissal. If a successor-in-interest becomes the plaintiff merely by filing a motion in the action, then the specific requirements to substitute parties contained in Rule 1.260(c) becomes meaningless.

A successor-in-interest can become a party to an action by making a motion to the trial court pursuant to Rule 1.260(c). Indeed, Florida courts have recognized that once a plaintiff has assigned its interests in an action a trial court has two options: "(1) to allow the action to be continued in the name of the plaintiff; or (2) to allow [the successor] to be either substituted for or joined with the original party-plaintiff." *Levine v. Gonzalez*, 901 So. 2d 969, 972 (Fla. 4th DCA 2005) (quoting *Schmidt v. Mueller*, 335 So. 2d 630, 631 (Fla. 2d DCA 1976)). The trial court's unilateral substitution of Goshen as the plaintiff violated the requirements of Rule 1.260(c).

We note that after the voluntary dismissal of Taylor's action by Goshen, the trial court did not have jurisdiction to substitute Goshen as the plaintiff. *See Randle-Eastern Ambulance Serv., Inc. v. VASTA*, 360 So. 2d 68, 68-69 (Fla. 1978) (holding that "a plaintiff's volitional dismissal divests a trial court of jurisdiction to entertain a later request to be relieved from the dismissal" and that a "trial court loses jurisdiction to proceed in any way beyond the announcement of dismissal"). Because the trial court's unilateral substitution of Goshen as the plaintiff occurred several months after the voluntary dismissal, it acted without jurisdiction. While the trial court had jurisdiction to hear the motion for attorney's fees, it did not have jurisdiction to substitute the plaintiff.

IV.

In conclusion, Goshen could dismiss the foreclosure suit as Taylor's successor-in-interest without substituting itself as the Plaintiff. Pursuant to Florida Rule of Civil Procedure 1.260(c), a trial court must rule on a motion for substitution before it can substitute a party to an action. The trial court's *sua sponte* substitution of Goshen as the Plaintiff was error. We reverse the entry of Final Judgment and remand to the trial court for proceedings consistent with this opinion.

REVERSED and REMANDED.

WOLF and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Cameron H.P. White and Jason R. Hawkins of South Milhausen, P.A., Orlando, for Appellants.

Lynn Drysdale, Jacksonville Area Legal Aid, Inc., Jacksonville, for Appellees.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D16-5878

IEZZI FAMILY LIMITED PARTNERSHIP,

Appellant,

v.

EDGEWATER BEACH OWNERS ASSOCIATION, INC., a Florida not for profit corporation; SUZANNE HARRIS; STEPHEN E. BURGIN; ROBERT D. MILLER, a/k/a R.D. MILLER; WILLIAM R. TERRY, SR.; FRANK T. FOSTER; LAWRENCE A. COX; and HARRY E. LOGUE,

Appellees.

On appeal from the Circuit Court for Walton County.
Jeffrey E. Lewis and Thomas R. Santurri, Judges.

August 1, 2018

WINOKUR, J.

Iezzi Family Limited Partnership ("Iezzi"), owner of a condominium in the Edgewater Beach Condominiums, filed a 27-count complaint against the condominium's Association and seven current or former directors or officers of the Association ("Directors"), seeking both equitable and legal relief. The trial court dismissed Iezzi's action, finding that its claims were

derivative and Iezzi did not comply with derivative pre-suit requirements. On appeal, Iezzi argues that its actions were brought under a statute specific to condominiums, outside of the purview of the derivative procedures. We affirm, and hold that members of not-for-profit condominium associations may not avoid pre-suit requirements for derivative actions.

I. BACKGROUND

A condominium[1] association incorporated under chapter 617, Florida Statutes, the "Florida Not For Profit Corporation Act," is generally subject to its laws. § 617.1703, Fla. Stat. The members of these associations are the condominium unit owners, and the officers and directors of the associations owe these members certain fiduciary responsibilities. *See* § 718.111, Fla. Stat. However, the association has broad powers and duties, including all of those set forth in chapter 617, unless otherwise noted. *Id.*

Section 617.07401, Florida Statutes, restricts the ability of members to bring lawsuits "in the right of" their non-for-profit corporation. Members must bring their complaints to the board of directors to allow the corporation to conduct investigations and initiate a lawsuit. *Id.* If the corporation proves that it has conducted an independent and reasonable investigation, and determines in good faith that a lawsuit is not in the best interests of the corporation, a court may dismiss the proceeding. *Id.*

Section 718.303(1), Florida Statutes, provides a cause of action for damages or equitable relief that may be pursued by either an association or unit owner. Liability for violating chapter 718 or the association's governing documents may be imposed on the association, unit owners, directors, and tenants. § 718.303, Fla. Stat. The broad language of this statute encompasses a wide variety of violations.

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[1] "The condominium is a hybrid estate in property law whereby an individual obtains fee simple ownership of a unit and shares with other unit owners an undivided interest in the common elements." *Rogers & Ford Const. Corp. v. Carlandia Corp.*, 626 So. 2d 1350, 1352 (Fla. 1993).

Iezzi's complaint alleges that the Association acted improperly and the Directors breached their fiduciary duties, resulting in various illegal expenditures and assessments, and losses of Association funds. Iezzi argues that to limit section 718.303(1) actions by requiring that they comply with the pre-suit requirements of section 617.07401, would necessarily create a conflict between the statutes. As Iezzi asserts, if the sections do conflict, the provisions of chapter 718 must control. *See* § 617.1703, Fla. Stat.; *see also Heron at Destin W. Beach & Bay Resort Condo. Ass'n, Inc. v. Osprey at Destin W. Beach*, 94 So. 3d 623, 631 (Fla. 1st DCA 2012).

II. ANALYSIS

Because it "is axiomatic that statutes must be read with other related statutes," and courts must "construe related statutory provisions in harmony with one another" when possible, we conclude that sections 718.303(1) and 617.07401 do not conflict. *See Abbott Labs. v. Mylan Pharm., Inc.*, 15 So. 3d 642, 657 (Fla. 1st DCA 2009) (quoting *State v. Negrin*, 306 So. 2d 606, 607 (Fla. 1st DCA 1975); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992)).

In Part A, we define derivative actions and note that plaintiffs may not evade pre-suit requirements by labeling their complaints a certain way. In Part B, we examine the application of common-injury claims to condominiums since chapter 718's enactment in 1976. Part C discusses the enactment of section 617.07401 in 2009, and the limited case law following it. We conclude by finding that section 617.07401 applies to the instant action and Iezzi's failure to comply with its requirements merits dismissal.

A. *Derivative Actions*

> A derivative suit has been defined as an action in which a stockholder seeks to enforce a right of action *existing in the corporation*; the injury sustained by the stockholder bringing such suit is basically the same as

> the injury sustained by other stockholders in the corporation.

Leppert v. Lakebreeze Homeowners Ass'n, Inc., 500 So. 2d 252, 252 (Fla. 1st DCA 1986) (emphasis in original).[2]

Iezzi acknowledges that its actions fit this description. It further acknowledges that compliance with derivative procedures has been required in the condominium context. *See Collado v. Baroukh*, 226 So. 3d 924, 926 (Fla. 4th DCA 2017) (holding that condominium owner's "[n]oncompliance with the pre-suit requirements of section 617.07401 mandates dismissal of the suit"). Iezzi contends that the plaintiff in *Collado* chose to bring her action as a derivative claim, whereas Iezzi does not bring its action pursuant to the derivative-claim statute. But plaintiffs may not decide that they are not subject to statutory requirements merely by labeling their allegations in an effort to avoid them. *See S. Miami Hosp., Inc. v. Perez*, 38 So. 3d 809, 811 (Fla. 3d DCA 2010) (rejecting the plaintiff's "disingenuous[] attempts to avoid" pre-suit requirements for medical malpractice actions by "recharacterizing" the allegations); *Dr. Navarro's Vein Ctr. of Palm Beach, Inc. v. Miller*, 22 So. 3d 776, 778 (Fla. 4th DCA 2009) (holding that the "factual allegations belie[d] the conclusory legal allegations," and, "despite the plaintiff's creative dance around the obvious, this complaint alleges a claim of medical negligence").

The plaintiff in *Leppert* brought suit against her homeowners association alleging "corporate mismanagement, invalidity of the bylaws, and a need for court supervision of all

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[2] *See also Dinuro Invs., LLC v. Camacho*, 141 So. 3d 731, 738-41 (Fla. 3d DCA 2014) (holding that Florida requires a direct harm and special injury to a corporation member, or a special duty owed, for a member to maintain an individual action compared to a derivative one); *Braun v. Buyers Choice Mortg. Corp. ex rel. McAloon*, 851 So. 2d 199, 203 (Fla. 4th DCA 2003) (holding that the claims were derivative because the body of the complaint alleged injuries that equally affected other corporation shareholders).

corporate expenditures." 500 So. 2d at 252. She argued that her action was not derivative because she brought it individually and sought redress for injuries she sustained directly. *Id.* This Court reviewed the substance of the allegations made, noting that "the character of the suit is to be determined from the gravamen of the complaint." *Id.* We held that the claim was derivative, finding that the injury alleged was not distinct from other homeowners and any harm was primarily against the corporation. *Id*; *see also Fox v. Prof'l Wrecker Operators of Florida, Inc.*, 801 So. 2d 175, 179 (Fla. 5th DCA 2001) ("[T]he injury is the determining factor in deciding whether a claim is direct or derivative; if the injury is to the corporation, and only indirectly harms the shareholder, the claim must be pursued as a derivative claim."). The substance of the allegations made, and not what they are labeled, determines the action.

B. *Common Injury Claims & Condominiums: 1976-2009*

The standing of individual condominium owners to allege violations of fiduciary duties owed to associations has been limited since the inception of chapter 718. In *Avila S. Condo. Ass'n, Inc. v. Kappa Corp.*, 347 So. 2d 599, 602, 605 (Fla. 1977),[3] a condominium association and several individual plaintiffs sued three of the original owners, developers, and officers of the condominium, alleging self-dealing and other improper acts. The supreme court noted that "the allegation, boiled down, is that a fiduciary duty owed to the Association was breached." *Id.* at 609. Because the individual plaintiffs pled no injury distinct from that to the association, only the association could bring suit. *Id.*

Since *Avila*, many unit owners alleging injuries common to others have found success in court, but these suits largely fall into two categories: those seeking equitable relief and those brought in a representative capacity.

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[3] We note that although both sections 718.111 and 718.303 have been repeatedly amended since 1976, there have been no changes relevant to the issues before us, and Iezzi does not contend otherwise.

Many courts have permitted condominium unit owners to seek equitable relief from their associations and directors, especially when the alleged injury is to common areas of the condominium. *See*, *e.g.*, *Hobbs v. Weinkauf*, 940 So. 2d 1151 (Fla. 2d DCA 2006) (holding that owners could seek equitable relief based on association's failure to comply with statutory accounting requirements); *Sheoah Highlands, Inc. v. Daugherty*, 837 So. 2d 579 (Fla. 5th DCA 2003) (unit owners complaint that other owners erected non-compliant screen enclosures on common property required them to be removed); *Islandia Condo. Ass'n, Inc. v. Vermut*, 501 So. 2d 741 (Fla. 4th DCA 1987) (association's unauthorized repainting of buildings required owners' vote to decide whether to repaint buildings back to original color).

Other cases have found standing when the plaintiffs have represented more than their own individual interests. *See Rogers & Ford Const. Corp. v. Carlandia Corp.*, 626 So. 2d 1350, 1354 (Fla. 1993) ("Appellate decisions indicate that actions with respect to common areas or common elements of condominiums have been brought either as class actions, derivative actions, or by a unit owner joined by the condominium association and/or other unit owners."). In *Rogers*, the supreme court determined that an owner could sue developers or general contractors over a common injury "only after ensuring that the interests of the other unit owners are represented in the action," but specifically declined to address whether individual owners could sue the association or directors for breaching fiduciary duties. *Id.* at 1355 & 1355 n.7.

Iezzi points to the above cases and others similar for support, while its own suit seeks legal damages and was brought in a purely individual capacity.

C. *Enactment of Section 617.07401*

Despite a possible 1993 attempt to prohibit members of not-for-profit corporations from bringing derivative actions,[4] they

[4] For a discussion of the 1993 amendment to chapter 617, and its effect, *see Larsen v. Island Developers, Ltd.*, 769 So. 2d 1071 (Fla. 3d DCA 2000), and *Fox*, 801 So. 2d at 179.

were continually permitted, although perhaps to a lesser extent in the condominium context. Not until 2009 did the Legislature enact section 617.07401, providing a pre-suit process for members to bring derivative claims in the right of not-for-profit corporations. *See* Ch. 09-205, § 24, at 2060, Laws of Fla.

This statute resolves the representative issues discussed in *Rogers*. Section 718.303(1) permits condominium unit owners and associations to take action against each other, as well as directors and tenants. But if the claims are derivative, plaintiffs must comply with the requirements necessary for any not-for-profit corporation under section 617.07401. This legislative requirement resolves the "numerous practical problems" discussed by the supreme court in *Rogers* regarding individuals bringing common-injury claims. 626 So. 2d at 1354 (including "determining the appropriate measure of damages to the unit whose owner sued, as distinct from the remaining units; allocating the recovered damages; litigating multiple lawsuits; incurring unnecessary costs incident to having multiple trials; having potentially contradictory adjudications; expediting resolution of controversies; and accomplishing repairs").

Little case law discussing section 617.07401 has developed since its inception. In *Sharma v. Ramlal*, 76 So. 3d 955 (Fla. 2d DCA 2011), members and directors of a not-for-profit corporation sued the president of the corporation and the corporation itself, alleging breaches of fiduciary duties and fraud, among other charges. In a concurrence, Judge LaRose questioned the plaintiffs' standing, noting that their cause of action appeared to belong to the corporation, and they did not allege compliance with section 617.07401. *Id at* 956-57 (LaRose, J., concurring); *see also Udick v. Harbor Hills Dev., L.P.*, 179 So. 3d 489, 491 (Fla. 5th DCA 2015) (noting that derivative suit requirements apply to corporations not for profit); *Collado*, 226 So. 3d at 927 (holding that condominium owner's action did not adequately comply with section 617.07401).

Iezzi cites *MacKenzie v. Centex Homes,* 208 So. 3d 790, 791 (Fla. 5th DCA 2016), which dealt with a homeowners association and an analogous cause-of-action statute. The plaintiff filed an action for a declaratory judgment against the association and

Centex Homes, which was then in control of the association, alleging that Centex Homes failed to make statutorily required monetary contributions to the association. *Id.* at 791-92. Centex Homes argued that the Mackenzies did not have standing because any recovery stemming from a declaratory judgment would go to the association and not the Mackenzies. *Id.* at 793. The Fifth District found standing, concluding that an increase in the association's accounts lessened the chance of a special assessment on the homeowners in the future, and thus, the plaintiffs had a "bona fide interest in the account." *Id.*

We find that *Mackenzie* does not apply here for three reasons. First, *MacKenzie* does not carry the same concerns apparent in *Rogers* regarding plaintiffs representing unit owners similarly injured. While the declaratory action in *Mackenzie* was brought individually, its success would benefit the entire class; the plaintiffs' success would result in an influx of funds for the association, giving every homeowner potential relief in the form of reduced assessments. In contrast, here, success against the Association and/or Directors would result only in relief for Iezzi. Second, the factual posture of the instant case is more analogous to *Leppert* and *Avila*, both of which held that the directors' alleged violations of fiduciary duties were derivative claims. Third, there is no indication that the defendant made any argument as to compliance with derivative pre-suit requirements.

III. CONCLUSION

Iezzi claims injuries not distinct from any other unit owner, and seeks legal damages for its exclusive benefit. This is a derivative action, and because sections 718.303(1) and 617.07401 do not conflict, the court did not err in dismissing Iezzi's complaint because Iezzi did not comply with section 617.07401 pre-suit requirements. We affirm, and repeat the principle that the substance of the allegations made in a complaint determines the nature of the action.

AFFIRMED.

B.L. THOMAS, C.J., and MAKAR, J., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Gary A. Shipman, Robert L. Kauffman, and Lana Hillis, Dunlap & Shipman, P.A., Santa Rosa Beach, for Appellant.

Mary K. Simpson and Amanda W. Gay, Guilday, Simpson, West, Hatch, Lowe & Roane, P.A., Tallahassee, for Appellees.

Third District Court of Appeal

State of Florida

Opinion filed August 1, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-1149
Lower Tribunal No. 13-16523

Thomas DePrince,
Appellant,

vs.

Starboard Cruise Services, Inc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Michael Hanzman, Judge.

McDonald Hopkins, and Robert A. Cohen, Mario M. Ruiz and Joelle H. Dvir, for appellant.

Isicoff Ragatz and Eric D. Isicoff and Carolina A. Latour, for appellee.

Before ROTHENBERG, C.J., and SUAREZ, LAGOA, SALTER, EMAS, FERNANDEZ, LOGUE, SCALES, LUCK and LINDSEY, JJ.

On Motion for Rehearing En Banc

LUCK, J.

In 1965, our state Supreme Court held that Florida law allowed for rescission of a contract based on unilateral mistake. Maryland Cas. Co. v. Krasnek, 174 So. 2d 541, 542 (Fla. 1965) ("Although there is little doubt that the statement in the District Court's opinion that unilateral mistake provides no basis for rescission of a contract or for other equitable relief therefrom, represents the majority view, we are of opinion that it does not accurately reflect Florida case law." (citations omitted)). But what elements are required to prove unilateral mistake? Our court has read Krasnek to answer the question in two ways. In one line of cases, we have read Krasnek to require that the party seeking rescission prove "the mistake was induced by the party seeking to benefit from the mistake." DePrince v. Starboard Cruise Servs., Inc., 163 So. 3d 586, 592 (Fla. 3d DCA 2015) (DePrince I); Rachid v. Perez, 26 So. 3d 70, 72 (Fla. 3d DCA 2010); Lechuga v. Flanigan's Enters., Inc., 533 So. 2d 856, 857 (Fla. 3d DCA 1988). In another line of cases, we have not required the party seeking rescission to prove that she was induced to make the mistake. See U.S. Alliance Corp. v. Tobon, 715 So. 2d 1122, 1123 (Fla. 3d DCA 1998); Penn. Nat'l Mut. Cas. Ins. Co. v. Anderson, 445 So. 2d 612, 613 (Fla. 3d DCA 1984). To address the lack of uniformity, we grant Starboard Cruise Service's motion for rehearing en banc, vacate the panel opinion, DePrince v. Starboard Cruise Servs., Inc., 43 Fla. L. Weekly D171 (Fla. 3d DCA Jan. 17, 2018) (DePrince II), and recede from Lachuga, Rachid, and DePrince I to

the extent they require inducement as an element of unilateral mistake. We conclude that a party seeking rescission of a contract based on a unilateral mistake does not have to prove that she was induced into making the mistake by the other party, and affirm the judgment for Starboard.

FACTUAL AND PROCEDURAL BACKGROUND

1. The cruise. On February 11, 2013, Thomas DePrince, a passenger aboard a cruise ship, visited the ship's jewelry boutique, operated by Starboard, where he indicated his interest in purchasing a fifteen to twenty carat loose diamond.[1] DePrince specified he wanted an emerald cut, high quality, color D, E, or F diamond with a G.I.A. certificate.[2] Because the shipboard jewelry store did not have such a diamond, the store's manager, Mr. Rusan, electronically mailed Starboard's corporate office.

Ms. Jimenez, at the corporate office, reached out to Starboard's diamond vendor in California, Sophia Fiori. Mr. Bachoura from Sophia Fiori, with some reservations because he did not believe a sale of this magnitude should take place aboard a ship, called a diamond broker in New York, Julius Klein, for its available inventory. Julius Klein sent Mr. Bachoura a list of diamonds available with the

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[1] "A 'loose diamond' refers only to the gemstone itself, rather than a gemstone that is a component of a larger piece of jewelry." DePrince I, 163 So. 3d at 589 n.1.

[2] "[T]he Gemological Institute of America (the 'GIA'), [is] a not-for-profit entity that grades and certifies gemstones . . . ." Zaretsky v. William Goldberg Diamond Corp., 820 F.3d 513, 516 (2d Cir. 2016).

desired specifications. The list provided a per-carat price and a net price for each diamond. Mr. Bachoura selected two diamonds from the inventory listing, and electronically mailed the following information to Ms. Jimenez:

> These prices are ship sailing prices based on the lowest tier diamond margin we have. Let me know if you have any questions.
>
> EC 20.64 D VVS2 GIA VG G NON selling price $235,000
> EC 20.73 E VVS2 GIA EX EX FNT selling price $245,000

Ms. Jimenez forwarded this information to Mr. Rusan on the ship. Mr. Rusan, in turn, presented the information to DePrince and his partner, Mr. Crawford.

Neither Ms. Jimenez nor Mr. Rusan had ever sold a large loose diamond before, and did not realize the quoted price was per carat. Mr. Crawford, who was a certified gemologist, asked the opinion of DePrince's sister, a graduate gemologist. Ms. DePrince warned that something was not right because the price for a diamond of that size should be in the millions and recommended not buying the diamond.

Disregarding his sister's advice, DePrince contracted with Starboard to purchase the 20.64 carat diamond for the quoted $235,000 price, paying with his American Express credit card. Shortly after the sale, Starboard discovered that the $235,000 price was per carat. Starboard immediately notified DePrince of the error and reversed the charges to his credit card. DePrince then filed this complaint seeking to enforce the parties' contract.[3]

2. DePrince I. The trial court initially granted summary judgment in favor of Starboard on June 20, 2014, based on Starboard's defense of unilateral mistake. This court reversed that judgment in DePrince I. There, the court reviewed the various tests for determining whether a party's agreement could be rescinded based on a unilateral mistake. Concluding that the panel and trial court were bound by the "four-prong test to establish unilateral mistake," the court

> held that in order to rescind an otherwise-valid contract based on a unilateral mistake, the party seeking to avoid the contract must show:
>
> > (1) [T]he mistake was induced by the party seeking to benefit from the mistake, (2) there is no negligence or want of due care on the part of the party seeking a return to the status quo, (3) denial of release from the agreement would be inequitable, and (4) the position of the opposing party has not so changed that granting the relief would be unjust.

Id. at 592 (quotation omitted; footnote omitted). The court explained that "this panel – along with the trial court – is of course bound by" the four-prong test. Id. at 591. Later in the opinion, the court "reiterate[d] our position" that we "currently adhere[] to the four-prong test." Id. at 594. The court then went on to apply the four-prong test to the facts in the record at the summary judgment hearing.

The court concluded that there was a genuine issue of material fact on the inducement prong because "knowledge of an error is markedly different than

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[3] DePrince's complaint also included claims for specific performance and conversion but he voluntarily dismissed those before trial.

inducement of that error." Id. at 592. As an example of inducement, the court quoted the test for fraudulent inducement, and explained in a footnote:

> We do not hold that the burden to establish inducement for purposes of the first prong of a unilateral mistake defense is the same as proving the elements for a fraudulent inducement defense, but merely use fraudulent inducement by way of example to demonstrate that inducement requires some type of action, not mere knowledge. In fact, the burden of proof cannot be the same because such a requirement would render the unilateral mistake of fact defense completely obsolete by requiring a party seeking to avoid a contract on that basis to prove fraudulent inducement, which is itself sufficient to render a contract voidable by the aggrieved party.

Id. at 592 n.6 (emphasis added).

The court also concluded that there was a genuine issue of material fact on the negligence prong. "[W]hether Starboard made a reasonable and understandable mistake or acted negligently in its handling of the sale is a disputed issue of fact," the court explained. Id. at 593. Based on this, the court reversed the summary judgment for Starboard and remanded for further proceedings because "[t]here remain genuine issues of material fact to be resolved." Id. at 598.

3. The trial. The case went to trial on April 4, 2016 on DePrince's claim of breach of contract, and Starboard's defense of unilateral mistake. By the end of the case the issues had been whittled down. The parties did not dispute that they entered into an agreement; the only issue was whether Starboard was excused from that agreement because it made a unilateral mistake. The trial court instructed the jury on the elements of the unilateral mistake affirmative defense, including

inducement: "To establish this defense Starboard must prove . . . the mistake was induced by the party, here Mr. DePrince, seeking to benefit from the mistake. Inducement may occur through misrepresentations, statements, or omissions which cause the contracting party to enter into a transaction."

The jury found that Starboard should be excused from performing under the contract because it committed a unilateral mistake. The trial court denied DePrince's motion for directed verdict on the unilateral mistake affirmative defense, and entered judgment for Starboard consistent with the jury's verdict. This appeal followed.

4. DePrince II. In DePrince II, a divided panel of the court, being bound by DePrince I, reversed the judgment for Starboard and remanded for a new trial because the trial court's jury instruction on the inducement prong of the unilateral mistake test was inconsistent with DePrince I. The trial court defined inducement to include DePrince's omission of information about the price of the diamond, even though DePrince I defined inducement to be "some type of action, not mere knowledge." See DePrince II, 43 Fla. L. Weekly at D174 ("Defining inducement as making misrepresentations and statements is correct, but the trial court went astray by telling the jury that an omission of information can be inducement. DePrince I was clear 'that inducement requires some type of action, not mere

knowledge,' and as an example gave making a false statement." (quoting DePrince I, 163 So. 3d at 592 & n.6)).

5. Motion for Rehearing En Banc. Starboard moved for rehearing en banc based on the lack of uniformity in our decisions. According to Starboard, in some of our cases (Lechuga, Rachid, and DePrince I) we have required parties claiming a unilateral mistake to meet a four-part test that included inducement as an element. In other cases (Anderson and Tobon), we have not required inducement. We grant rehearing en banc to resolve this conflict.

DISCUSSION

While the panel in DePrince II was bound by DePrince I to hold that the unilateral mistake doctrine required some type of action to induce the mistake, the en banc court is not so bound. See State v. Washington, 114 So. 3d 182, 188-89 (Fla. 3d DCA 2012) ("This panel is not free to disregard, or recede from, that decision; only this Court, sitting en banc, may recede from an earlier opinion."). We, unlike the DePrince II panel, are allowed to take a fresh look at the Florida Supreme Court's Krasnek decision to see if it required inducement as an element of unilateral mistake, and to review the two strands of our post-Krasnek decisions: those that have not required inducement (Anderson and Tobon); and those that have (Lechuga, Rachid, and DePrince I).

Krasnek

In Krasnek, the plaintiff was injured by a car owned by a furniture company. 174 So. 2d at 542. The furniture company filed an insurance claim with Maryland Casualty Company. Id. The insurance company, "believing that their company carried liability insurance on the vehicle involved," negotiated a settlement with the injured plaintiff. Id. The terms of the settlement were as follows: the plaintiff signed and delivered a general release, and in exchange, the insurance company gave the plaintiff a check for $759.86. Id. After the check was delivered, but before it was deposited, the insurance company "discovered that earlier information received from its home office was in error and that the policy covering the vehicle in question had been permitted to lapse." Id. Immediately after discovering the coverage error, the insurance company "stopped payment on the check." Id. The plaintiff sued to enforce the settlement. Id. The insurance company "defended . . . on the equitable ground that the settlement contract was subject to rescission by reason of a unilateral mistake as to a material fact." Id.

The trial court granted summary judgment for the insurance company, but the district court reversed on two grounds. Id. First, the district court concluded that "under Florida law, unilateral mistake provide[d] no basis for equitable relief and therefore no defense" to rescind the contract. Id. Second, the district court found that even if unilateral mistake was a valid defense, the insurance company did not meet the elements of reliance and undue negligence. Id.

The Florida Supreme Court accepted conflict jurisdiction on the first holding that under Florida law there was no unilateral mistake defense. Id. Discussing a string of earlier cases, the Court concluded that "this court has granted equitable relief on the basis of unilateral mistake." Id. at 543. Having decided the conflict issue, the Court "turn[ed] to the alternative grounds for the holding below." Id. at 543. The Court explained there was "no doubt that the law was correctly stated" in the district court's decision. Id. There could be no "equitable relief on the ground of unilateral mistake," the Court said, "in instances in which the mistake is the result of a lack of due care or in which the other party to the contract has so far relied upon the payment that it would be inequitable to require repayment." Id. The trial court had found, "first, that the mistake did not result from an inexcusable lack of due care in the circumstances, and second, that the [injured plaintiff]'s position had not been so changed in reliance on the contract that it would be unconscionable to order rescission." Id. Because these findings were supported by substantial evidence, the Florida Supreme Court concluded that "they should not be disturbed on appeal." Id. The Court reversed the district court, and directed the trial court "to reinstate the judgment" for the insurance company. Id. at 544.

Post-Krasnek (Anderson and Tobon): Inducement Not Required

Following Krasnek, in Anderson and Tobon, we did not require inducement as an element of unilateral mistake. In Anderson, a couple's Cadillac caught fire.

445 So. 2d at 613. The car, at the time of the fire, was insured by Pennsylvania National. Id. The insurance company's adjuster went to the dealer's lot where the Cadillac had been taken, but he mistakenly inspected the wrong fire-damaged Cadillac (which looked like the couple's car and had a similar vehicle identification number). Id. Based on the inspection of the wrong car, the insurance company determined it was a total loss and issued a check "for the full insured value of the[] car." Id. Before the check was cashed, however, the error was discovered and the insurance company stopped payment on the check. Id. The couple sued to enforce the settlement, and the trial court found for the couple. Id.

We reversed because Krasnek "squarely h[eld] that a party – even an insurance company such as the present appellant – should be relieved of the consequences of a unilateral mistake like the one involved here." Id. The court explained that neither of the two exceptions to the unilateral mistake doctrine discussed in Krasnek (reliance and undue negligence) applied:

> Neither of the two exceptions stated in the decision itself apply. First, the plaintiffs did not detrimentally rely upon the mistake since, as they concede, their only action which even arguably so qualifies, a commitment to purchase an expensive replacement vehicle, occurred before they knew of the extent of the carrier's erroneous largesse. Second, while some degree of negligence was undoubtedly involved – in common, as the supreme court pointed out . . . with all such cases – it surely does not approach the inexcusable lack of due care the court indicated was necessary to entitle the plaintiffs to retain their consequent windfall.

Id. (citations and quotations omitted).

Tobon also explained the test for unilateral mistake without reference to inducement. In Tobon, the plaintiff sued a security company and its driver for wrongful death. 715 So. 2d at 1122. The company filed an offer of judgment "on behalf of" the security company, which was accepted by the plaintiff. Id. at 1122-23. Shortly after the offer had been accepted, the security company moved to clarify that the offer was made on its behalf and on behalf of the driver. Id. at 1123. The same attorney represented the security company and driver, and testified that "after his secretary typed up the offer of judgment he reviewed it but failed to notice that [the driver]'s name was not on it." Id. The trial court denied the motion and entered judgment consistent with the offer. Id.

The question on appeal was "whether the mistake in this case afford[ed] ground for relief." Id. We said that it did, citing to Krasnek and explaining that "the Florida Supreme Court has held that a contract such as the settlement agreement in this case may be rescinded on the grounds of unilateral mistake unless the mistake is a result of an inexcusable lack of due care or if the other party to the contract has so far relied upon the contract that it would be inequitable to rescind." Id.

Post-Krasnek (Lechuga, Rachid, and DePrince I): Inducement Required

On the other hand, in three of our post-Krasnek cases – Lechuga, Rachid, and DePrince I – we have said that to prove unilateral mistake, the mistaken party must show that it was induced into making the mistake by the other party. In Lechuga, for example, which was decided after Anderson but before Tobon, the plaintiff sued a bar after the plaintiff was beaten up in the bar's parking lot. Lechuga, 533 So. 2d at 856. During settlement negotiations, the bar told the plaintiff that it would be filing a bankruptcy petition. Id. "Based on that representation," the plaintiff authorized his attorney to accept the settlement. Id. After the case was dismissed, the plaintiff "learned that [the bar] did not file for liquidation in bankruptcy, as was represented to [the plaintiff], but instead filed for reorganization under the bankruptcy laws." Id. When the plaintiff refused to sign the settlement documents, the bar moved to compel enforcement of the settlement agreement, which was granted by the trial court. Id. at 857.

The plaintiff argued on appeal that his attorney was authorized to settle only if the bar was going into liquidation under the bankruptcy laws, and there was a unilateral mistake as to the bar's ability to satisfy a judgment. Id. We agreed, and reversed for both reasons. The "unrebutted testimony" was that the plaintiff's attorney did not have blanket authority to unconditionally settle the case, we said, and "[e]ven if [the plaintiff] had given his attorney authority to settle, the agreement could still be rescinded on the basis of a unilateral mistake." Id.

> Where it is shown that (1) the mistake was induced by the party seeking to benefit from the mistake, (2) there is no negligence or want of due care on the part of the party seeking a return to the status quo, (3) denial of release from the agreement would be inequitable, and (4) the position of the opposing party has not so changed that granting the relief would be unjust, a unilateral mistake may provide a basis for rescission of a contract.

Id. (emphasis added). We cited Krasnek as support for this four-part test.

We reaffirmed the four-part test, including the inducement prong, in Rachid. There, the wife sought to rescind her prenuptial agreement based on unilateral mistake because "she was uninformed or misunderstood significant facts." 28 So. 2d at 71. We affirmed the trial court's order denying the wife's motion to set aside the order granting the motion to enforce the mediated settlement agreement because the wife "fail[ed] to present the legal argument of unilateral mistake below." Id. at 72. But "[e]ven if [she] had preserved the issue of unilateral mistake, we would affirm," we said, because "the record d[id] not support the legal remedy of rescission on the basis that the settlement agreement was the product of a unilateral mistake." Id. We explained that "[u]nder Florida law, the party seeking rescission based on unilateral mistake must establish" the four-part test, quoting and citing to Lechuga. Id. Because the wife did "not claim that any party misled or induced her to enter into the settlement agreement," she did not meet her burden. Id.

In DePrince I, we acknowledged the various tests for unilateral mistake, but stated unequivocally that "[t]his Court's most recent decisions on this topic clearly articulated and reaffirmed the viability of the four-prong test to establish a unilateral mistake." 163 So. 3d at 591 (citing Rachid). "[T]his Court," we held, "currently adheres to the four-prong test as stated in Rachid and Lechuga." Id. at 594.

Resolving the Conflict: Inducement Is Not Required

We agree with Starboard that inducement is not an element of unilateral mistake, and for three reasons, we recede from Lechuga – and the cases that followed it (Rachid and DePrince I) – to the extent they require inducement. First, the inducement requirement is inconsistent with Krasnek. Krasnek used the term induce once, and it was only to describe an older case from the 1920s (Langley) that the Florida Supreme Court used to reject the conclusion that unilateral mistake had no basis in Florida law. See Krasnek, 174 So. 2d at 542 ("[I]n the Langley case . . . although it appears that the mistake was actually induced by the party against whom rescission was sought, the fact is that the court held in favor of rescission on the ground of unilateral mistake.").

Two of its other older cases, the Court said, were "rather more in point" and "noteworthy." Id. at 542-43. In one case, "the decedent of the party suing for rescission had executed a general release in favor of the other party to an accident,

unaware at the time that he had suffered more serious injuries than yet appeared." Id. at 542 (discussing Boole v. Fla. Power & Light Co., 3 So. 2d 335 (Fla. 1941)). In the other case, "the board of trustees of a church sought to cancel a deed by which they had conveyed certain church property, on the ground that they had by mistake included land which had previously been conveyed to another grantee." Id. at 543 (discussing Crosby v. Andrews, 55 So. 57 (Fla. 1911)). In both cases, the Court granted rescission of the contracts based on unilateral mistake. And in both cases, the party that benefited from the mistake did not induce it.

In the part of the Krasnek opinion discussing the district court's conclusion that the insurance company had not met the test for unilateral mistake, the Court said there was "no doubt" the district court "correctly stated" the law for unilateral mistake: equitable relief for a unilateral mistake would be prevented "in instances in which the mistake is the result of a lack of due care or in which the other party to the contract has so far relied upon the payment that it would be inequitable to require repayment." Id. Unlike for negligence, the Court did not require lack of inducement as a way to prevent the application of the unilateral mistake doctrine.

Nor could it. A court's holding can only go as far as its facts, see Miccosukee Tribe of Indians v. Lewis Tein, P.L., 227 So. 3d 656, 661 (Fla. 3d DCA 2017) ("One of the basic principles of appellate law is that the holding of a decision cannot extend beyond the facts of the case."), cert. denied, 138 S. Ct. 741

(2018), and the facts in Krasnek did not include inducement. There, the insurance company erroneously believed that it insured the car that injured the plaintiff. Krasnek, 174 So. 2d at 542. The error was caused by the insurance company's home office, which discovered the policy had lapsed after the settlement. Id. The insurance company's mistake was its own doing, and was not induced by the injured plaintiff or anyone else. Krasnek could not have concluded that the mistaken party was induced into making the mistake by the other party. Yet, the Court still found that the trial court got it right in rescinding the contract. Our Lechuga decision was wrong for reading Krasnek as requiring inducement as an element of unilateral mistake. (Rachid and DePrince I simply followed Lechuga's lead.)

Second, the Florida Supreme Court did not require inducement in its most recent discussion of the unilateral mistake test. In 2013, the Court adopted standard jury instructions for contract and business law cases, and included one for the unilateral mistake affirmative defense. In re Standard Jury Instructions – Contract & Bus. Cases, 116 So. 3d 284, 323-24 (Fla. 2013). In support, the instruction cited our Anderson decision as one of its sources and authorities. Id. at 324.[4] As the Court reminded us, publishing standard instructions "does not

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[4] **SOURCES AND AUTHORITIES FOR 416.26**

1. A contract may be "set aside on the basis of unilateral mistake unless (a) the mistake is the result of an inexcusable lack of due care

foreclose either requesting additional or alternative instructions or contesting the[ir] legal correctness" Id. at 288. We cite the unilateral mistake instruction not for its "correctness," but to show the Court knows how to read the unilateral mistake cases better than we can. The Court adopted an instruction based on Anderson that did not require inducement as an element of unilateral mistake.

Third, the other four district courts also have read Krasnek consistent with how we read it in Anderson and Tobon as not requiring inducement:

- First District. "In order to establish that the mistake is one for which equitable relief may be granted, it must be established that it is one of such consequence that enforcement would be unconscionable; it must relate to the substance of the consideration, that is, a material feature; the mistake occurred regardless of the exercise of ordinary care; and it must be possible under the circumstances to place the other party in status quo." State Bd. of Control v. Clutter Const. Corp., 139 So. 2d 153, 156 (Fla. 1st DCA 1962).

> or (b) the other party has so changed its position in reliance on the contract that rescission would be unconscionable." BMW of N. Am. v. Krathen, 471 So. 2d 585, 588 (Fla. 4th DCA 1985) (citing Maryland Cas. Co. v. Krasnek, 174 So. 2d 541 (Fla.1965); Orkin Exterminating Co. v. Palm Beach Hotel Condo. Ass'n, Inc., 454 So. 2d 697 (Fla. 4th DCA 1984); Pennsylvania Nat'l Mutual Cas. Ins. Co., v. Anderson, 445 So. 2d 612 (Fla. 3d DCA 1984)).

Standard Jury Instructions – Contract & Bus. Cases, 116 So. 3d at 324.

- Second District. "Florida law permits a party to rescind a contract based on unilateral mistake unless the mistake results from an inexcusable lack of due care or unless the other party has so detrimentally relied on the contract that it would be inequitable to order rescission." Fla. Ins. Guar. Ass'n, Inc. v. Love, 732 So. 2d 456, 457 (Fla. 2d DCA 1999).
- Fourth District. "[A] trial court may rescind an agreement based on unilateral mistake if (1) the mistake did not result from an inexcusable lack of due care, and (2) defendant's position did not so change in reliance that it would be unconscionable to set aside the agreement. Additionally, we will look at whether the unilateral mistake goes to the very substance of the agreement." Garvin v. Tidwell, 126 So. 3d 1224, 1228 (Fla. 4th DCA 2012) (quotations omitted).
- Fifth District. "Florida law permits a party to rescind a contract based on unilateral mistake unless the mistake results from an inexcusable lack of due care or unless the other party has so detrimentally relied on the contract it would be inequitable to order rescission." Flynt v. Progressive Consumers Ins. Co., 980 So. 2d 1217, 1219 (Fla. 5th DCA 2008).

* * *

Based on Krasnek, our decisions in Anderson and Tobon, the Florida Supreme Court's standard instruction on unilateral mistake, and the unilateral

mistake cases from the other four districts, we conclude that inducement is not an element of unilateral mistake. A contract may be set aside on the basis of a unilateral mistake of material fact if: (1) the mistake was not the result of an inexcusable lack of due care; (2) denial of release from the contract would be inequitable; and (3) the other party to the contract has not so changed its position in reliance on the contract that rescission would be unconscionable. See Krasnek, 174 So. 2d at 543 ("There is no doubt that the law was correctly stated therein as preventing equitable relief on ground of unilateral mistake in instances in which the mistake is the result of a lack of due care or in which the other party to the contract has so far relied upon the payment that it would be inequitable to require repayment."); Anderson, 445 So. 2d at 613 ("[T]he case is . . . governed by [Krasnek], which squarely holds that a party . . . should be relieved of the consequences of a unilateral mistake like the one involved here. And there are no grounds for departing from Krasnek in this case. Neither of the two exceptions stated in the decision itself apply. First, the plaintiffs did not detrimentally rely upon the mistake since, as they concede, their only action which even arguably so qualifies, a commitment to purchase an expensive replacement vehicle, occurred before they knew of the extent of the carrier's erroneous largesse. Second, while 'some degree of negligence' was undoubtedly involved – in common, as the supreme court pointed out . . . with all such cases – it surely does not approach the

'inexcusable lack of due care' the court indicated was necessary to entitle the plaintiffs to retain their consequent windfall." (footnote and citations omitted)).

This Case

Applied to this case, the jury was properly instructed on the elements of unilateral mistake, although the instruction included extra language on inducement, which we've concluded is not an element. The trial court instructed the jury that: "Starboard m[u]st show that there was no inexcusable lack of due care under the circumstance on its part, the party seeking return to the status quo. Starboard must also show that denial of release from the agreement would be inequitable. In other words, it would be inequitable to hold it to the contract. And it must show that Mr. DePrince did not change his position in any way and that granting relief would not be unjust."

Competent substantial evidence supported the jury's finding that all the required elements for unilateral mistake had been met. Starboard received incorrect information from its home office, which caused the company to quote a price that was a fraction of the company's cost to purchase the diamond wholesale. Based on the evidence, the jury was entitled to find that the mistake was not "inexcusable," and DePrince did not detrimentally rely on the mistake such that it would be unconscionable to rescind the sales contract.

CONCLUSION

We granted the motion for rehearing en banc, and vacated our opinion in DePrince II, to resolve the lack of uniformity in our decisions defining the elements of unilateral mistake. Having resolved the conflict, we conclude that inducement is not a required element, and recede from Lechuga, Rachid, and DePrince I to the extent they held that it was. Without inducement as an element, we affirm the trial court's judgment for Starboard.[5]

[5] We agree with DePrince II that none of the evidentiary issues raised by DePrince, "separately or together, constituted reversible error warranting a new trial." 43 Fla. L. Weekly at D175. And because we are affirming based on the jury's finding that Starboard made a unilateral mistake, we do not need to reach the issue of whether the jury's verdict on Starboard's fraudulent inducement defense was supported by the evidence.

Third District Court of Appeal

State of Florida

Opinion filed August 1, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2756
Lower Tribunal No. 14-27252

David Rahimi, etc.,
Appellant,

vs.

Global Discoveries, Ltd., LLC,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jorge E. Cueto, Judge.

Murdoch, Weires & Neuman, PLLC and Scott A. Weires (Boca Raton), for appellant.

McCumber, Daniels, Buntz, Hartig, Puig & Ross, P.A., Amy L. Dilday, Starlett M. Massey, and Jonathan D. Kaplan (Tampa), for appellee.

Before ROTHENBERG, C.J., and SALTER and LUCK, JJ.

LUCK, J.

Florida statutes allow for the government-sponsored forced sale of real property to pay the overdue property tax bill owed on that property. If, after the

money from the sale has been used to pay the property taxes and other government liens, there is a balance – or surplus – the surplus is to be paid to the property's titleholders, lienholders, and mortgagees. But what date must the clerk use to determine which titleholders, lienholders, and mortgagees are entitled to the surplus – the date of the sale or when the court adjudicates disputed claims to the surplus? Because we agree with the trial court that the determination of who is entitled to the surplus is made at the time of the tax deed sale, we affirm the summary judgment.

Factual Background and Procedural History

Ila Weiner purchased a condominium at the Mayfair House on January 5, 2005. About a year later, she took out a mortgage loan on the property with Regions Bank in the amount of $193,000. In September 2007, the loan, which at this time had $198,539.73 owing, was modified. Soon thereafter, Weiner executed the first of three warranty deeds transferring the property to the Mayfair 555 Trust. David Rahimi is the current trustee of this trust.

Taxes on the condominium were not paid, and, on June 12, 2014, the property was sold at a tax deed sale. The sale, after the taxes were paid off, resulted in a surplus of $92,519.89, which remained in the court registry. Global Discoveries, Ltd. is a company that recovers judicial sale surplus proceeds on behalf of mortgagees. The company obtained an assignment from Regions Bank to

recover the subject funds. At the time, the amount owed on the modified mortgage loan was $208,618.92.

Two lawsuits were filed to recover the surplus. Rahimi filed a complaint to quiet title, which sought to recover the surplus funds resulting from the tax deed sale. Upon the filing of the quiet title action, the clerk marked the funds "do not disburse." When Global Discoveries filed a statement of claim against the surplus, the clerk refused to disburse the money. Global Discoveries then filed a declaratory action to compel disbursement based on the priority held by the mortgage. Rahimi moved to intervene in the declaratory action and the trial court eventually consolidated the two cases.

While the two cases were pending, on January 14, 2016, Regions Bank recorded a release of mortgage. The release stated that Regions Bank "cancel[led] and discharge[d]" the subject mortgage. Nonetheless, Global Discoveries moved for summary judgment asserting that "discharge of the [m]ortgage . . . does not release the prior titleholder's obligation to pay the [l]oan, it only releases the property from serving as collateral for the [l]oan." The trial court concluded that the mortgage lien had priority to the surplus funds regardless of the later release. Thus, it granted summary judgment in favor of Global Discoveries and ordered the clerk to disburse the surplus to the company.

This is the appeal of that order.

Standard of Review

"When considering a motion for summary judgment, the trial court must determine that no genuine issue of material fact exists, and the moving party is entitled to summary judgment as a matter of law. A trial court's entry of summary judgment based on its interpretation of a statute is reviewed de novo." Mesa v. BMW of N. Am., LLC, 904 So. 2d 450, 453 (Fla. 3d DCA 2005) (citations omitted).

Discussion

Rahimi contends he is entitled to the surplus funds because at the time the trial court decided the conflicting claims to the surplus Regions Bank was no longer a mortgagee with rights to the proceeds of the tax deed sale. Global Discoveries responds that entitlement to the surplus money is determined at the time of the tax deed sale, and at the time that the Mayfair House condominium was sold, Regions Bank was the mortgagee of record entitled to the surplus. We agree with Global Discoveries based on our reading of the tax deed statutes.

Four tax deed statutes are relevant here. Section 197.582, entitled "Disbursement of proceeds of sale," provides:

> (2) If the property is purchased for an amount in excess of the statutory bid of the certificateholder, the excess must be paid over and disbursed by the clerk…. The clerk shall distribute the excess to the governmental units for the payment of any lien of record held by a governmental unit against the property, including any tax certificates not incorporated in the tax deed application and omitted taxes, if

> any…. If, after all liens of governmental units are paid in full, there remains a balance of undistributed funds, the balance shall be retained by the clerk for the benefit of persons described in s. 197.522(1)(a) . . . as their interests may appear. The clerk shall mail notices to such persons notifying them of the funds held for their benefit….

§ 197.582(2), Fla. Stat. (2014). Section 197.582 references section 197.522(1)(a):

> The clerk of the circuit court shall notify, by certified mail with return receipt requested or by registered mail if the notice is to be sent outside the continental United States, the persons listed in the tax collector's statement pursuant to s. 197.502(4) that an application for a tax deed has been made. Such notice shall be mailed at least 20 days prior to the date of sale. If no address is listed in the tax collector's statement, then no notice shall be required.

Id. § 197.522(1)(a). Section 197.522(1)(a) then references section 197.502(4):

> The tax collector shall deliver to the clerk of the circuit court a statement that payment has been made for all outstanding certificates or, if the certificate is held by the county, that all appropriate fees have been deposited, and stating that the following persons are to be notified prior to the sale of the property:
>
> (a) Any legal titleholder of record if the address of the owner appears on the record of conveyance of the property to the owner. However, if the legal titleholder of record is the same as the person to whom the property was assessed on the tax roll for the year in which the property was last assessed, the notice may be mailed to the address of the legal titleholder as it appears on the latest assessment roll.
>
> (b) Any lienholder of record who has recorded a lien against the property described in the tax certificate if an address appears on the recorded lien.
>
> (c) Any mortgagee of record if an address appears on the recorded mortgage or if the mortgagee has designated an address with the Department of State pursuant to s. 655.0201(2), then the notice must be sent to the address on file with the Department of State.

Id. § 197.502(4)(a)-(c). Finally, section 197.552 provides that:

> All tax deeds shall be issued in the name of a county and shall be signed by the clerk of the county. The deed shall be witnessed by two witnesses, the official seal shall be attached thereto, and the deed shall be acknowledged or proven as other deeds. Except as specifically provided in this chapter, no right, interest, restriction, or other covenant shall survive the issuance of a tax deed, except that a lien of record held by a municipal or county governmental unit, special district, or community development district, when such lien is not satisfied as of the disbursement of proceeds of sale under the provisions of s. 197.582, shall survive the issuance of a tax deed. The charges by the clerk shall be as provided in s. 28.24. Tax deeds issued to a purchaser of land for delinquent taxes shall be in the form prescribed by the department. All deeds issued pursuant to this section shall be prima facie evidence of the regularity of all proceedings from the valuation of the lands to the issuance of the deed, inclusive.

Id. § 197.552. Three times (at least), the tax deed statutes tell us the determination of who is entitled to the surplus is made at the time of the sale.

First time. After the property tax bill and other government liens are paid off, the court clerk holds the "balance" (or surplus) of the tax deed sale "for the benefit of person described in section 197.522(1)(a)." Id. § 197.582(2). Section 197.522(1)(a) refers to "the persons listed in the tax collector's statement pursuant to section 197.502(4)." Id. § 197.522(1)(a). These "persons" must be notified by the court clerk, and the notice must be mailed out "at least 20 days prior to the date of sale." Id. The "persons" receiving notice are the titleholder to the property up for sale, "[a]ny lienholder of record who has recorded a lien against the property," and "[a]ny mortgagee of record." Id. § 197.502(4)(a)-(c).

The clerk, thus, is required to hold the surplus for benefit of the titleholder, lienholders of record, mortgagees of record, and others defined in section 197.502(4). The determination of which titleholder, lienholders, and mortgagees are entitled to the benefit of the surplus is made based on the notice that is sent out twenty days before the sale. Only those titleholders, lienholders, and mortgagees that are of record before the tax deed sale are entitled to notice, and those for whom the clerk is holding the surplus.

Here, it is undisputed that Regions Bank recorded a mortgage on the Mayfair House condominium years before the tax deed sale, and the mortgage had not been released when the property was sold in 2014. In order to be included in the group of people entitled to notice of both the tax sale and the existence of a surplus, the mortgagee must have a mortgage of record prior to the sale. Regions Bank did, so the clerk was holding the surplus for the benefit of Regions Bank (and the others entitled to notice).

Second time. Once there's a "balance" following the sale after paying off the property tax bill and any government liens, "the clerk shall mail notices to such persons notifying them of the funds held for their benefit." Id. § 197.582(2). "[S]uch persons" are those titleholders, lienholders, and mortgagees of record that also received notice at least twenty days prior to the sale. Id. The "excess

proceeds shall be presumed payable or distributable on the sale the notice is sent." Id.

The money held by the clerk, in other words, is "presumed payable" to those that are required to receive notice. The notice list includes titleholders, lienholders, and mortgagees of record at the time of the sale.

Here, again, it is undisputed that Regions Bank had a recorded mortgage on the property at the time of the tax deed sale. As one of "the persons" required to be notified, payment to Regions Bank was presumed once the clerk sent the notice following the sale.

Third time. After the sale, once the tax deed is issued to the new owner, "no right, interest, restriction, or other covenant shall survive the issuance of a tax deed." Id. § 197.522. The tax deed statutes "extinguish any covenant that creates a lien or requires a [new owner] to 'expend money for any purpose' for debts that precede the issuance of the tax deed. Both the lien and the [new owner's] liability for the preexisting debt are extinguished upon issuance of the deed." Lunohah Invs., LLC. v. Gaskell, 158 So. 3d 619, 621 (Fla. 5th DCA 2013); see also A to Z Props., Inc. v. Fairway Palms II Condo. Assoc., Inc., 137 So. 3d 453, 456 (Fla. 4th DCA 2014) (same); Cricket Props., LLC v. Nassau Pointe at Heritage Isles Homeowners Ass'n, Inc., 124 So. 3d 302, 307 (Fla. 2d DCA 2013) ("Under sections 197.552 and 197.573(2), any lien Nassau may have had for unpaid

homeowners association assessments did not survive the issuance of the tax deed."). The prior liens are extinguished in exchange for the prior lienholder's interest in the surplus.

This is what happened to Regions Bank's lien on the Mayfair House condominium. It was extinguished after the property was sold at the tax sale and the deed was issued. In exchange for wiping the title clean of non-government liens, the tax deed statutes give former lienholders an interest in the surplus. The extinguishment and the interest in the surplus are exchanged after the sale, when the deed is issued, and not years later when the dispute over the surplus is litigated.[1]

* * * *

Although the tax deed statutes require that entitlement to the surplus be decided at the time of the sale, this also happens to be good sense. Determining entitlement at the time of the sale allows for an orderly distribution of the surplus from a defined and finite pool of applicants. The clerk can easily determine from the notices who was entitled to the surplus and distribute the money without much administrative hassle and years of litigation. Doing it the other way, as Rahimi suggests, would have the clerk holding onto significant amounts of money waiting

[1] Rahimi may still have a claim against Regions Bank if the bank improperly kept the surplus money, but that is not the issue in this case. This case is about whether the trial court properly determined that Regions Bank was entitled to the surplus because it held a mortgage of record at the time of the sale. We read the law to be clear and unambiguous that it was.

for years of litigation to be over. This prolongs the distribution process, adds administrative burdens on the clerks and the courts, and creates uncertainty in the process.

Conclusion

We conclude that the determination of who is entitled to the surplus of a tax sale is made at the time of the sale. Because it is undisputed that Regions Bank had a lien and mortgage interest in the Mayfair House condominium at the time of the sale, we affirm the trial court's summary judgment in favor of Regions Bank on the declaratory judgment and quiet title cases.

Affirmed.

Third District Court of Appeal

State of Florida

Opinion filed August 1, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-1246
Lower Tribunal No. 13-20646

Eduardo Gonzalez and Rosa Gonzalez,
Appellants,

vs.

Federal National Mortgage Association,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Thomas J. Rebull, Judge.

Rosa M. Armesto, for appellants.

Choice Legal Group, P.A., and Robert R. Edwards (Fort Lauderdale), for appellee.

Before LAGOA, FERNANDEZ, and LUCK, JJ.

LAGOA, J.

Appellants Eduardo Gonzalez and Rosa Gonzalez (collectively, "Appellants") appeal the entry of a final judgment of foreclosure in favor of Appellee Federal National Mortgage Association ("Fannie Mae"). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In February 2002, Appellants executed a Note and Mortgage in favor of Chase Manhattan Mortgage Corporation ("Chase"), which endorsed the Note in blank and transferred ownership to Fannie Mae. Appellants made payments on the Note until April 2007. On August 8, 2007, Chase sent Appellants a default letter, notifying them that they were in default for an amount of $11,414.42, which included principal, interest, escrow, late charges, and fees, for failing to make the required monthly installments and late charges owed on the Note. The default letter gave Appellants thirty days from the date of letter to cure the default. Appellants failed to cure the default, and on October 3, 2007, Chase filed a complaint to foreclose and accelerate the full amount due on the Note. Chase alleged that Fannie Mae was the owner of the Note, that Chase was Fannie Mae's servicer, and that Appellants defaulted on "the payment due June 01, 2007 and all subsequent payments." This initial complaint was dismissed by the trial court.[1]

Chase subsequently filed the instant action on June 12, 2013, again alleging that Appellants were in default from the payment due on June 1, 2007, and all subsequent payments, and again exercising its right to accelerate all amounts due under the Note and Mortgage. Chase was later substituted as the party plaintiff by Fannie Mae on October 7, 2014.

[1] It is unclear from the record why this initial complaint was dismissed.

On March 16, 2017, the case proceeded to bench trial. Through the testimony of a Seterus[2] employee, Jon Greenlee ("Greenlee"), Fannie Mae introduced the following evidence: (1) a limited power of attorney Fannie Mae provided to Seterus; (2) the original Note; (3) the Mortgage; (4) an escrow disclosure statement; (5) a copy of the August 8, 2007, breach letter; (6) a screenshot showing that the breach letter was mailed to Appellants; (7) a letter indicating that the loan service had been transferred from Chase to Seterus; (8) a screen printout showing that Fannie Mae acquired ownership of the loan on April 1, 2002; (9) three sets of loan payments histories; and (10) judgment figures that were substantiated by Greenlee's testimony.

Rosa Gonzalez also testified at trial that Appellants were current on the Note until April 2007, when their credit union reversed the payment. She further testified that she made two full monthly payments on June 14, 2007, and August 7, 2007, which Chase applied to the Note, and two partial payments on July 16, 2007, and August 7, 2007, both of which went unapplied. She further testified that she mailed two checks to Chase in October 2007, which Chase returned because the checks were insufficient to cure the default. It is undisputed that Appellants did not tender a full payment of the $11,414.42 demanded by the default letter.

[2] In 2014, Fannie Mae changed its loan servicer from JPMorgan Chase Bank, N.A., the successor-by-merger to Chase, to Seterus, another loan servicing company.

On May 9, 2017, the trial court entered a Final Judgment of Foreclosure in favor of Fannie Mae in the amount of $467,527.41. This timely appeal ensued.

II. STANDARD OF REVIEW

To the extent the trial court's final judgment of foreclosure "'is based on factual findings, we will not reverse unless the trial court abused its discretion; however, any legal conclusions are subject to de novo review.'" Verneret v. Foreclosure Advisors, LLC, 45 So. 3d 889, 891 (Fla. 3d DCA 2010) (quoting Colucci v. Kar Kare Auto. Grp., Inc., 918 So. 2d 431, 436 (Fla. 4th DCA 2006)).

III. ANALYSIS

On appeal, Appellants raise several arguments challenging the trial court's entry of Final Judgment of Foreclosure in favor of Fannie Mae. We affirm the trial court's entry of Final Judgment of Foreclosure, but we write to address one of the arguments raised by Appellants. Specifically, Appellants contend that Fannie Mae is barred by the five-year statute of limitations[3] from collecting any amounts that were due on the Note prior to the dismissal of the first action, as the instant complaint alleges the same default date—June 1, 2007—as alleged in the first action.

In Bartram v. U.S. Bank National Ass'n, 211 So. 3d 1009 (Fla. 2016), the Florida Supreme Court stated that:

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[3] See § 95.11(2)(c), Fla. Stat. (2013).

> [w]hen a mortgage foreclosure action is involuntarily dismissed . . . , the effect of the involuntary dismissal is revocation of the acceleration, which then reinstates the mortgagor's right to continue to make payments on the note and the right of the mortgagee, to seek acceleration and foreclosure based on the mortgagor's subsequent defaults.

Id. at 1012. The mortgagee, however, has "the right to file a subsequent foreclosure action—*and to seek acceleration of all sums due under the note*—so long as the foreclosure action was based on a *subsequent default*, and the statute of limitations had not run on that particular default." Id. at 1021 (emphasis added); accord Wells Fargo Bank, NA v. BH-NV Invs. 1, LLC, 230 So. 3d 60, 62 (Fla. 3d DCA 2017). "Each 'alleged default create[s] a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.'" Bollettieri Resort Villas Condo. Ass'n, Inc. v. Bank of N.Y. Mellon, 198 So. 3d 1140, 1142 (Fla. 2d DCA 2016) (quoting Singleton v. Greymar Assocs., 882 So. 2d 1004, 1008 (Fla. 2004)).

In the instant case, Fannie Mae's Verified Complaint alleges that "[t]here has been a default under the note and mortgage held by Plaintiff in that the payment due June 1, 2007 and *all subsequent payments have not been made.*" (emphasis added). It was undisputed at trial that Appellants did not renew making payments on the Note after the dismissal of the initial complaint. Thus, Fannie Mae's second foreclosure action was not barred by the statute of limitations. See Bank of N.Y. Mellon Corp. v. Anton, 230 So. 3d 502, 504 (Fla. 3d DCA 2017).

Appellants argue, however, that the statute of limitations bars Fannie Mae from collecting any amounts due on the Note more than five years prior to the filing of the second complaint, i.e., any amounts due before June 12, 2008. In support of this argument, Appellants cite to language from this Court's decision in Deutsche Bank National Trust Co. v. Torres, 43 Fla. L. Weekly D991 (Fla. 3d DCA May 2, 2018), where this Court stated that the bank "may be barred from seeking certain defaulted payments under the note (those falling outside the five-year statute of limitations)." Id. at D991. This quoted language is inapplicable, however, as it was dicta[4] and was not necessary to this Court's determination in Torres that a "complaint . . . filed more than five years after the alleged initial default date" is not barred where "the complaint also alleges that the borrower defaulted 'by failing to pay the payment due 5/01/2008 and all subsequent payments.'" Id. (emphasis in original). As the Florida Supreme Court clearly held in Bartram, "with each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage." 211 So. 3d at 1019;

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[4] See Hilkmeyer v. Latin Am. Air Cargo Expediters, Inc., 94 So. 2d 821, 825 (Fla. 1957) (stating that language which "was not necessary to the determination of the cause . . . was therefore obiter dicta"); Bellsouth Telecomms., Inc. v. Church & Tower of Fla., Inc., 930 So. 2d 668, 673 (Fla. 3d DCA 2006) (finding that language in case citing and quoting from another case was not dicta but was "critical to the outcome" of that case, as dicta is defined as "a judicial comment in an opinion that is 'unnecessary to the decision in the case and therefore not precedential'" (quoting Blacks's Law Dictionary 1102 (8th ed. 2004))).

accord Torres, 43 Fla. L. Weekly at D991 (quoting Bartram, 211 So. 3d at 1019); see also Bollettieri Resort Villas Condo. Ass'n v. Bank of N.Y. Mellon, 228 So. 3d 72, 74 (Fla. 2017) (Lawson, J., specially concurring) (discussing the running of the statute of limitations in the foreclosure context and noting that a mortgagee "must bring suit for all amounts due under the note, which it cannot do under the terms of the note until maturity—unless it gives notice that it intends to act on a default (missed payment) by accelerating and declaring the entire balance due immediately" (citation omitted)); Desai v. Bank of N.Y. Mellon Tr. Co., 240 So. 3d 729 (Fla. 4th DCA 2018) (finding a similar argument made by the borrower to be without merit under Bartram); *In re* BCML Holding LLC, 65 Bankr. Ct. Dec. 193 (Bankr. S.D. Fla. 2018) (finding a similar argument made by the debtor-in-possession which had purchased a condominium subject to defendant's mortgage and which was seeking a default judgment against the defendant that excluded payment amounts outside the five year limitations period to be without merit under Bartram).

As discussed below, we conclude that Fannie Mae is *not* barred from seeking a final judgment that includes amounts due outside the five-year statute of limitations, as Fannie Mae alleged that Appellant had defaulted within the limitations period and that Fannie Mae had exercised its right to accelerate all sums due under the Note and Mortgage. In a typical residential loan, the terms of the note and mortgage split the entirety of the debt owed by the borrower into a

series of periodic installment payments. If a borrower defaults, the note holder could choose to seek a judgment only for that missed installment payment. More typically, and as occurred here, the note holder can choose to exercise its contractual right to accelerate the entirety of the borrower's obligation under the note and mortgage and seek a judgment on that amount.[5] By exercising its contractual right to acceleration, the note holder is not seeking to collect a series of individual past and future installment payments due to it. Instead, the holder elects to accelerate the entirety of the obligation owed to it under the terms of the note and mortgage, such that the entire sum owed—including principal, interest, advances, costs, and fees—will be included in the judgment. It is that entire debt—not individual installments of it—that comes due upon acceleration and that is sought to be liquidated in a foreclosure action. Thus, when considering an accelerated obligation, while the triggering default must occur within the five year limitations period, the debt that is subject to judgment and collection is the

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[5] In paragraph 6(C) of the Note, the Appellants affirmed that upon a default, the note holder may send notice that the holder "may require me to pay immediately the full amount of the Principal which has not been paid and all interest that I owe on that amount." Paragraph 6(E) of the Note further provides that upon acceleration the note holder may also recover its costs and expenses, including attorneys' fees. Finally, Paragraph 10 of the Note expressly incorporates by reference all the remedies available to the note holder under the Mortgage, including its right to acceleration.

Turning to the Mortgage, Paragraph 22 of that document provides that a default by the borrower means that the note holder "at its option may require immediate payment of all sums secured by this Security Instrument," as well as costs and expenses, including attorneys' fees.

accelerated debt, i.e., the entire amount due under the mortgage loan. See Bartram, 211 So. 3d at 1019. Because Fannie Mae was seeking a judgment on the accelerated obligation, the trial court properly entered a Final Judgment of Foreclosure in favor of Fannie Mae in the full amount of that obligation.

For those reasons, we disagree with the decision of our sister court, the Fifth District Court of Appeal, in Velden v. Nationstar Mortgage, LLC, 234 So. 3d 850 (Fla. 5th DCA 2018), which Appellants cite in support of their argument. In Velden, the Fifth District "reverse[d] and remand[ed] for the trial court to exclude an award of damages for any defaults that occurred more than five years prior to the filing date," relying on its recent precedent. See id. at 852. We find Velden to be contrary to the Florida Supreme Court's decision in Bartram and decline to follow the Fifth District's reasoning. See id. at 852-53 (Lambert, J., specially concurring) (noting that under Bartram, because "Velden . . . defaulted on subsequent monthly note payments[,] . . . Nationstar's predecessor . . . 'had the right to file a subsequent foreclosure action—and to seek acceleration of all sums due under the note—so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default'" (quoting Bartram, 211 So. 3d at 1021)). To the extent that this decision conflicts with Velden, we certify conflict.

Accordingly, we affirm the Final Judgment of Foreclosure in favor of Fannie Mae.

Affirmed.