Business Litigation Committee
Florida Bar Business Law Section
Meeting Agenda: September 5, 2015

I. Call to Order

II. Approval of Minutes

III. Subcommittee Updates

a. Business Litigation Jury Instructions

b. Antitrust: Certification Standards

c. Franchise Law

d. Legislative Overview

i. Subcommittee International Banking Act

e. Section 607 updates

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VI. Business Litigation Certification Review Course

VII. State/Federal Court Judicial Liaison Committee

VIII. Proceedings Supplementary Task Force

IX. New Business

a. Amicus Brief – *Deutsche Bank Trust Company v. Beauvais*, Case No. 3D14-0575 (See attached Order and Briefs)

ORDER SCHEDULING EN BANC ORAL ARGUMENT AND INVITING AMICUS

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

AUGUST 03, 2015

DEUTSCHE BANK TRUST COMPANY AMERICAS, etc.,
Appellant(s)/Petitioner(s),
vs.
HARRY BEAUVAIS, et al.,
Appellee(s)/Respondent(s),

CASE NO.: 3D**14-0575**

L.T. NO.: 12-49315

This cause is set for rehearing en banc on Thursday, November 12, 2015 at 10:00 o'clock A.M. Counsel will be allowed twenty (20) minutes a side to present oral argument. Each party may file a supplemental brief within thirty (30) days from the date of this order addressing the following issues:

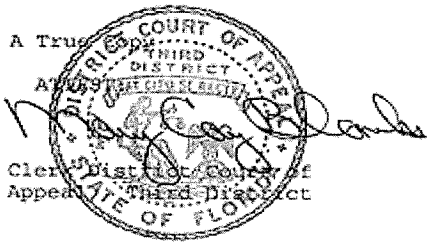
1. Identify and discuss any parts of the record reflecting the parties' treatment of the December 6, 2010 dismissal as an adjudication denying acceleration and foreclosure which placed the parties back into their respective contractual positions.
2. Identify and discuss any parts of the record evidencing if, how, and when, the Bank notified Beauvais that the December 6, 2010 dismissal constituted an adjudication denying the Bank's January 23, 2007 acceleration.

No reply briefs will be permitted.

Mortgage Bankers Association of South Florida, Business Law Section of The Florida Bar, Real Property Probate & Trust Law Section of The Florida Bar, Florida Alliance for Consumer Protection, Federal National Mortgage Association

and Federal Home Loan Mortgage Corporation are each invited to file an amicus curiae brief within sixty (60) days from the date of this order addressing the following issues:

1. Where a foreclosure action has been dismissed with the note and mortgage still in default:
   a. Does the dismissal of the action, by itself, revoke the acceleration of the debt balance thereby reinstating the installments terms?
   b. Absent additional action by the mortgagee can a subsequent claim of acceleration for a new and different time period be made?
   c. Does it matter if the prior foreclosure action was voluntarily or involuntarily dismissed, or whether the dismissal was with or without prejudice?
   d. What is the customary practice?
2. If an affirmative act is necessary by the mortgagor to accelerate a mortgage, is an affirmative act necessary to decelerate?
3. In light of Singleton v. Greymar Assocs., 882 So. 2d 1004 (Fla. 2004), is deceleration an issue or is deceleration inapplicable if a different and subsequent default is alleged?



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mc

APPELLANTS INITIAL BRIEF

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO: 3D14-575

DEUTSCHE BANK TRUST COMPANY AMERICAS,
AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE
INVESTMENT TRUST 2006-2,

Appellant,

v.

HARRY BEAUVAIS, AND AQUA MASTER ASSOCIATION, INC.,
A NON-PROFIT FLORIDA CORPORATION,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA
L.T. CASE NO: 12-49315-CA-05

APPELLANT'S INITIAL BRIEF

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I. STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

Appellant/Plaintiff Deutsche Bank Trust Company Americas, as Indenture Trustee for American Home Mortgage Investment Trust 2006-2 ("Deutsche Bank" or "Appellant") sued Appellees/Defendants Harry Beauvais (the "Borrower") and Aqua Master Association, Inc. (the "Association") to foreclose its $1.4 million mortgage lien (the "Mortgage" (R. 15 [App., Ex. 1])[1]) on residential property located in Miami-Dade County, Florida (the "Property") due to the Borrower's payment defaults. Deutsche Bank respectfully requests that this Court reverse the lower court's summary judgment order holding that Deutsche Bank's foreclosure action is barred by the statute of limitations, and further holding that its note (the "Note") and Mortgage securing the Property are null and void.

The lower court erred when it determined that the underlying action was barred by the statute of limitations as a result of the filing of a 2007 foreclosure action which had been dismissed without prejudice and that alleged a different payment default than the default alleged in the present action. The lower court further erred by concluding that the expiration of the statute of limitations rendered

[1] Citations to the Record on Appeal are made by the designation "R." followed by the appropriate page number of the first page of the document cited, based on the Index to the Record on Appeal. Documents from the Record on Appeal central to the arguments made in this Brief also appear in the Appendix filed concurrently herewith and are cited as "[App. __]" immediately following the cite to the identical document in the Record on Appeal.

the Note and Mortgage on the Property invalid. Deutsche Bank is seeking a reversal of the lower court's holding on both issues, a mandate to the lower court to reverse the summary judgment in favor of the Association, a determination that the statute of limitations does not bar the present action, a ruling allowing Deutsche Bank to proceed with the foreclosure action, and a ruling that, pursuant to Florida Statute Section 95.281, the Mortgage lien remains on the Property until 2041, unless satisfied.

B. Course of the Proceedings and Disposition Below

There are three actions regarding the Property that provide context for this appeal, all of which were filed in the lower court. The first foreclosure action relating to the Property was filed in 2007 and was styled, *American Home Mortgage Servicing, Inc. ("AHMS") v. Beauvais, et al.*, Case No. 07-2054-CA-10 (the "Initial Action"). (R. 81.) AHMS[2] sought to foreclose the Property based on the Borrower's payment default for the installment due in September 2006. (R. 81.) The Initial Action was dismissed without prejudice because AHMS's counsel did not appear at a mandatory case management conference. (R. 143.)

[2] The Mortgage secured payment of the Note to Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for American Brokers Conduit. (R. 15; R. 82 at ¶ 9.) MERS, acting solely as nominee for American Brokers Conduit, assigned the Mortgage to AHMS. (R. 82 at ¶ 10.) Deutsche Bank is acting as trustee for AHMS.

In 2009, the Association filed its own foreclosure action styled, *Aqua Master Association, Inc. v. Beauvais, et al.*, Case No. 09-56799-CA-27 (the "Condominium Action"), in which the Association foreclosed its lien on the Property based on the Borrower's failure to pay condominium assessments. (R. 67; R. 75.) The Association obtained title to the Property in 2011, by issuance of a certificate of title, and obtained title subject to the Mortgage. (R. 80.)

The underlying action, from which this appeal is taken, was filed in 2012 and is styled, *Deutsche Bank Trust Company Americas v. Beauvais, et al.*, Case No. 12-49315-CA-05 (the "Current Action"). (R. 5.) Deutsche Bank sought foreclosure of the Property due to the Borrower's payment default for the installment due in October 2006, a default occurring one month after the default alleged in the Initial Action. (R. 6.) On January 29, 2014, the lower court entered an order granting the Association's motion for summary judgment (the "Summary Judgment Order") (R. 193 [App., Ex. 2]), and held that: (1) the Current Action was barred by the statute of limitations because it was filed December 18, 2012, more than five years after the filing of the complaint in the Initial Action in January 2007; and (2) the expiration of the statute of limitations rendered the Note and Mortgage null and void. Based on the lower court's misapplication of the statute of limitations, Deutsche Bank moved for rehearing on February 5, 2014. (R. 148.) The lower court denied the motion on February 21, 2014. (R. 196.)

The chronology of the three actions regarding the Property is as follows:

Initial Action

- January 28, 2007: AHMS filed its complaint for foreclosure and damages against the Borrower, among others, based on the payment default for the installment due in September 2006. (R. 81.)
- December 6, 2010: The lower court dismissed the case without prejudice for failure of AHMS's counsel to appear at the case management conference. (R. 143.)

Condominium Action

- July 31, 2009: The Association filed its complaint to foreclose on its claim of lien against the Borrower. Deutsche Bank was not named as a party in the Condominium Action. (R. 67.)
- August 17, 2010: The lower court entered summary final judgment of foreclosure in favor of the Association. (R. 75.)
- February 22, 2011: The Clerk issued a certificate of title to the Association. (R. 80.)

Current Action

- December 18, 2012: Deutsche Bank filed its complaint for mortgage foreclosure against the Borrower based on the payment default for the installment due in October 2006. (R. 5.)

- March 20, 2013: The Association filed its answer and affirmative defenses to the complaint. (R. 48.)
- December 17, 2013: The Association filed its motion for summary judgment. (R. 66.)
- January 27, 2014: Deutsche Bank filed its response in opposition to the Association's motion for summary judgment. (R. 138.)
- January 29, 2014: The lower court entered the Summary Judgment Order in favor of the Association. (App., Ex. 2.)
- February 5, 2014: Deutsche Bank filed its motion for rehearing on the Summary Judgment Order. (R. 148.)
- February 21, 2014: The lower court denied Deutsche Bank's motion for rehearing. (R. 196.)

Because the lower court misapplied the statute of limitations to this matter and held the Mortgage was null and void without legal basis, the Court should reverse the Summary Judgment Order and allow Deutsche Bank to proceed with its foreclosure action.

II. SUMMARY OF THE ARGUMENT

The five-year statute of limitations for foreclosure of real property, set forth in Florida Statute Section 95.11(2)(c), does not preclude enforcement of the Mortgage in the Current Action. The lower court erred when it ruled that the

Current Action was barred by the statute of limitations. This ruling is incorrect, and should be reversed, for three reasons.

First, the lower court erred by ruling that the filing of the Initial Action in 2007 barred the filing of the Current Action. The lower court failed to acknowledge that the Current Action is based on a separate and distinct default than the default alleged in the Initial Action. As such, notwithstanding the filing of the Initial Action, Deutsche Bank may foreclose the Mortgage based on subsequent defaults by the Borrower, as the default alleged in the Initial Action had not been established, and each default on an installment contract is a distinct default requiring separate proof. This reasoning finds sound support not only in *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004), but also in numerous other recent Florida state and federal cases that recently have applied the *Singleton* analysis in the statute of limitations context. Moreover, the dismissal without prejudice of the Initial Action effectively halted any purported acceleration of the debt caused by the filing of the Initial Action.

Second, the lower court failed to recognize that the Borrower's contractual right to reinstate the Mortgage until entry of a final judgment effectively precluded acceleration of the debt simply by the filing of the Initial Action.

Third, a new right of enforcement, and thus a new limitations period, began once the Association obtained title to the Property, which is a separate and distinct

default under the terms of the Mortgage. During the Initial Action, the Association's interest in the Property was limited to the holder of an inferior lien. At the time of the Current Action, the Association's interest had evolved into an ownership interest in the Property. Therefore, in the Current Action, unlike the Initial Action, Deutsche Bank sought to foreclose the Association's ownership interest, which the Association had only acquired in 2011.

Even if the Court were to conclude that the statute of limitations bars enforcement of the Mortgage, the Court should find that the lower court erred by declaring the Note and Mortgage null and void. The lower court's ruling in this respect is also flawed for three reasons.

First, Deutsche Bank still maintains a valid mortgage lien on the Property through 2041. The statute of limitations for a foreclosure action, set forth in Florida Statute Section 95.11(2)(c), has no bearing on the life of a mortgage lien. Rather, Florida Statute Section 95.281(1)(a), a statute of repose, determines the duration of a mortgage lien. *Compare* § 95.281(1)(a), FLA. STAT., *with* § 95.11(2)(c), FLA. STAT.; *see also Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601 (Fla. 2d DCA 2005). The statute of repose provides that if the maturation of the debt instrument is ascertainable from the public record, then the mortgage lien lasts for five years from the date of maturity as reflected in the public records. *See* § 95.281(1)(a), FLA. STAT. The face of the recorded Mortgage reflects that it

matures on March 1, 2036. (App., Ex. 1 at 2.) Deutsche Bank's mortgage lien, therefore, remains on the Property until March 1, 2041, regardless of whether the statute of limitations bars enforcement of the Mortgage.

Second, the principles of due process prevent the lower court's nullification of the Note and Mortgage. The Association's motion for summary judgment did not seek in any fashion to void the Note or Mortgage, nor was the validity of the Note or Mortgage raised at the summary judgment hearing. (R. 66; R. 177.) As a result, the part of the Summary Judgment Order invalidating the Note and Mortgage must be reversed because Deutsche Bank was deprived of proper notice and the opportunity to be heard on this issue.[3]

Third, it would be an inequitable windfall for the Association to obtain title to the Property, free and clear of Deutsche Bank's $1.4 million mortgage lien, simply because of the Borrower's previous default and the incomplete Initial Action. It is also unjust for the Association to retain clear title to the Property when the Mortgage holder has paid the real estate taxes on the Property since 2006.

[3] It appears, as is too often the case, that the lower court was led into this error by the Association's counsel, who presented an order to the court at the conclusion of the hearing that included a provision determining the Note and Mortgage to be null and void even though this remedy was neither sought in the motion for summary judgment, nor at the hearing, and despite clear case law to the contrary. (R. 66; R. 177.)

In light of the foregoing, the Court should reverse the Summary Judgment Order, hold that Deutsche Bank maintains a valid mortgage lien on the Property, and permit Deutsche Bank to proceed with its foreclosure action.

III. ARGUMENT

A. Standard of Review

The standard of review for an order granting summary judgment is *de novo*. *See S. Fla. Coastal Elec., Inc. v. Treasures on Bay II Condo Ass'n,* 89 So. 3d 264, 266 (Fla. 3d DCA 2012). A motion for summary judgment may be granted only if the pleadings, affidavits, answers to interrogatories, admissions, depositions and other materials demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* FLA. R. CIV. P. 1.510(c); *see also Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). In reviewing a summary judgment, the Court "must consider the evidence contained in the record, including any supporting affidavits, in the light most favorable to the non-moving party and if the slightest doubt exists, the summary judgment must be reversed." *Treasures on Bay II*, 89 So. 3d at 266 (internal quotation marks and alterations omitted).

B. The Five-Year Statute of Limitations Does Not Preclude Enforcement of the Mortgage

1. The statute of limitations does not bar enforcement of the Mortgage based on subsequent defaults

Deutsche Bank is entitled to enforce the Mortgage notwithstanding the filing and ultimate dismissal without prejudice of the Initial Action. Given that a default was not established in the Initial Action, Deutsche Bank maintains the right to enforce the Mortgage based on the Borrower's subsequent defaults under the loan, as each default is a separate and distinct default requiring separate proof.

This logic is supported not only by *Singleton*, but also by several recent Florida cases that have applied the *Singleton* analysis in the statute of limitations context. In *Singleton*, the lender brought two successive foreclosure actions based on different payment defaults by the borrower. *See Singleton*, 882 So. 2d at 1005. The first action was dismissed because the lender failed to appear at a case management conference. *Id*. The Florida Supreme Court held, however, that because the two actions were based on separate payment defaults, dismissal of the first action did not preclude the plaintiff from filing a second foreclosure action. *Id*. at 1006-07. The court notably extended this principle to foreclosure actions involving an acceleration clause: "While it is true that a foreclosure action and an acceleration of the balance due based upon the same default ***may bar a subsequent action on that default***, an acceleration and foreclosure predicated upon subsequent

and different defaults present a separate and distinct issue." *Id*. at 1007 (emphasis added) (citing *Olympia Mortg. Corp. v Pugh*, 774 So. 2d 863, 866 (Fla. 4th DCA 2000)). Recognizing the "unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship," the court explained that if the court "prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note." *Id.* at 1007.

Even though *Singleton* involves the issue of res judicata and not the statute of limitations, its reasoning is still applicable to this case. As in the first action in *Singleton*, the default in the Initial Action was not established because the case was dismissed for failure of AHMS's counsel to appear at a case management conference. Another similarity is that the foreclosure actions in *Singleton* were based on separate payment defaults, just like the Initial and Current Actions are based on different payment defaults. Following *Singleton*, this Court should determine that Deutsche Bank may proceed with the Current Action because the default alleged in the Initial Action was not established and a subsequent and distinct default forms the basis of the Current Action. Otherwise, as feared by the Florida Supreme Court, a borrower could simply stop making payments on a loan should a lender fail to establish a previous default.

The lower court, in summarily dismissing *Singleton* as solely dealing with the issue of res judicata, erred by finding *Singleton* to be "wholly irrelevant to the issue of the statute of limitations." (App., Ex. 2 at 2.) Indeed, under circumstances virtually identical to those in this case, the United States District Courts for the Middle and Southern Districts of Florida, and the Florida Fifth District Court of Appeal recently applied *Singleton's* holding—that each default establishes a separate and distinct cause of action—in the statute of limitations context.

In *Dorta v. Wilmington Trust Nat'l Ass'n*, No. 5:13-cv-185, 2014 WL 1152917, at *5-7 (M.D. Fla. Mar. 24, 2014), the mortgagee admitted that the loan had been accelerated based on a September 1, 2007 default and filed a foreclosure action in December 2007. *Id*. at *1. The foreclosure action was dismissed without prejudice for lack of prosecution in November 2009. *Id*. The owner of the property filed a quiet title action in December 2012 attempting to hold the note and mortgage void based on the five-year statute of limitations set forth in 95.11(2)(c). *Id*. at *2. The court rejected this argument stating:

> Applying *Singleton* here, it is clear that Wilmington has not lost its right to enforce the Note and the Mortgage (and in turn neither document is invalid) simply because its first foreclosure action was dismissed. To be sure, *Singleton* limits its discussion to the application of the doctrine of res judicata—however, the analysis applies with equal effect to the arguments before this Court. Ms. Dorta contends that Wilmington's (through its predecessor Citibank) unsuccessful attempt to foreclose on the Note and the Mortgage based on a September 1, 2007 default forever barred Wilmington from bringing any further foreclosure proceedings

> because the statute of limitations had run. **Sinqelton *[sic] directly refutes this argument, holding that even where a mortgagee initiates a foreclosure action and invokes its right of acceleration, if the mortgagee's foreclosure action is unsuccessful for whatever reason, the mortgagee still has the right to file later foreclosure actions—and to seek acceleration of the entire debt—so long as they are based on separate defaults.***

Id. at *6 (emphasis added; internal footnote omitted); *see also Kaan v. Wells Fargo Bank, N.A.*, No. 13-80828, 2013 WL 5944074, at *3 (S.D. Fla. Nov. 5, 2013) (similarly applying *Singleton* to the statute of limitations and rejecting the argument that a prior foreclosure prevented a lender from filing a subsequent action on a separate default); *Romero v. SunTrust Mortg., Inc.*, No. 1:13-cv-24491, 2014 WL 1623703, at *3 (S.D. Fla. Apr. 22, 2014) (applying the same reasoning of *Singleton*, *Kaan* and *Dorta*, the court held that voluntary dismissal of foreclosure action was a deceleration of note and mortgage and thus, mortgagees were "not barred from bringing subsequent foreclosure and acceleration actions on the note and mortgage for any payment default less than five years old.").

The Fifth District Court of Appeal, in *U.S. Bank National Ass'n v. Bartram*, Case No. 5D12-3823, 2014 WL 1632138, at *6 (Fla. 5th DCA Apr. 25, 2014), similarly recognized, in accordance with *Singleton*, *Dorta* and *Kaan*, that "a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed on its merits." As such, under similar circumstances

as here, the *Bartram* court held that despite the dismissal of the initial foreclosure action, the statute of limitations did not bar a subsequent foreclosure action that was based on subsequent payment defaults. *See id*.

Harmonious with the *Singleton* line of cases outlined above, Florida courts have also recognized the principle that dismissal of a foreclosure action means that the lender effectively has decided not to accelerate payment of the loan. In *Olympia*, for example, the lender filed a third foreclosure action after voluntarily dismissing two prior actions. *See* 774 So. 2d at 864-65. The court explained that by voluntarily dismissing the first and second actions, the lender "in effect decided not to accelerate payment on the note and mortgage at that time." *Id*. at 866. Because there was no acceleration and the second action was based on different (although overlapping) payment defaults requiring the consideration of additional facts and evidence, there was no identity of the causes of action. *Id*. at 867. As such, the court held that the second action did not operate as an adjudication of the merits that triggered the application of res judicata to bar subsequent suits for foreclosure. *Id*.

The principles in *Olympia* demonstrate that the filing of the Initial Action does not bar foreclosure of the Mortgage. Similar to the foreclosure actions in *Olympia*, the Initial and Current Actions allege separate payment defaults. Additionally, the actions in *Olympia* were dismissed just like the Initial Action was

dismissed (albeit involuntarily). In line with *Olympia*, this Court should find that dismissal of the Initial Action halted acceleration of the Note and thus, the running of the limitations period to enforce the entire Note. In other words, the dismissal of the Initial Action restored the Note to an installment contract under which Deutsche Bank maintains the right to enforce each payment default as a separate and distinct default.

Accordingly, Deutsche Bank's right to enforce the Mortgage is not precluded by the filing of the Initial Action, which alleged a separate default. Deutsche Bank retains the right to enforce the Mortgage based on a default, subsequent to that alleged in the Initial Action, because the default alleged in the Initial Action was not established, and the dismissal of the Initial Action halted any purported acceleration during the Initial Action.

2. The Borrower's contractual right to reinstate the Mortgage precludes acceleration of the Mortgage until a final judgment is actually entered by the lower court

The Borrower's contractual entitlement to reinstate the Mortgage effectively barred acceleration of the Mortgage until the entry of a final judgment by the lower court, despite the filing of the Initial Action. The statute of limitations on a foreclosure action "begins to run against a mortgage at the time the right to foreclose accrues." *Travis Co. v. Mayes*, 36 So. 2d 264, 265 (Fla. 1948). The

terms of the mortgage relating to acceleration dictate when the right to foreclosure accrues:

- When the mortgage being foreclosed does not contain an acceleration clause, the statute of limitations on a mortgage foreclosure does not begin to run until the last payment is due. *See Conner v. F. R. Coggins*, 349 So. 2d 780, 782 (Fla. 1st DCA 1977).
- When the mortgage being foreclosed contains a mandatory acceleration clause, the statute of limitations begins to run automatically upon the occurrence of a default. *See Cook v. Merrifield*, 335 So. 2d 297, 299 (Fla. 1st DCA 1976).
- When the mortgage being foreclosed contains an optional acceleration clause, such as the Mortgage, the statute of limitations begins to run on a debt when the last payment is due (*i.e.*, the maturity date) unless the lender exercises its right of acceleration, whichever is earlier. *See Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1973); *Greene v. Bursey*, 733 So. 2d 1111, 1114-15 (Fla. 4th DCA 1999).

The premise for the principle that acceleration commences an earlier accrual of the statute of limitations is that no further installment payments are due once the lender accelerates the loan. This premise, however, collapses under the facts of this case as the Borrower has the contractual right to reinstate the Mortgage up

until entry of a final judgment, which thereby allows the Borrower to revert to repaying the loan in installments.

Here, the Mortgage allows for optional acceleration, but restricts the lender's acceleration until the entry of a final judgment. Section 22 of the Mortgage provides in relevant part:

> ***Lender shall give notice to Borrower prior to acceleration*** following Borrower's breach of any covenant or agreement in this [Mortgage] . . . ***[which] shall specify: (a) the default; (b) action required to cure the default; (c) the 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 default on or before the date specified in the notice may result in acceleration of the sums accrued by this [Mortgage], foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration . . .[.] ***If the default is not cured . . . the Lender at its option may require immediate payment in full*** of all sums secured by this [Mortgage] without further demand and may foreclose this [Mortgage] by judicial proceeding.

(App., Ex. 1 at 14, ¶ 22 (emphasis added).)

Section 19 of the Mortgage states:

> Borrower shall have the right to have enforcement of this [Mortgage] ***discontinued*** at any time prior to . . . entry of a judgment enforcing this [Mortgage]. ***Upon reinstatement by Borrower, this [Mortgage] and obligations secured hereby shall remain fully effective as if no acceleration had occurred***.

(App., Ex. 1 at 12, ¶ 19 (emphasis added).)

Sections 19 and 22, read in tandem, allow the following: (1) while Section 22 permits Deutsche Bank to accelerate the Note upon providing the proper notice

and opportunity to cure, Section 19 allows the Borrower to halt acceleration and go back to making monthly payments on the Note by virtue of reinstatement; and (2) Section 19 effectively prevents acceleration under Section 22, and the resulting commencement of the statute of limitations based on acceleration, until the entry of a final judgment. The plain text and harmonious reading of these two provisions support these conclusions. *See Aristech Acrylics, LLC v. Lars, LLC*, 116 So. 3d 542, 544 (Fla. 3d DCA 2013) (contract should be interpreted according to its plain and ordinary meaning). On the other hand, a finding that reinstatement does not prevent acceleration until the entry of a final judgment would render Section 19 meaningless, which is contrary to principles of contract interpretation. *See City of Homestead v. Johnson*, 760 So. 2d 80, 83 (Fla. 2000) (court should give effect to all provisions of a contract whenever possible).

Given that the Borrower maintained the contractual right to reinstate the Mortgage until entry of a final judgment, there could be no acceleration (and no resulting triggering of the statute of limitations) simply by the filing of the Initial Action. Thus, the lower court erred when it determined that the statute of limitations barred the Current Action based on the filing of the Initial Action, which had been dismissed without prejudice and wherein no final judgment had been entered.

3. A new limitations period began once the Association acquired title to the Property subject to the Mortgage

The Association's acquisition of the Property accorded Deutsche Bank with a new enforcement right against the Association. The Association held no ownership interest in the Property during the Initial Action; therefore, Deutsche Bank was limited to seeking foreclosure of the Association's inferior lien. By the time of the Current Action, however, the Association had obtained title to the Property, which conferred upon Deutsche Bank the right to foreclose the Association's ownership interest. In sum, the Initial and Current Actions involved different causes of action based on the parties' different interests in the Property.

Given the Association's evolving interest in the Property, it would be inequitable for the Initial Action to time-bar the Current Action. The Initial Action could not have activated the limitations period for foreclosure of the Association's ownership interest in the Property because the Association did not own the Property at that time. It was only when the Association obtained title to the Property in 2011 that Deutsche Bank could seek foreclosure of the Association's ownership interest. In fact, the Association's acquisition of title is also a separate and distinct default under the terms of the Mortgage. (*See* App., Ex. 1 at 12, ¶ 18.)

The court in *Kaan* addressed this very issue and stated:

> Even if the statute of limitations barred foreclosure due to payment defaults within the last five years, the lien would still be enforceable if Plaintiff breaches or defaults in other ways. Plaintiff

> [can]not sell or transfer any interest in his property without the prior written consent of Wells Fargo. . . . Wells Fargo's right to consent to a sale, and right to foreclose if it does not consent, confers separate rights that cannot be cancelled or lost because of the passage of time after a payment default.

Kaan, 2013 WL 5944074, at *3. As such, Deutsche Bank should be permitted to proceed with its foreclosure action that is based on a new enforcement right (created in 2011) for which the five-year statute of limitations has not expired.

Allowing the Current Action does not offend the purpose of the statute of limitations. The Florida Supreme Court has explained that statutes of limitations are "shields to protect defendants against unreasonable delays in filing law suits and to prevent unexpected enforcement of stale claims." *Tortura & Co. v. Williams*, 754 So. 2d 671, 681 (Fla. 2000) (citation omitted). Deutsche Bank's attempt in 2012 to enforce its Mortgage on the Property to which the Association took title in 2011 is not stale, nor would it be unexpected given that the Association was aware of the Mortgage as a party to the Initial Action.

C. Even if the Statute of Limitations Bars Enforcement of the Mortgage, Deutsche Bank Maintains a Valid Lien on the Property

1. Pursuant to Florida Statute Section 95.281(1)(a), the Mortgage lien remains on the Property until March 1, 2041

Deutsche Bank holds a valid mortgage lien on the Property regardless of whether it may foreclose the Mortgage. In *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601 (Fla. 2d DCA 2005), the court held that although the statute of limitations barred foreclosure of the property pursuant to Section 95.11(2)(c), the

mortgage lien remained on the property until twenty years from the date of the mortgage pursuant to Section 95.281(1)(b). As such, in the event the titleholder attempted to sell the property before expiration of the lien, the titleholder would have to satisfy the lien. *See id*. at 605. The court explained that the statute of limitations, *i.e.*, the time period when a party has the right to file a claim, "does not affect the life of the lien or extinguish the debt." *Id*. at 603; *see also Am. Bankers Life Assur. Co. of Fla. v. 2275 West Corp.*, 905 So. 2d 189, 192 (Fla. 3d DCA 2005) (*quoting Houck*, 900 So. 2d at 603). The court in *Houck* elaborated that Section 95.11(2)(c), which governs the statute of limitations on a foreclosure action, is a procedural statute providing that an action to foreclose a mortgage must be commenced within five years of the time the right to foreclose accrues. *See Houck*, 900 So. 2d at 603. In contrast, Section 95.281, which governs the duration of a lien on property, is a statute of repose that provides a substantive right to be free from liability after the time period set forth in the statute expires, regardless of whether the action has accrued. *See id*.

In contravention to *Houck*, the lower court erred when it declared the Note and Mortgage null and void. Section 95.281(1)(a) provides that "if the final maturity of an obligation secured by a mortgage is ascertainable from the record of it," then the lien of the mortgage terminates "5 years after the date of maturity." § 95.281(1)(a), FLA. STAT. The Mortgage sets forth a maturity date of March 1,

2036, as reflected on the recorded Mortgage. (App., Ex. 1 at 2.) As such, Deutsche Bank's mortgage lien remains on the Property until March 1, 2041. This holds true regardless of whether or not the time period under Section 95.11(2)(c) would have expired.

2. The lower court deprived Deutsche Bank of due process when it invalidated the Mortgage without affording Deutsche Bank proper notice and an opportunity to be heard

The lower court's nullification of the Note and Mortgage violated Deutsche Bank's due process rights. Florida law has firmly established that a mortgage lien is "a species of intangible property, of which the holder cannot be deprived without due process." *Seaboard All-Fla. Ry. v. Leavitt*, 141 So. 886, 889 (Fla. 1932). Due process requires that Deutsche Bank had notice and an opportunity to be heard on the issue concerning the validity of the Note and Mortgage. The Florida Supreme Court has explained: "In observing due process of law, the opportunity to be heard must be full and fair, not merely colourable or illusive. Fair notice and a reasonable opportunity to be heard shall be given interested parties before a judgment or decree is rendered." *Ryan's Furniture Exch., Inc. v. McNair*, 162 So. 483, 487 (Fla. 1935) (citations omitted). Yet, despite the mandates of due process, Deutsche Bank had no notice that the validity of the Note or Mortgage was in dispute. The Association did not seek to void and nullify the Note or Mortgage in its motion for summary judgment. (*See* R. 66.) The Association also did not raise

the issue of nullifying the Note or Mortgage at the summary judgment hearing. (*See* R. 177.) Moreover, Deutsche Bank was deprived of the opportunity to present to the lower court its position concerning the continued validity of the Note and Mortgage lien on the Property. Deutsche Bank's counsel expressed concern that the Association's proposed order, which contained language voiding the Note and Mortgage, went far beyond the requested relief and the lower court's ruling. (R. 190 at 12:9-17.) The lower court, however, approved the order despite the lack of the opportunity for Deutsche Bank to brief and argue its position on the continued validity of the Note and Mortgage lien.[4]

Because Deutsche Bank was denied due process, this Court should reverse the portion of the Summary Judgment Order voiding and nullifying the Note and Mortgage.

3. It would be inequitable for the Association to take clear title to the Property

Principles of equity and unjust enrichment prevent the Association from assuming title to the Property free and clear of the Mortgage. The Mortgage provides for a $1.4 million lien. It would be a windfall for the Association to obtain unencumbered title of the Property simply because of the Borrower's previous default and the incomplete Initial Action. In fact, the Association has not

[4] It should be noted that the lower court did not address either Section 95.281 or the *Houck* decision.

even paid real estate taxes on the Property. The Mortgage holder has paid such taxes since 2006.

IV. CONCLUSION

For the foregoing reasons, Deutsche Bank respectfully requests that the Court enter an Order: (1) reversing the lower court's Summary Judgment Order; (2) holding that the statute of limitations does not bar Deutsche Bank's right to enforce the Note and Mortgage; (3) holding that Deutsche Bank maintains a valid mortgage lien on the Property until March 1, 2041; (4) remanding this matter to allow Deutsche Bank to proceed with its foreclosure action; and (4) awarding Deutsche Bank its attorneys' fees and costs pursuant to the terms of the Mortgage.

Dated: May 21, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic mail and U.S. Mail this 21st day of May, 2014, to the below-named addressees:

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CERTIFICATE OF COMPLIANCE

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

s/ William P. McCaughan
WILLIAM P. McCAUGHAN

APPELLEE AQUA MASTER ASSOCIATION, INC.'S ANSWER BRIEF

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOR THE THIRD DISTRICT

Case No. 3D14-575

DEUTSCHE BANK TRUST COMPANY AMERICAS,
AS INDENTURE TRUSTEE FOR AMERICAN HOME
MORTGAGE INVESTMENT TRUST 2006-2

Plaintiff/Appellant,

vs.

HARRY BEAUVAIS and AQUA MASTER ASSOCIATION, INC.,
A NON-PROFIT FLORIDA CORPORATION

Defendants/Appellees

APPELLEE AQUA MASTER ASSOCIATION, INC.'S ANSWER BRIEF

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in and for Miami-Dade County, Florida
L.T. Case No.: 12-43915 CA (05)

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STATEMENT OF THE CASE AND FACTS

I. Nature of the Case

On December 12, 2012, Appellant Deutsche Bank Trust Company Americas, as Indenture Trustee for American Home Mortgage Investment Trust 2006-2, ("Deutsche Bank") brought this action, seeking to foreclose on an extinguished mortgage lien. Because the action was commenced more than five years after the cause of action accrued, the lower court canceled the mortgage lien from the county records, having determined that the statute of limitations had run on the claim. Deutsche Bank's motion for rehearing was denied and this appeal, from the Order Denying Rehearing, followed.

II. The Mortgage and Property

The mortgage at issue encumbered a condominium unit located at 201 Aqua Avenue, PH 4, in Miami Beach, Florida, which is currently owned by Appellee Aqua Master Association, Inc. (the "Association"). The mortgage was recorded on April 14, 2006 at Book 24429, Page 2693 of the Public Records of Miami-Dade County, Florida (the "Mortgage"). The mortgagor was Harry Beauvais (the "Mortgagor"). The Mortgagor lost title to the property as a result of an unrelated foreclosure proceeding initiated by the Association. The Association has owned the property since February 22, 2011. [R. 80].

III. The Initial Action

The Mortgagor in this case defaulted on his payments to the original mortgagee in 2006. In response, the original mortgagee accelerated the debt, demanding payment of the full amount payable under the note and mortgage, $1,439,976.80. On January 23, 2007, after the Mortgagor failed to pay, the original mortgagee instituted an action to foreclose the mortgage on the accelerated debt ("Initial Action"). [R. 81]. In paragraph 4 of its complaint, the original mortgagee alleged: "[d]efendant, Harry Beauvais, failed to pay the payment due on the Note on September 1, 2006, and Plaintiff elected to accelerate payment of the balance." [R. 81 (emphasis added)]. Mortgagor never reinstated the Mortgage pursuant to the "reinstatement" provision of the Mortgage, never responded to the acceleration of the Mortgage and has made no payments since 2006.

On December 6, 2010, the original mortgagee's 2007 foreclosure action was dismissed without prejudice, after it failed to appear at the case management conference. [R. 143].

IV. The Current Action

On December 18, 2012, nearly six (6) years after the debt was accelerated Deutsche Bank, successor to the original mortgage, filed a second foreclosure

action (the "Current Action"). The Current Action sought to enforce the same accelerated debt as in the Initial Action. [R. 5].

As did its predecessor in the Initial Action, Deutsche Bank also alleged that it sought recovery of the full amount payable under the note—the same $1,439,976.80 that was at issue in the Initial Action. [R. 6]. Appellee moved for summary judgment, arguing that the foreclosure action was barred by the statute of limitations. [R. 66]. Deutsche Bank responded on January 27, 2014, arguing that the Initial Action was based on a different default date[1] than the present action and that, as a result, pursuant to *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007 (Fla. 2004), the statute of limitations did not bar the Current Action. [R. 138].

Deutsche Bank did not argue that there had been no acceleration of the debt in the Initial Action because there was no "final judgment" in favor of the mortgagee or that the mortgagor's right to reinstate prior to entry of final judgment somehow "restricts the lender's acceleration until entry of a final judgment."[2] It did not argue that a new limitations period began once the Appellee acquired title to the property.[3] It did not argue that, even if the mortgage cannot be enforced

[1] How a different default date could result in precisely the same amount due never explained by Deutsche Bank. Logic dictates that the amount due was calculated from the same default date as in the Initial Action, but a different date alleged solely in an effort to avoid the result which has given rise to this appeal.
[2] Init. Brf. at 15.
[3] Init. Brf. at 19.

because of the statute of limitations, the mortgage lien should remain recorded in the county records.[4] It did not argue that the lower court's cancelation of the mortgage lien constituted a violation of due process.[5] Lastly, it did not argue that there would be some sort of inequity if Association retained the property free and clear of the mortgagee's extinguished lien.[6] Each of these arguments (hereinafter "the Five New Arguments") has been raised for the first time on appeal.

The lower court rejected Deutsche Bank's *Singleton* argument, concluding that the opinion is "inapposite" and "wholly irrelevant" here because it did not involve the statute of limitations. [R. 193]. Final Summary Judgment was entered against Deutsche Bank on January 29, 2014 and, on February 21, 2014, the lower court denied Deutsche Bank's motion for rehearing. Deutsche Bank then appealed from "the Order on Motion for Rehearing rendered on February 21, 2014." [R. 169].

[4] Init. Brf. at 20.
[5] Init. Brf. at 22.
[6] Init. Brf. at 23.

SUMMARY OF THE ARGUMENT

The January 2007[7] acceleration gave rise to Deutsche Bank's cause of action. Since the original mortgagee, or its successor, Deutsche Bank had five (5) years to act on the accelerated debt, any action to foreclose the Mortgage would have to have been brought before January 23, 2012. On December 6, 2010, the Initial Action was dismissed without prejudice, and no amended complaint or new action was instituted before the statute of limitations expired. The Current Action, instituted in December 2012 is time barred.

The original mortgagee's January 2007 exercise of its right to demand full payment under the note, expressly accelerated the maturity of the note. Not only did its cause of action based on the note and Mortgage terminate five years later under the statute of limitations, but, so too did its lien pursuant to the statute of repose. The only way the acceleration could be un-done following the election would have been: (1) if the mortgagor complied with the reinstatement provision of the Mortgage; or (2) if the court determined that the mortgagee's election to accelerate was improper in the first place — if, for example, it was shown that the mortgagor did not, in fact, default on the note and mortgage. Neither occurred here.

[7] While record does not reflect the date the notice of acceleration was actually provided, it may well be before the suit on the accelerated date was instituted in January 2007.

There was no new or additional event of default which would give rise to a new cause of action and nothing which could delay the accrual of the cause of action beyond the 2007 acceleration. The statute of limitations begins to run when the cause of action first could have been brought. Given that the Initial Action was brought in January 2007, Appellant cannot fairly argue that the cause of action had not accrued at least by that date. Even by this conservative analysis of the accrual of the cause of action, it was time barred by January 2012. Since the Current Action was not instituted until eleven (11) months later (December 2012), it is time barred.

The Florida Supreme Court's discussion of the *res judicata* doctrine in *Singleton* did not alter, or even address, these statutory termination dates. To the contrary, *Singleton* merely stands for the proposition that serial foreclosure actions are not "necessarily" identical, even when the right to accelerate is exercised in the initial action, for purposes of applying the *res judicata* doctrine. The fact that the *res judicata* doctrine will not "always" bar a subsequent foreclosure action when the right to accelerate has been exercised, however, does not mean that the statute of limitations will not bar the subsequent action when the second action is filed more than five years after the action first could have been filed.

The Current Action is identical to the Initial Action in that both accelerated the debt by claiming the same full amount payable under the same note to be due:

"$1,439,976.80." Accordingly, *Singleton* would not apply even if the action had been timely filed. The two actions are substantively indistinguishable and the equitable considerations discussed in *Singleton* are not present here.

For the reasons that follow, the instant appeal should be dismissed or, in the alternative, the judgment entered below should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review of an order granting final summary judgment[8] is *de novo. See Courvoisier Courts, LLC v. Courvoisier Courts Condo. Ass'n, Inc.*, 2010 WL 6602858, *1 (Fla. 3d DCA 2012).

[8] As mentioned above, Appellant did not appeal from the order granting final summary judgment in this case. The order from which this appeal has been perfected is a subsequent non-final order denying Deutsche Bank's motion for rehearing. The order denying rehearing is not an appealable order and is not subject to review. *See Young Adults for Progressive Action, Inc. v. B&B Cash Grocery Stores, Inc.*, 157 So. 2d 809 (Fla. 1963) ("A notice of appeal seeking review of a denial of a petition for rehearing presents no issue for review other than those finally determined by the decree from which no appeal was taken."); *Finley v. Finley*, 103 So. 2d 191 (Fla. 1958) ("The appellant thus appeals not from the final decree, but from the order denying the petition for rehearing, and under our decisions this does not lodge the cause in this Court for review."); *Stevens v. Metro. Dade County*, 164 So. 2d 273 (Fla. 3d DCA 1964) (same); *Oxford v. Polk Fed. Sav. & Loan Ass'n of Lakeland*, 147 So. 2d 603, 604-05 (Fla. 2d DCA 1962) (same); *Kaemmerlen v. Shannon*, 119 So. 2d 315 (Fla. 2d DCA 1960) (same); *but see Puga v. Suave Shoe Corp.*, 417 So. 2d 678 (Fla. 3d DCA 1981) (excusing citation to order denying post trial motion, rather than final judgment, in notice of appeal where the notice indicated did indicate that the appeal was from "a final Order").

II. APPELLANT'S CAUSE OF ACTION AND MORTGAGE LIEN BOTH EXPIRED FIVE YEARS AFTER THE DEBT WAS ACCELERATED, WELL BEFORE THE CURRENT ACTION WAS FILED. AS SUCH, SUMMARY FINAL JUDGMENT WAS PROPER AND THE LIEN WAS PROPERLY CANCELED

The Mortgage at issue was an installment contract, meaning that, by its terms, the mortgagor may repay his debt by making payments on a monthly basis. When a party fails to make payment on such an installment contract, the party with the right to receive payment can: (1) sue only for the default or defaults on the installment(s) already past due—*and thereby preserve its cause of action pertaining to future defaults if they occur*—or; (2) if the agreement contains an "acceleration" clause, it can declare a default on all future installments and seek recovery of the total amount due under the contract. *See Greene v. Bursey*, 733 So. 2d 1111, 1114-15 (Fla. 4th DCA 1999).

If it elects the latter, then the acceleration occurs when the mortgagee "**takes affirmative action to alert the debtor that [it] has exercised the option to accelerate**." *Id.* at 1115 (emphasis added); *see also Spencer v. EMC Mortgage Corp.*, 97 So. 3d 257, 260 (Fla. 3d DCA 2012) (applying *Greene*); *Arlaine & Gina Rockey, Inc. v. Cordis Corp.*, 2004 WL 5504978, *48 (S.D. Fla. 2004). One way to alert the debtor that the mortgagee has exercised the option to accelerate is to actually file a foreclosure action seeking payment of the full amount due under the note. *See Campbell v. Werner*, 232 So. 2d 252, 254 n.1 (Fla. 3d DCA 1970)

("[T]he filing of suit to foreclose operates as notice to the mortgagor of the election to accelerate … where the complaint on its face shows that foreclosure for the entire mortgage indebtedness is sought therein."). A lawsuit is not necessary, however; other affirmative acts to alert the debtor of the election will suffice. *See Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1993) (demand of "total principal balance and interest by letter" operated as acceleration of debt); *see also Central Home Trust. Co. of Elizabeth v. Lippincott*, 392 So. 2d 931 (Fla. 5th DCA 1980) ("To constitute an acceleration after default … the holder or payee of the note must take some clear and unequivocal action indicating its intent to accelerate all payments under the note … Examples of acceleration are a creditor's sending written notice to the debtor, making an oral demand, and alleging acceleration in a pleading filed in a suit on the debt.").

When a lender "elects to accelerate payment on a note, [moreover,] the lender accelerates the maturity of the note itself" and "the maturity date of the note accelerate[s] to the present—the date of default and of notice." *Casino Espanol de Habana, Inc. v. Bussel*, 566 So. 2d 1313, 1314 (Fla. 3d DCA 1990) (emphasis added). *See also Erwin v. Crandall*, 175 So. 862, 863 (Fla. 1937) (It is well settled that the "holder of a note may rely upon acceleration clause contained in the mortgage … to accelerate the maturity of the note.") The act of acceleration, by definition, means that the mortgagor no longer has a right to repay his or her debt

in installments. *See Campbell v. Werner*, 232 So. 2d 252, 257 (Fla. 3d DCA 1970) ("A willingness of a mortgagor to cure a default, after notice that the mortgagee has exercised his election to declare the entire mortgage indebtedness due for such default, is not a circumstance which is recognized in law or equity as a ground for denying acceleration and foreclosure."). Consequently, absent either a "wrongful acceleration" or compliance with a contractual "reinstatement" provision, there can be no new default after the right to accelerate is exercised.[9]

In the instant case, the original mortgagee elected to accelerate the debt on January 23, 2007, when it filed suit to foreclose on the Mortgage seeking payment of the full amount due under the note, $1,439,976.80. [R. 81]. In paragraph 4 of its complaint, the mortgagee alleged: "[d]efendant, Harry Beauvais, failed to pay the payment due on the Note on September 1, 2006, and Plaintiff elected to

[9] Even late fees stop accruing once a bank accelerates a loan. In *LaSalle Bank Nat'l Ass'n v. Shepherd Mall Ptners, L.L.C.*, 2006 OK CIV APP 91, for example, an Oklahoma court held that "a 5% late fee to the entire amount due after acceleration constitutes an unenforceable penalty *LaSalle Bank Nat'l Ass'n v. Shepherd Mall Ptners, L.L.C.*, 2006 OK CIV APP 91, 94. *See also In re Tavern Motor Inn, Inc.*, 69 B.R. 138 (D.Vt. 1986) (prohibiting collection of late charges after default and acceleration); *In re White*, 88 B.R. 498, 505 (D. Mass. 1988) (late charges allowed only until acceleration); *Rizzo v. Pierce & Associates*, 351 F. 3d 791, 793, n.1 (7th Cir. 2004) (citing sixteen cases for the proposition that post-acceleration late charges are unenforceable); *Wells Fargo Bank Minnesota N.A. v. Guarnieri*, 308 B.R. 122, 127 (D. Conn. 2004) (post-acceleration late payment charges unenforceable). This line of cases is consistent with the proper interpretation of acceleration – that there cannot be new default after the bank calls the entire amount due.

accelerate payment of the balance." [R. 81 (emphasis added)]. By its action, the mortgagee changed the nature of the contract from an installment contract with a maturity date in 2036 to a fully-mature note where payment in full was immediately due. This election had important implications for both the statute of repose and statute of limitations.

A. Acceleration and the Statute of Repose

When a lender exercises its right to accelerate the debt, the debt matures. As such, the act of acceleration limits the life of its mortgage lien to five years after acceleration. The statute of repose, Section 95.281 of the Florida Statutes, provides in pertinent part:

> **95.281 Limitations; instruments encumbering real property –**
>
> (1) The lien of a mortgage … shall terminate after the expiration of the following periods of time:
>
> (a) If the final maturity of an obligation secured by a mortgage is ascertainable from the record of it, 5 years after the date of maturity. (Emphasis added)

This statute provides a substantive right to be free from liability under a mortgage and note five years after the note matures. *See Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 603 (Fla. 2d DCA 2005) (the statute of repose is a "substantive statute" that "prevent[s] the accrual of a cause of action … beyond the time established by the statute.").

Appellant admits that subsection (a) of the statute of repose applies in this case, but takes the position that the maturity date of the note is not until March 1, 2036. *See* Init. Brf. at 21-22. Appellant's assertion is contrary to the law:

> When a lender elects to accelerate payment on a note, the lender **accelerates the maturity of the note itself** and, as such, **the maturity date of the note accelerate[s] to the present—the date of default and of notice**… "Acceleration" is a change in the date of maturity from the future to the present.

Casino Espanol de Habana, Inc., 566 So. 2d at 1314 (emphasis added). *See also Conner v. Coggins*, 349 So. 2d 780, 782 (Fla. 1st DCA 1977) ("Since the mortgage and the installment contract for which it was security *did not* contain an acceleration clause, the contract did not fully mature until there was default in payment of the final installment."). Because the "maturity date" on the note becomes the date that "notice" of acceleration is provided by the mortgagee, the mortgage lien terminates "5 years after" the notice of acceleration—on the same date that the five-year statute of limitations expires pursuant to Section 95.11(2)(c) of the Florida Statutes.

Accordingly, the lien in this case was extinguished as a matter of law prior to the filing of this action and the lower court properly canceled it of record. *In re Brown*, 2014 WL 983532, *1 (M.D. Fla. Feb. 11, 2014) ("Pursuant to Fla. Stat. § 95.281, the Court finds that the mortgage lien … was extinguished … as a matter of law.").

B. Acceleration and the Statute of Limitations

It is well settled that the statute of limitations is triggered when a cause of action "accrues." *See Hearndon v. Graham*, 767 So. 2d 1179, 1184 (Fla. 2000). "A cause of action accrues when the last element constituting the cause of action occurs" and, hence, when the action "may be brought." *City of Riviera Beach v. Reed*, 987 So. 2d 168, 170 (Fla. 4th DCA 2008). The action to recover the total due under the note and mortgage in this case, $1,439,976.80, obviously may have been brought as early as January 2007—in fact, it **was** brought at that time. [R. 81]. Accordingly, the cause of action to collect on any debt under this note and mortgage accrued, at the latest, in January 2007. *See Travis Co. v. Mayes*, 36 So. 2d 264, 265 (Fla. 1948) ("When a [mortgagee] declares the entire indebtedness due upon default of certain of [the mortgage's] provisions or within a reasonable time thereafter, the Statute of Limitations begins to run immediately [when] the default takes place or the time intervenes."); *Spencer*, 97 So. 3d at 260, 262; *Smith v. F.D.I.C.*, 61 F. 3d 1552, 1561 (11th Cir. 1995) ("When the promissory note secured by a mortgage contains an optional acceleration clause, the foreclosure cause of action accrues, and the statute of limitations begins to run, on the date the acceleration clause is invoked."); *In re Brown*, 2014 WL 983532 at *1 ("Where a lender has accelerated a loan and made the borrower responsible for the full balance of the loan, the statute of limitations begins to run at the time when the

mortgagee exercises the right to accelerate."); *Arlaine & Gina Rockey, Inc. v. Cordis Corp.*, 2004 WL 5504978, *48 (S.D. Fla. 2004) ("Where the installment contract contains an optional acceleration clause, the statute of limitations may commence running earlier on payments not yet due if the holder exercises its right to accelerate the total debt due because of default. In that situation, 'the entire debt … becomes due when the creditor takes affirmative action to alert the debtor that he has exercised the option to accelerate.'" (citations omitted)); *see also Arvelo v. Park Finance of Broward, Inc.*, 15 So. 3d 660, 662-63 (Fla. 3d DCA 2009) ("All of that indebtedness had, in fact, become due upon the March 2002 default and the automatic acceleration of the debt as specified in the form installment contract. Upon the occurrence of that event, Park Finance's cause of action for breach of contract had fully accrued, and the five-year statute of limitations began to run.").

The statute of limitations for contract actions such as this is five years. *See* § 95.11(2)(c), Fla. Stat. This five year period for commencing the Current Action expired no later than January 23, 2012. Appellant did not initiate the Current Action until nearly eleven months after both statutes expired. Accordingly, the action is barred by both the statute of limitations and the statute of repose and the lien has terminated as a matter of law.

III. THE SINGLETON DECISION DID NOT ADDRESS, MUCH LESS ALTER, THE LEGISLATIVELY-MANDATED LIMITATIONS PERIODS SET FORTH IN THE STATUTES OF LIMITATION AND REPOSE

Appellant relied exclusively on *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004) in opposing the entry of summary judgment below, [R. 138], arguing that the Current Action is not barred because the complaint alleges a different default date than the complaint in the 2007 lawsuit. The trial court properly rejected Appellant's argument.

In *Singleton*, a mortgagee "brought two consecutive foreclosure actions," the first was predicated on the mortgagor's failure to make "payments due from September 1, 1999 to February 1, 2000," *id.* at 1005, and the second was for his failure to make payments "from April 1, 2000, onward," *id.* The first suit was dismissed with prejudice after the mortgagee failed to appear at a case management conference. *Id.* Summary judgment was entered in favor of the mortgagee in the second lawsuit and both the trial court and the Fourth District rejected the mortgagor's argument that the second suit was barred by application of *res judicata* because "[t]he second action involved a new and different breach" of contract. *Id.* at 1005. On review, the Florida Supreme Court agreed with the Fourth District, holding that "when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged

in the first action, the case is not necessarily barred by *res judicata*." *Id.* at 1006-07.

While it is not clear if the mortgagee in *Singleton* elected to accelerate the debt in the first action,[10] the Court indicated that **the doctrine of *res judicata*** should not be applied strictly to bar a subsequent foreclosure action "regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit." *Id.* at 1008 ("Res judicata does not necessarily bar successive foreclosure suits…" (emphasis added)). Its reasoning was that certain factual situations may exist where a strict application of *res judicata—i.e.* a view that the dismissal of the first action operated as a determination on the merits—would work an injustice:

> For example, **a mortgagor may prevail in a foreclosure action by demonstrating that she was not in default** on the payments alleged to be in default, **or that the mortgagee had waived reliance on the defaults**. In those instances, the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence, **an adjudication denying acceleration and foreclosure under those circumstances** should not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven.

Id. at 1007 (emphasis added).

[10] Footnote 1 of the opinion indicates that the mortgagor asserted that the mortgagee did make that election in his briefing to the Court and that the mortgagee did not challenge the assertion. The Court did not make a determination on this issue, however.

At most, *Singleton* stands for the proposition that the dismissal of a foreclosure action, regardless of whether the mortgagee accelerated the debt, will not **necessarily** equate to a dismissal on the merits such that a subsequent action will always be barred by the doctrine of *res judicata.* It does not, as Appellant suggests, stand for the proposition that a mortgagee who accelerates the debt in one foreclosure action can **always** initiate a second foreclosure action after it fails to secure a judgment in its favor the first time around—particularly where the second action is not filed within five years of the initial acceleration of the debt. *Singleton* does not impose such a rule.

As the lower court properly stated, *Singleton* has no application here. Not only is the doctrine of *res judicata* not at issue in this case, neither are the equitable principles discussed in *Singleton*. This case does not present a situation where the mortgagee and mortgagor should, or even can, "be placed back in the same contractual relationship with the same continuing obligations"—such as when a mortgagor defeats an initial foreclosure action by establishing that he did not, in fact, default on the loan. To the contrary, there is no dispute about the default here and the mortgagor has made it abundantly clear that, since January 2007, no future payments would be made; indeed, the mortgagor no longer even owns, or has an interest in, the property.

Under these circumstances—*even in the absence of an acceleration clause*—the failure to make installment payments in the future cannot be viewed as separate breaches of the contract for purposes of triggering application of the statute of limitations. In *Brauch v. Bank of America Corp.*, 2005 WL 1027907 (M.D. Fla. 2005), for example, the plaintiffs claimed entitlement to periodic payments from the defendant in installments from 1997-1999. The defendant stopped making payments in January 1998, however, and no payments were forthcoming thereafter. The plaintiffs did not file suit until late-2003, but sought to avoid the statute of limitations by arguing that the failure to make payment on each installment constituted a separate breach of contract, resulting in the accrual of a new cause of action each time payment was not made. The *Brauch* court disagreed with the plaintiffs' position, stating:

> [T]he Court agrees with the Defendant that the Plaintiffs' breach of contract claims are barred by the five-year statute of limitations under Florida law. The Plaintiffs claim they were entitled to benefits continuing through December 31, 1999, and that the Defendant continued to deny payments … through that date, less than five years prior to the filing of these claims. The Court finds, however, that in early 1998 (and certainly when the stock awards for 1997 were not paid by the bank), the **Plaintiffs had every reason to realize that no future stock awards would be forthcoming. As such, because there was simply no reason to believe that the bank would pay awards for 1998 and 1999 when it paid none for 1997, the Plaintiffs' breach of contract claims accrued in early 1998** and should have been pursued long before the end of 2003 and 2004. The

> evidence demonstrates that the claims are accordingly time barred.

Id. at *4 (emphasis added). *See also, Servicios de Almacen Fiscal Zona Franca y Mandatos, S.A. v. Ryder Int'l, Inc.*, 264 Fed. Appx. 878, 880 n.1 (11th Cir. 2008) (rejecting argument that statute of limitations begins to run anew on a contract with continuing obligations "each time [the defendant] contacted another customer without notifying [the plaintiff] in violation of an agreement" and holding that the cause of action accrued on the date of the first breach); *see also Garden Isles Apts. No. 3, Inc. v. Connolly*, 546 So. 2d 38, 41 (Fla. 4th DCA 1989) ("Contrary to appellants' argument that a new cause of action arose each time a new five-year escalation clause became effective, we hold that the cause of action in this case accrued at the time of the first escalation and that the complaint filed in 1986 was well beyond the applicable five-year statute of limitations which commenced in 1975 and 1976.").

Not only are the equitable concerns discussed in *Singleton* missing in this case, there is a fundamental difference between application of *res judicata* and application of the statute of limitations.[11] *Res judicata* addresses whether a

[11] *Res judicata* is a judicially-created doctrine, lending it to flexible treatment by the courts. The statute of limitations, by contrast, reflects the legislature's policy decision as to when an a cause of action can no longer be enforced. As a matter of separation of powers, statutes of limitations are firmly within the province of the legislature. *See Kalway v. Singletary*, 708 So. 2d 267, 268 (Fla. 1998).

particular issue has been resolved on the merits. *See Atlantic Shores Resort, LLC v. 507 South Street Corp.*, 937 So. 2d 1239, 1243 n.3 (Fla. 3d DCA 2006) ("Res Judicata applies only when there is '[a] judgment on the merits rendered in a former suit between the same parties or privies, *upon the same cause of action*, by a court of competent jurisdiction." (emphasis in original)). It does not address whether or when a right of action "accrued," and the *Singleton* Court never even addressed when the action against all future installments first could have been brought. While the *Singleton* Court's reluctance to apply *res judicata* "strictly," *see Singleton*, 882 So. 2d at 1008, when a foreclosure action had been dismissed for failure to appear at a case management conference is understandable, *see e.g. Smith v. St. Vil*, 714 So. 2d 603, 605 (Fla. 4th DCA 1998) (dismissal for lack of prosecution is not a dismissal on the merits and should not bar subsequent action under *res judicata* doctrine), it has little, if anything, to do with the issue presented here.

Unlike *res judicata*, the statute of limitations addresses the issue of whether an action has been commenced within a period of time after it first **could have been brought** — *i.e.* after the cause of action accrued. *See State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996) ("The intent of Section 95.11(2)(b) is to limit the commencement of actions from the time of their accrual."). As discussed above, the cause of action on all future installments due under the

Mortgage here accrued when the original mortgagee took affirmative steps to notify the Mortgagor that it was accelerating the debt in January 2007. As of that time, the original mortgagee could have filed, and, in fact, did file, an action to foreclose on the full amount due under the note. The statute of limitations for seeking payment on the fully-matured note clearly began to run at that time.

The policy behind the statute of limitations is to promote efficiency and finality, and to "prevent unreasonable delay in the enforcement of legal rights." *Med. Jet, S.A. v. Signature Flight Support-Palm Beach, Inc.*, 941 So. 2d 576, 578 (Fla. 4th DCA 2006). "Statutes of limitation are intended to encourage the enforcement of legal remedies before time dilutes memories, witnesses move to greener pastures, and parties pitch out (or 'delete,' in the electronic age) old records." *Arvelo*, 15 So. 3d at 663. As in *Arvelo*, following its declaration of default on all future installment payments by way of acceleration, Plaintiff here failed to enforce its right to seek payment on those future installments and foreclose on the property within the time period that the Florida legislature deemed reasonable—five years. Plaintiff's contention that it should have a right to do so at any time up until the year 2041—decades after the mortgagor stopped making payments and abandoned the property—is completely antithetical to the purpose of the statute of limitations.

Appellant's dismissive position as to the statute of limitations is that, regardless of its election to accelerate or how many times it loses a foreclosure action based on the same mortgage and note, it can simply declare a new default and file new foreclosure actions over and over again. Appellant's position is not supported by *Singleton*, it is contrary to the clear and unambiguous purpose of the statute of limitations, and, if adopted, would place an undue burden on the courts, which are already inundated with foreclosure actions. It would also create a disincentive for lenders to comply with court orders in foreclosure actions because, even if the actions are dismissed, they will be able to start all over again as many times as they like without significant consequences.

A. The Mortgage was Never "Reinstated" Following Acceleration

In its Brief, Appellant attempts to expand on the *Singleton* argument that it presented below by arguing, for the first time, that the prior acceleration of the debt did not actually take effect because the first lawsuit was dismissed without a judgment in the mortgagee's favor. *See* Init. Brf. at 10-11 ("Given that a default was not established in the Initial Action, Deutsche Bank maintains the right to enforce the mortgage based on the Borrower's subsequent defaults." … "[T]he default in the Initial Action was not established…"). In making this argument, Appellant overlooks the effect of the acceleration and asks the Court to:

> [F]ind that dismissal of the Initial Action **halted acceleration** of the Note and thus, the running of the

> limitations period to enforce the entire Note. In other words, **the dismissal** of the Initial Action **restored the Note to an installment contract** under which Deutsche Bank maintains the right to enforce each payment default as a separate and distinct default.

Id. at 15 (emphasis added).

As a preliminary matter, Appellant's suggestion that the acceleration is not effective until there is a judgment in its favor is contrary, not only to well-settled Florida law, *see Campbell*, 232 So. 2d at 254, n.1; *Monte*, 612 So. 2d at 716; *Lippincott*, 392 So. 2d at 933, but also to the express terms of the Mortgage itself. Paragraph 22 of the Mortgage gives Appellant the right to accelerate the debt and paragraph 19 provides the sole contractual means for un-doing the acceleration, via "reinstatement." By the terms of the Mortgage, "reinstatement" can only occur after "acceleration" and before there is a judgment. Paragraph 19 states, in pertinent part:

> 19. **Borrower's Right to Reinstate After Acceleration**. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument **discontinued at any time prior to**: … (c) **entry of a judgment** enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note **as if no acceleration had occurred**…

[R. 15] (emphasis added). Accordingly, because "acceleration" occurs before "entry of a judgment," the entry of a judgment plainly cannot be a precondition of the act of "acceleration."

Because the mortgagor here stopped making payments nearly eight years ago and never attempted to comply with the reinstatement provision of the Mortgage, Appellant essentially asks the Court to rewrite the Mortgage to add a new "reinstatement" provision that would allow it to "decelerate" the debt any time a mortgagee fails to follow through with its acceleration election. Such a rewriting of the Mortgage would impose a new obligation on the mortgagor to make installment payments, once again, nearly a decade after the right to make those payments was foreclosed by acceleration. It is not for the Court to add this term to the Mortgage, however. *See Avisena, Inc. v. Santalo*, 65 So. 3d 14 (Fla. 3d DCA 2011) (the court will not "read language into the parties' agreement that simply is not there."); *Fernandez v. Homestar at Miller Cove, Inc.*, 935 So. 2d 547, 551 (Fla. 3d DCA 2006) (the "court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties."); *Olson v. Hirschberg*, 145 So. 2d 303, 305 (Fla. 1st DCA 1962) ("Whatever may have actually been within the minds of the parties at the time of the transaction, we are restricted in our consideration to the parties' intention as *expressed* in the note. We

have no authority to rewrite the note by adding a provision which the parties failed to incorporate in their instrument.").

Further, the re-imposition of an obligation to make periodic mortgage payments under these circumstances would have due process implications. The Mortgagor defaulted in the Initial Action and thereby admitted that the mortgagee's acceleration election was proper. *See BAC Home Loans Servicing, Inc. v. Headley,* 130 So. 3d 703, 705 (Fla. 3d DCA 2013). "A litigant may choose to suffer a default, for whatever reason, and suffer the consequences. However, the litigant should be entitled to anticipate the consequences that reasonably flow" therefrom. *Id*. at 705-706 (quoting *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1233 (Fla. 1st DCA 1995)). After acquiescing to the mortgagee's acceleration of the debt, the Mortgagor had a right to notice and an opportunity to be heard before any obligations under the Mortgage and note could be reinstated.

B. The Mortgage was Not "Reinstated" by Operation of Law

The only other way that a mortgage could have been "reinstated" following acceleration was if the court, in the initial action, had determined that the original mortgagee had no right to accelerate in the first place — *i.e.* where there was a "wrongful acceleration." In *Campbell*, this Court listed the situations where such wrongful acceleration occurs, stating:

> [B]ecause of the essentiality of safeguarding the validity of contracts… a contract for acceleration of a mortgage

> indebtedness should not be abrogated or impaired, or the remedy applicable thereto denied, except upon defensive pleading and proof of facts or circumstances which are regarded in law as sufficient grounds to prompt or support such action by the Court. The decisions disclose that foreclosure on an accelerated basis may be denied **where the right to accelerate has been waived or the mortgagee is estopped to assert it** …; or **where the mortgagee failed to perform some duty upon which the exercise of his right to accelerate was conditioned**; or **where the mortgagor tenders payment of defaulted items**, after the default but before notice of the mortgagee's election to accelerate has been given (by actual notice or by filing suit to foreclose for the full amount of the mortgage indebtedness); or **where there was intent to make timely payment, and it was attempted, or steps taken to accomplish it, but nevertheless the payment was not made due to a misunderstanding or excusable neglect**, coupled with some conduct of the mortgagee which in a measure contributed to the failure to pay when due or within the grace period.

Campbell, 232 So. 2d at 256-57 (emphasis added). *Accord Singleton*, 882 So. 2d at 1007 ("An adjudication denying acceleration … should not bar a subsequent action a year later" under circumstances where a "mortgagor … prevail[s on] a foreclosure action by demonstrating that she was not in default … or that the mortgagee had waived reliance on the defaults…"). Absent one of these situations, the lender's decision to accelerate the debt stands. *Campbell*, 232 So. 2d at 257 (because that case did not involve one of these factual situations, no deceleration occurred).

As in *Campbell*, this case does not involve a determination that the original mortgagee had wrongfully accelerated the debt. Again, the original mortgagee actually secured a default against the Mortgagor in the initial action and, as a consequence, the propriety of the acceleration was deemed admitted. *See BAC Home Loans Servicing, Inc. v. Headley*, 130 So. 3d 703, 705 (Fla. 3d DCA 2013). To this day, Deutsche Bank maintains that acceleration was proper back in January 2007 — the instant action is, for all intents and purposes, identical to the January 2007 lawsuit.

In sum, pursuant to well settled law and to the terms of the Mortgage itself, a judicial determination is not necessary to establish acceleration. In fact, the initiation of a lawsuit is not even necessary to establish acceleration. Rather, absent contractual reinstatement, a judicial determination (establishing "wrongful acceleration" or "denying acceleration") is only necessary to establish *deceleration*.

C. *Bartram* and the Federal Cases Relied Upon by Appellant Should Not be Followed by this Court

Despite the fact that this Court has repeatedly discussed the effect of debt "acceleration" in opinions such as *Campbell v. Werner*, 232 So. 2d 252 (Fla. 3d DCA 1970), *Casino Espanol de la Habana, Inc. v. Bussel*, 566 So. 2d 1313 (Fla. 3d DCA 1990), *Arvelo v. Park Finance of Broward, Inc.*, 15 So. 3d 660 (Fla. 3d DCA 2009), and *Spencer v. EMC Mortgage Corp.*, 97 So. 3d 257 (Fla. 3d DCA

2012), Appellant does not address or attempt to distinguish any of these opinions in its Brief.[12] Appellant ignores over 40 years of this Court's jurisprudence and, instead, urges this Court to blindly follow the Fifth District's recent opinion in *U.S. Bank, N.A. v. Bartram*, 2014 WL 1632138 (Fla. 5th DCA, April 25, 2014) and some federal district court decisions — all of which are directly contrary to this Court's repeated pronouncements of law. This Court should resist Appellant's efforts.

1. Bartram Conflicts with this Court's Precedent and Misstates the Law

In *Bartram*, a mortgagor filed a quiet title action seeking a declaration that he was no longer required to make monthly mortgage payments because: 1) the mortgagee accelerated the debt and initiated a foreclosure action in 2006; 2) that action had been dismissed; and 3) no new action had been filed more than five years after the filing of the first action. *See id.* at *1. The trial court granted summary judgment for the mortgagor and canceled the mortgage lien, concluding that the lender no longer had the ability to enforce its rights under the note. *Id.* at *2.

[12] Remarkably, Appellant only cites to one decision from this Court in its entire Brief. That citation, found on page 9, provides authority for the standard of review of an order granting summary judgment.

On review, the Fifth District began its analysis by noting that "there is no question of the Bank's successful acceleration of the entire indebtedness on May 15, 2006." *Id.* at *2. It then recognized that, under a significant and long-standing body of Florida law, the lender's decision to accelerate the debt triggered the running of the statute of limitations, citing *Greene v. Bursey*, 733 So. 2d 1111, 1114–15 (Fla. 4th DCA 1999), *Reed v. Lincoln*, 731 So. 2d 104 (Fla. 5th DCA 1999), *Locke v. State Farm Fire & Cas. Co.*, 509 So. 2d 1375 (Fla. 1st DCA 1987), and *Conner v. Coggins*, 349 So. 2d 780 (Fla. 1st DCA 1977), *see Bartram*, 2014 WL 1632138 at *2.

After acknowledging the effect of these authorities, however, the *Bartram* court concluded that they are no longer good law because they pre-date *Singleton*, *id.* at *3 — as if *Singleton* had been a precedent setting statute of limitations case. *Singleton* did not address the statute of limitations, however, and it certainly did not reject these opinions. Notably, the *Bartram* court did not mention the authorities from this District—such as *Spencer* and *Arvelo* — which were issued after *Singleton* and confirm that the statute of limitations begins to run on the entire debt due under the note upon acceleration.

Nevertheless, although *Singleton* clearly only addressed the *res judicata* doctrine, the *Bartram* court became fixated on one sentence at the very end of the *Singleton* opinion: "the subsequent and separate alleged default [in that case]

created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." *See id.* at *6. In making this statement, however, the Florida Supreme Court implicitly assumed that there was, in fact, a subsequent default under the agreement after the initial action had been dismissed — but that issue had not been argued and it was not decided. Because of this one sentence, the *Bartram* court reasoned that:

> [i]f a 'new and independent right to accelerate' exists in a res judicata analysis, there is no reason it would not also exist vis-à-vis a statute of limitations issue. A 'new and independent right to accelerate' would have to mean that the new defaults presented new causes of action, regardless of the fact that their due dates had been accelerated in the prior suit.

Id.

What the *Bartram* court failed to grasp is that, following acceleration, there are no "new defaults" on which "new causes of action" can be based—absent, of course, a finding of "wrongful acceleration" or contractual "reinstatement." Again, the act of accelerating the debt "accelerates the maturity of the note itself," *see Casino*, 566 So. 2d at 1314 (citing *Erwin*, 175 So. at 863), so there cannot be new defaults or new rights to accelerate following acceleration. *See Olson*, 145 So. 2d at 305 ("[O]bviously there could be no acceleration after the note had matured."). *Singleton* did not hold otherwise.

The *Bartram* court also misconceived the fundamental difference between *res judicata* and the statute of limitations. As discussed above, the *Singleton* Court

was only focused on whether the causes of action in two lawsuits were sufficiently identical to trigger application of *res judicata*; it was not focused on when the cause of action at issue first could have been asserted as would have been required for a statute of limitations analysis. *Singleton* simply has no application to the statute of limitations issue as the trial court here correctly noted.

Perhaps because its logic requires overturning decades of Florida jurisprudence, moreover, the *Bartram* court decided to certify the question as to whether "acceleration of payments due under a note and mortgage **in a foreclosure action that was dismissed** … trigger[s] application of the statute of limitations to prevent a subsequent foreclosure action … **based on all payment defaults occurring subsequent to dismissal of the first foreclosure suit**." *Id.* at *6 (emphasis added). In doing so, however, the Fifth District unnecessarily infused *res judicata* issues into the statute of limitations equation. If it had simply limited the question to whether "acceleration of payments due under a note and mortgage triggers application of the statute of limitations to prevent a subsequent foreclosure action" five years later (without the bolded language quoted above), the answer would unquestionably be "yes." *See Travis*, 36 So. 2d at 265 ("When a [mortgagee] declares the entire indebtedness due upon default of certain of [the mortgage's] provisions or within a reasonable time thereafter, the Statute of Limitations begins to run immediately [when] the default takes place or the time

intervenes."); *Spencer*, 97 So. 3d at 262 ("The record contains unrebutted affirmative evidence from the plaintiff's representative that a prior owner of the mortgage had appropriately accelerated it, thus triggering the limitations period … well more than five years before commencement of this action."); *Smith*, 61 F. 3d at 1561 ("When the promissory note secured by a mortgage contains an optional acceleration clause, the foreclosure cause of action accrues, and the statute of limitations begins to run, on the date the acceleration clause is invoked."); *In re Brown*, 2014 WL 983532 at *1 ("Where a lender has accelerated a loan and made the borrower responsible for the full balance of the loan, the statute of limitations begins to run at the time when the mortgagee exercises the right to accelerate."); *Arlaine & Gina Rockey, Inc*, 2004 WL 5504978 at *48 ("Where the installment contract contains an optional acceleration clause, the statute of limitations may commence running earlier on payments not yet due if the holder exercises its right to accelerate the total debt due because of default. In that situation, 'the entire debt … becomes due when the creditor takes affirmative action to alert the debtor that he has exercised the option to accelerate.'" (citations omitted)); *Arvelo*, 15 So. 3d at 662-63 ("All of that indebtedness had, in fact, become due upon the March 2002 default and the automatic acceleration of the debt as specified in the form installment contract. Upon the occurrence of that event, Park Finance's cause of

action for breach of contract had fully accrued, and the five-year statute of limitations began to run.").

Bartram should not be followed.

2. The Federal Authorities Relied upon by Appellant Also Conflict with this Court's Precedent and Should Not be Followed

Unlike *Bartram*, the federal district court in *Dorta v. Wilmington Trust, N.A.*, 2014 WL 1152917 (M.D. Fla., March 24, 2014) did not declare decades of Florida law construing the statute of limitations to be invalid. Instead, the judge there read *Singleton* as meaning that a mortgagee's failure to obtain a judgment in its favor in a foreclosure action results in "deceleration" of the debt.[13] *Id.* at *5. The court came to this conclusion after considering the mortgagee's briefing, **which was unopposed by the *pro se* mortgagor.** *Id.* at *1.

Unopposed motions lead to bad opinions. The *Dorta* court overlooked the fact that a simple failure to obtain judgment in the mortgagee's favor is not

[13] The judge in *Dorta* relied heavily on another district court opinion, *Kaan v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1271 (S.D. Fla. 2013). *Kaan* was another quiet title action where the mortgagor claimed that the "dismissal of the foreclosure action invalidates the note and mortgage." *Id.* at 1273. As in *Singleton*, however, it was not clear in *Kaan* as to whether the mortgagee accelerated the debt in the initial foreclosure action. *See id.* at 1274 ("The foreclosure action at issue here alleged a default of Plaintiff's July 1, 2007 through February 1, 2008 Note and Mortgage payments."). The trial court in *Kaan* did not even discuss the implications of a mortgagee's act of accelerating the debt.

tantamount to a "wrongful acceleration" and, as such, it is not a recognized basis for reinstating the mortgage and note under Florida law. *See Campbell*, 232 So. 2d at 256-57; *accord Singleton*, 882 So. 2d at 1007 ("An adjudication denying acceleration … should not bar a subsequent action a year later" under circumstances where a "mortgagor … prevail[s on] a foreclosure action by demonstrating that she was not in default … or that the mortgagee had waived reliance on the defaults…"). Further, the concept of deceleration endorsed by the judge in *Dorta* is inconsistent with the long-standing rule in Florida that acceleration can occur, and trigger the statute of limitations, without a foreclosure action even being filed. *See Monte*, 612 So. 2d at 716; *Lippincott*, 392 So. 2d at 934.

The only way that *Dorta* can be harmonized with Florida law is if there was a contractual provision in the mortgage contract at issue there, which permitted reinstatement of the note and mortgage under the circumstances of that case. No such provision exists here, however, and, as such, *Dorta* is inapposite (or wrongly decided). Like Bartram, it should not be followed by this Court.

D. *Singleton* Supports Dismissal of the Current Action Because it is Identical to the Initial Action

Appellant attempts to align this case with the facts of *Singleton* by claiming that the Current Action involves "a separate default" which is distinct from the

default at issue in the Initial Action. *See* Init. Brf. at 15. Specifically, Appellant claims that the Initial Action sued for "default for the installment due in September 2006," *id.* at 2, and the Current Action alleges "default for the installment due in October 2006, a default occurring one month after the default alleged in the initial action," *id.* at 3. The Initial Action was, however, filed after October 2006 and plainly covered that default. Indeed, both actions allege the same accelerated amount to be due: "$1,439,976.80," a mathematical impossibility if there was no September default. If the causes of action had truly been based on different defaults, then the amounts due would necessarily be different. The reference to an "October" default date in the complaint in this case is either a typographical error or a misguided effort to avoid the statute of limitations. The actions seek identical relief and must be found to have been based on the same default (especially since there can be no further default after the acceleration that supported the Initial Action).

IV. APPELLANT'S REMAINING ARGUMENTS ARE NOT PRESERVED FOR CONSIDERATION IN THIS APPEAL

As indicated above, the only argument actually presented by the Appellant below was that *Singleton* precluded a finding that the Current Action is barred by the statute of limitations. Nevertheless, as set forth above, Deutsche Bank now presents Five New Arguments to this Court which were never presented below. These Five New Arguments should not be considered by this Court.

It is well settled that "[a]n argument not presented to the trial court in opposition to a motion for summary judgment may not be raised in an appeal of that summary judgment." *Bill Seidle Aircraft Sales & Servs., Inc. v. Bellomy*, 782 So. 2d 449 (Fla. 3d DCA 2001) (citing *Wildwood Properties, Inc. v. Archer of Vero Beach, Inc.*, 621 So. 2d 691, 692 (Fla. 4th DCA 1993). Pursuant to the prior rulings of this Court, Appellant is precluded from raising these Five New Arguments on appeal. *See Estate of Herrera v. Berlo Indus., Inc.*, 840 So. 2d 272, 273 (Fla. 3d DCA. 2003); *see also Gisela Invs., N.V. v. Liberty Mut. Insur. Co.*, 452 So. 2d 1056 (Fla. 3d DCA 1984).

A. A New Limitations Period Did Not Begin When the Association Acquired Title to the Property Subject to the Mortgage

Even if Deutsche Bank had preserved its argument that a new limitations period began once the Association obtained title to the property, which it did not, the argument is baseless. Deutsche Bank relies exclusively on *Kaan v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1271 (S.D. Fla. 2013) in arguing that the Association's acquisition of title via foreclosure constitutes a "separate and distinct default under the terms of the Mortgage." *See* Init. Brf. at 19. Not only did Deutsche Bank fail to make this argument below, it failed to plead this breach as a basis for the action in its Complaint.

Regardless, *Kaan* does not support Appellant's argument that the Association's successful foreclosure action constitutes a new breach of the Mortgage. To the contrary, in *dicta*, the *Kaan* court merely noted that the mortgage contract at issue there required the mortgagor to obtain permission from the mortgagee before selling the property to a third party and that the failure to obtain consent to a sale "and right to foreclose if it does not consent, confers separate rights that cannot be cancelled or lost due to the passage of time after a payment default." *Kaan*, 981 F. Supp. 2d at 1274.

The instant action did not involve a sale of the property by the mortgagor; the property here was taken by way of foreclosure. Further, the *Kaan* case contains no discussion whatsoever about the effect of an acceleration of the debt or of the automatic termination of the lien five years thereafter pursuant to the statute of repose. In fact, the *Kaan* court went out of its way to describe the first foreclosure action as concerning only "a default of Plaintiff's July 1, 2007 through February 15, 2008 note and mortgage payments," *id.* at 1272, leaving open the possibility of future defaults. *Kaan* simply does not support Deutsche Bank's waived argument concerning a purported default that was not even pled in its complaint.

B. The Lower Court's Summary Judgment Contained the Same Relief Requested by the Association in Its Answer and Affirmative Defenses

Appellant's claim that it was unaware of the relief being sought by the Association is without merit. Aside from the fact that Appellant failed to raise this argument below, the relief sought by the Association in its answer and affirmative defense mirrors the relief granted by the lower court in its summary judgment order. [R. 44]. Furthermore, Appellant's due process concerns were not raised in its Motion for Rehearing below. [R. 148]. Finally, Appellant's vague objection that the summary judgment order stated "way more than Your Honor's ruling" is insufficient to preserve the issue on appeal.

There is simply no point in allowing the extinguished lien to stay on the county records, continuing to cloud the Association's title to the property, after the statute of limitations expired. *See e.g. In re Brown*, 2014 WL 983532 at *1 ("The Court finds that the mortgage lien … was extinguished … as a matter of law."). Any subsequent action by Appellant would be barred by the statute of limitations (and by the statute of repose), just as the Instant Action is barred. The cancelation of the extinguished lien was the natural and expected consequence of the lower court's determination that the lien is no longer enforceable.

C. Appellant is Not Entitled to an Equitable Exception to the Application of the Statute of Limitations

Appellant's final argument is that it would be unfair to apply the statute of limitations in this case and that application of the statute would provide a windfall to the Association because it has not even paid "real estate taxes" for the property. *See* Init. Brf. at 23-24. Again, Appellant did not make these arguments below and it never pled entitlement to an equitable lien. It would be inappropriate to consider these arguments at this time.

Regardless, from one party's perspective, application of the statute of limitations *always* results in "unfairness" or a "windfall". The legislature has, however, mandated that the limitations period be applied in this case regardless "the distasteful consequences." *See Spencer*, 97 So. 3d at 261-62 (J. Schwartz Specially Concurring) ("Because of the stumbling, bumbling, and general ineptitude of the mortgagee and its representatives, the appellant has managed to remain in the mortgaged premises without payment for over fifteen years after defaulting in 1997."). The statute of limitations applies because the mortgagee accelerated the debt but failed to follow through with a foreclosure action within the limitations period. *Id*. "[T]he law is the law. Notwithstanding the distasteful consequences of applying it in this case, it must be served." *Id*. Judge Schwartz' statement in *Spencer* is applicable here: Deutsche Bank cannot avoid the consequences of its failure to foreclose within the five years following January, 2007.

Because equity follows the law, it cannot be invoked to grant an exception to the statute of limitations. *U.S. Bank Nat. Ass'n v. Tadmore*, 23 So. 3d 822, 823 (Fla. 3d DCA 2009) citing *Davis v. Starling*, 799 So. 2d 373, 378 (Fla. 4th DCA 2001) (noting that "equity follows the law and cannot be used to eliminate its established rules"); *Laws v. Laws*, 364 So. 2d 798, 801 (Fla. 4th DCA 1978) ("It is apparent that the trial court was attempting to do 'equity' in the case, but in that quest for 'equity', the legal rights of the respective parties cannot be trammeled."); *see also Nordberg v. Green*, 638 So. 2d 91, 93 (Fla. 3d DCA 1994) ("[C]ourts of equity have [no] right or power under the law of Florida to issue such order it considers to be in the best interest of 'social justice' at the particular moment without regard to established law."). (quoting *Flagler v. Flagler*, 94 So. 2d 592, 594 (Fla. 1957)). The only inequitable result would be to grant an exception to the statute of limitations solely for lenders (or, in this case, the successor to a lender), when the statute applies to all other citizens.

V. CONCLUSION

For the foregoing reasons, the lower court's entry of final summary judgment in favor of Aqua Master Association, Inc. should be affirmed.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO: 3D14-575

DEUTSCHE BANK TRUST COMPANY AMERICAS,
AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE
INVESTMENT TRUST 2006-2,

Appellant,

v.

HARRY BEAUVAIS, AND AQUA MASTER ASSOCIATION, INC.,
A NON-PROFIT FLORIDA CORPORATION,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA
L.T. CASE NO: 12-49315-CA-05

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I. INTRODUCTION

The Court should reverse the lower court's holding that the statute of limitations has expired on Appellant Deutsche Bank's[1] ability to foreclose the Mortgage because the default alleged in the Current Action is separate and distinct from the default alleged in the Initial Action. The filing of the Initial Action, which resulted in a dismissal without prejudice, did not bar Deutsche Bank's right to enforce the Note and Mortgage based on allegations of a separate default.

This Court should also reverse the lower court's ruling that the Note and Mortgage were null and void as the ruling is directly contrary to both statutory and established case law. Furthermore, such remedy was never sought in the Association's motion for summary judgment, and therefore, Deutsche Bank was never afforded the opportunity to address this issue.[2]

II. ARGUMENT

A. Deutsche Bank Is Entitled to Foreclose the Mortgage.

The statute of limitations does not bar foreclosure of the Mortgage. The dismissal of the Initial Action without prejudice decelerated the Mortgage and

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[1] Capitalized terms are defined in Appellant's Initial Brief filed on May 21, 2014.

[2] Contrary to the Association's contention, Deutsche Bank clearly appealed the Summary Judgment Order in favor of the Association (App. to Initial Brief, Ex. 2.) and the Order denying Deutsche Bank's motion for rehearing (R. 196.), both of which are attached to its Amended Notice of Appeal. (App. to Reply Brief, Ex. 1.) *Pakonis v. Clark*, No., 3D12-200, 2014 WL 444044, at *1 (Fla. 3d DCA Feb. 5, 2014); *Puga v. Suave Shoe Corp*., 417 So. 2d 678, 679 (Fla. 3d DCA 1981).

restored the parties' contractual obligations under the Note and Mortgage. As such, Deutsche Bank is entitled to pursue foreclosure through the Current Action based on the Borrower's subsequent payment defaults.

1. ***Deutsche Bank is entitled to enforce the Note and Mortgage because the statute of limitations applicable to an installment note has not expired.***

The statute of limitations has not run on Deutsche Bank's right to enforce payment defaults that occurred subsequent to the filing of the Initial Action. The determination of when the cause of action accrues on an installment note depends on the terms of the contract. When an installment note contains a ***mandatory acceleration*** clause, the cause of action accrues automatically upon the occurrence of a default. *See Arvelo v. Park Fin. of Broward, Inc*., 15 So. 3d 660, 663-64 (Fla. 3d DCA 2009). When an installment note has ***no acceleration*** clause, the cause of action accrues when the last payment is due. *See Conner v. F. R. Coggins*, 349 So. 2d 780, 782 (Fla. 1st DCA 1977). When an installment note contains an ***optional acceleration*** clause, as in this case, the cause of action accrues on the stated maturity date or upon the lender's acceleration of the loan, whichever is earlier. *See Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1973); *Greene v. Bursey*, 733 So. 2d 1111, 1114-15 (Fla. 4th DCA 1999). Unlike a typical contract where the cause of action accrues upon a breach, with an installment note, the cause of action does not commence on a breach, unless the installment note

contains a mandatory acceleration provision. This different standard applies to installment notes because the lender has already substantially fulfilled its obligations by funding the full amount of the loan to the borrower. The borrower, however, has yet to fulfill its obligation to make installment payments to repay the loan. Indeed, the *Monte* court held that the statute of limitations on a payment default did not begin to run until the lender demanded payment, despite the fact that the default occurred fifteen (15) years earlier. 612 So. 2d at 716.

Because the Note contains an optional acceleration clause, Deutsche Bank is entitled, but is not obligated, to enforce the Note and Mortgage upon a default by the Borrower. The Borrower's payment default does not automatically trigger the limitations period to enforce the entire loan. It is only upon the acceleration of the loan by the lender that the accrual of the statute of limitations commences ***for that default***. *See Cent. Home Trust Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933 (Fla. 5th DCA 1981) (noting that the limitations period for each installment begins to run the day after each is due, and thus, the statute of limitations may run on some defaults and not others). As Deutsche Bank's right to accelerate is optional to begin with, it is illogical to conclude that Deutsche Bank's exercise of such

optional right, which for whatever reason remains unfulfilled or uncompleted, destroys its right to enforce the Note and Mortgage based on subsequent defaults.[3]

2. *The filing of the Initial Action did not prevent Deutsche Bank from filing a new action as Deutsche Bank retained the right to enforce the Note and Mortgage based on subsequent defaults.*

The Mortgage's optional acceleration clause affords Deutsche Bank the right to cease an acceleration of the Mortgage. Several recent Florida opinions, applying the principles in *Singleton*, *Olympia*, *Dorta*, *Bartram*, and *Kaan*,[4] and

---

[3] The Association relies on cases that are inapposite. It cites cases involving a mandatory acceleration clause to argue that an initial breach (the accrual date on an ordinary contract) triggers the limitations period in this case. *See e.g., Travis Co. v. Mayes*, 36 So. 2d 264, 266 (Fla. 1948); *Arvelo*, 15 So. 3d at 663-64.

It points to cases involving ordinary contracts, as opposed to installment notes. *See e.g., City of Riviera Beach v. Reed*, 987 So. 2d 168, 170 (Fla. 4th DCA 2008); *Servicios De Alamacen Fiscal Zona Franca Y Mandatos S.A., v. Ryder Int'l, Inc.*, 264 Fed. App'x 878, 880 (11th Cir. Feb. 11, 2008); *Garden Isles Apartments No. 3, Inc. v. Connolly*, 546 So. 2d 38, 41 (Fla. 4th DCA 1989); *State Farm Mut. Auto. Ins. Co., v. Lee*, 678 So. 2d 818, 821 (Fla. 1996).

It also relies on cases that do not dispose of the statute of limitations. *See, e.g., Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257, 260 (Fla. 3d DCA 2012); *Smith v. F.D.I.C.*, 61 F. 3d 1552, 1563 (11th Cir. 1995).

Arlaine & Gina Rockey, Inc., v. Cordis Corp. actually supports Deutsche Bank's position that the Current Action is not time-barred. No. 02-22555, 2004 WL 5504978, at *48 (S.D. Fla. Jan. 5, 2004) (recognizing that claims for installment royalty payments less than five years overdue were not time-barred).

[4] *See Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1006-07 (Fla. 2004); *Olympia Mortg. Corp. v Pugh*, 774 So. 2d 863, 866 (Fla. 4th DCA 2000): *Dorta v. Wilmington Trust Nat'l Ass'n*, No. 5:13-cv-185, 2014 WL 1152917, at *5-7 (M.D. Fla. Mar. 24, 2014); *U.S. Bank Nat'l Ass'n v. Bartram*, Case No. 5D12-3823, 2014

involving facts strikingly similar to those here, have upheld a lender's right to decelerate a mortgage and preserve its right of foreclosure based on a subsequent default. *See Evergreen Partners, Inc. v. Citibank, N.A.*, No. 4D13-2236, 2014 WL 2862392, at *1 (Fla. 4th DCA June 25, 2014) (dismissing action to cancel mortgage because lender's prior dismissed action did not "bar subsequent foreclosure actions and acceleration based upon different events of default"),[5] *and Matos v. Bank of New York*, No. 14-21954, 2014 WL 3734578, at *2-3 (S.D. Fla. July 24, 2014) (dismissing action to quiet title because dismissal of lender's prior foreclosure action resulted in deceleration of loan, and thus, lender could foreclose mortgage based on subsequent defaults); *see also Verdecia v. Bank of New York*, No. 13-62035, 2014 WL 3767668, at *3 (S.D. Fla. July 31, 2014); *Torres v. Countrywide Home Loans, Inc.*, No. 14-20759, 2014 WL 3742141, at *4 (S.D. Fla. July 29, 2014); *Ros v. LaSalle Bank*, No. 14-CIV-22112, 2014 WL 3974558, at *2-3 (S.D. Fla. July 18, 2014); *Poole v. Aurora Loan Services, LLC*, No. 8:13-cv-2548, 2014 WL 3378344, at *5 (M.D. Fla. June 30, 2014); *Lopez v. HSBC Bank*, No. 1:14-cv-20798 (S.D. Fla. Apr. 28, 2014) (ECF No. 13). These courts recognized that dismissal of a foreclosure action, for any reason, decelerates a

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WL 1632138, at *6 (Fla. 5th DCA Apr. 25, 2014); and *Kaan v. Wells Fargo Bank, N.A.*, No. 13-80828, 2013 WL 5944074, at *3 (S.D. Fla. Nov. 5, 2013).

[5] This opinion is not final until the disposition of a timely-filed motion for rehearing.

mortgage (*i.e.*, cancels the lender's previous exercise of its optional right to accelerate the loan) and restores the parties' contractual obligations thereunder. *See, e.g., Matos*, 2014 WL 3734578, at *4. Because the parties resume their original obligations, a lender may accelerate and foreclose the mortgage based on subsequent defaults. *Id*. "To find otherwise would disincentivize the mortgagor from making timely payments on the note." *Id*.

The Association offers no authority challenging the sound holding and rationale of *Singleton* and its progeny. It dismisses *Singleton* merely because it involves *res judicata*,[6] but fails to explain why its principles do not extend to the context of the statute of limitations. The Appellee does not even address *Olympia*. Furthermore, the Association erroneously claims that decisions of the Florida Third District Court of Appeal has firmly established that the statute of limitations bars the Current Action. *See* Answer Br. at 27-28. None of the cases cited by the Association support the Association's claim: (1) *Campbell v. Werner*, 232 So. 2d 252 (Fla. 3d DCA 1970) and *Casino Espanol de Habana, Inc. v. Bussel*, 566 So. 2d 1313 (Fla. 3d DCA 1990) predate *Singleton* and do not involve successive foreclosure actions; (2) *Arvelo* pertains to a mandatory acceleration clause, 15 So. 3d at 663-64; and (3) *Spencer* addresses dismissal for lack of prosecution and does

[6] Every court addressing this issue has in fact applied *Singleton* to the statute of limitations.

not dispose of the statute of limitations. 97 So. 3d at 260; *see also Espinoza v. Countrywide Home Loans Servicing, L.P.*, No. 14-20756, 2014 WL 3845795, at *5 (S.D. Fla. Aug. 5, 2014).

Following the overwhelming weight of recent Florida authority, the Court should apply *Singleton* and its progeny, and hold that the statute of limitations does not preclude foreclosure of the Mortgage. Here, Deutsche Bank accelerated the Mortgage when it filed the Initial Action in 2007 based on the Borrower's payment default in September 2006. The court dismissed the Initial Action without prejudice in December 2010. The dismissal effectively decelerated the Mortgage and returned Deutsche Bank and the Borrower to their original positions. As such, based on the Borrower's subsequent payment default in October 2006, Deutsche Bank had the right to accelerate the Mortgage again and seek foreclosure by filing the Current Action in 2012.[7]

[7] The Association claims that the Initial Action and Current Action are based on the same defaults because the complaints in both actions "allege the same accelerated amount to be due: $1,439,976.80." *See* Answer Br. at 35. Contrary to the Association's suggestion, Deutsche Bank did not allege in either complaint that the total indebtedness owed was $1,439,976.80. Instead, Deutsche Bank properly alleged in both complaints that the ***unpaid principal balance of $1,439,976.80 was due, together with interest and title search expenses***. The fact that no payments were made towards the unpaid principal balance is irrelevant to the statute of limitations. *See Olympia*, 774 So. 2d at 865. ("In this case, both the first and second foreclosure actions sought foreclosure and an acceleration of the balance due on the note and mortgage. However, the facts at issue in each foreclosure action differed, because the possible dates of default differed.")

3. *The filing of the Initial Action did not perfect acceleration because the Borrower maintained the right to reinstate the mortgage until entry of a final judgment, which did not occur in the Initial Action.*

The Borrower's contractual right to reinstate the Mortgage effectively precludes acceleration of the Mortgage until the entry of a final judgment. (App. to Initial Brief, Ex. 1 at 19 and 22.) The Borrower did not lose his power to reinstate the Mortgage simply because he did not do so while the Initial Action was pending. Indeed, the Borrower's contractual right to reinstate the Mortgage (and thereby halt acceleration) extends by the terms of the Mortgage until the entry of a final judgment. Because no final judgment was entered in the Initial Action, acceleration was never completed.

The Association confuses the purpose of contractual reinstatement. The Association claims that Deutsche Bank is attempting to rewrite the reinstatement provision to allow it to "'decelerate' the debt any time a mortgagee fails to follow through with its acceleration election." *See* Answer Br. at 24. Contractual reinstatement, however, recognizes the right of the Borrower—not Deutsche Bank—to decelerate the Mortgage through reinstatement any time before entry of a final judgment. *See Smith*, 61 F. 3d at 1563 (recognizing that under certain circumstances, a lender may lose the power to accelerate upon default).

Furthermore, as discussed above, *Singleton* and its progeny refute the Association's argument that, absent reinstatement, "wrongful acceleration" is the

only way that a mortgage may be reinstated. *See* Answer Br. at 25-26. It is also noteworthy that *Campbell*, upon which the Association relies, does not stand for this proposition or purport to exhaustively list examples of "wrongful acceleration." 232 So. 2d 252; *see also* Answer Br. at 25-26.

B. Deutsche Bank Maintains a Valid Lien on the Property.

Deutsche Bank maintains a valid mortgage lien on the Property until March 1, 2041, regardless of whether the statute of limitations were to have expired.

1. *The statute of repose protects Deutsche Bank's mortgage lien until five years after the maturity date as reflected in the Mortgage recorded in the public records.*

Deutsche Bank maintains its mortgage lien on the Property regardless of whether it may foreclose its lien. In arguing that acceleration of the Mortgage shortened the duration of Deutsche Bank's lien on the Property, the Association misapprehends the statute of repose and the statute of limitations. First, the Association misreads Section 95.281 of the Florida Statutes, the statute of repose that determines the duration of a lien. This statute provides in relevant part:

> (1) The lien of a mortgage . . . shall terminate after the expiration of the following periods of time:
>
> (a) If the final maturity of an obligation secured by a mortgage is ***ascertainable from the record of it***, 5 years after the date of maturity.
>
> (b) If the final maturity of an obligation secured by a mortgage is ***not ascertainable from the record of it***, 20 years after the date of the mortgage, unless prior to such time the holder of the mortgage: . . .

§ 95.281(1), FLA. STAT. (emphasis added). The statute clearly focuses on the ***recorded*** maturity date to determine the duration of a lien. The recorded maturity date is used because it is a fixed date, and thus, provides reliable notice as to the duration of a mortgage lien by setting a "definitive" time limitation. *See Am. Bankers Life Assur. Co. of Fla. v. 2275 West Corp.*, 905 So. 2d 189, 192 (Fla. 3d DCA 2005) (explaining the purpose of the statute of repose).

Contrary to the Association's argument, the acceleration of the loan has no bearing on the life of a mortgage lien. *See Poole*, 2014 WL 3378344, at *5 (rejecting argument that accelerated maturity date determined the life of mortgage lien). The statute makes no mention of acceleration. Moreover, using the accelerated maturity date as the point of reference would create uncertainty because the public record would not reflect an accelerated maturity date. It would also conflict with Section 95.281 because it would require the public, in order to confirm the duration of a lien, to investigate whether the loan had been accelerated. *See Zinkoff v. Von Aldenbruck*, 765 So. 2d 840, 843 (Fla. 4th DCA 2000) (noting that Section 95.281 imposes no such duty to investigate).

2. *The Association fails to distinguish between the statute of repose and statute of limitations.*

Second, the Association confuses the statute of repose set forth in Section 95.281(1)(a), with the statute of limitations provided in Section 95.11(2)(c). As explained by the court in *Houck Corp. v. New River, Ltd., Pasco,* Section

95.281(1)(a) establishes an ultimate date when the mortgage lien is no longer enforceable, regardless of whether a claim has accrued by that date. 900 So. 2d 601, 603 (Fla. 2d DCA 2005). In contrast, Section 95.11(2)(c) sets forth the five-year statute of limitations for mortgage foreclosure. *Id*. The statute of limitations does not impact the duration of a lien. *Id*. Notably, this Court has adopted the foregoing principles enunciated in *Houck*. *See Am. Bankers*, 905 at 192.

Despite the distinct separate purposes of Sections 95.281(1)(a) and 95.11(2)(c), the Association claims that the statute of limitations not only barred foreclosure of the Mortgage, but extinguished Deutsche Bank's lien on the Property. There is no legal support for this reasoning. The District Court for the Southern District of Florida, following *Houck*, recently rejected a similar argument. In *Matos*, the plaintiffs claimed that the mortgage lien expired because five years had passed since the filing of the lender's initial acceleration and foreclosure action, which had been dismissed. 2014 WL 3734578, at *3. The court, however, held that the lender maintained its lien on the property under Section 95.281(1) regardless of whether the five-year statute of limitations set forth in Section 95.11(2)(c) would bar a future foreclosure action. *Id*. It explained that the statute of limitations does not impact the life of a lien, and thus, the lender's lien remained on the property until September 1, 2041, "five years after the maturity date contained in the recorded mortgage." *Id*.

Following the plain language of Section 95.281(1) and Florida case law, the recorded maturity date is the proper benchmark to determine the life of Deutsche Bank's lien on the Property. The Mortgage provides a maturity date of March 1, 2036, as reflected on the recorded Mortgage. (App. to Initial Brief, Ex. 1 at 2.) As such, Deutsche Bank's mortgage lien remains on the Property until March 1, 2041, regardless of whether or not the time period under Section 95.11(2)(c) to foreclose the Mortgage has expired.[8]

C. Deutsche Bank Preserved Its Arguments for Appeal

Deutsche Bank is entitled to raise its arguments on appeal. Contrary to the Association's contention, Deutsche Bank argued below that: (1) the mortgage lien remained valid regardless of whether the statute of limitations barred foreclosure; (2); cancellation of the mortgage lien violated due process; and (3) it would be inequitable for the Association to obtain title to the Property free and clear of Deutsche Bank's $1.4 million mortgage lien (the "Lien Arguments"). Specifically,

[8] The cases cited by the Association do not compel otherwise. *Casino* does not address Section 95.281 or the duration of a mortgage lien. 566 So. 2d 1313. *Conner* involves a note that does not contain an acceleration clause; it also does not render a decision on the duration of the lien. 349 So. 2d at 782. While the Association follows the reasoning in *In re Brown*, it is noteworthy that the opinion involved an uncontested motion and confuses the statute of limitations with the statute of repose. No. 8:13-bk-09074, 2014 WL 983532, at *1 (M.D. Fla. Bank. Feb. 11, 2014). Furthermore, if the Association's analysis was correct, then there would be no reason for Section 95.281; under the Association's logic, both the statute of limitations and the statute of repose would expire at the same time—*i.e.*, five (5) years after acceleration.

following the hearing on the Association's motion for summary judgment, the Association presented the Court with a proposed order cancelling the Note and Mortgage even though this action was not raised in the motion or even at the hearing. Deutsche Bank's counsel, therefore, expressed concern that the Association's proposed order went far beyond the requested relief and the lower court's ruling. (R. 190 at 12: 9-17.) Her objection clearly pertained to the nullification of the Note and Mortgage as this was the only new issue set forth in the proposed order. Furthermore, in its motion for rehearing, Deutsche Bank urged that it would be inequitable for the Association to obtain a "free house." (R. 148.) As Deutsche Bank raised these arguments in the lower court, the Court should consider them on appeal.

Even if the Court were to determine that the Lien Arguments were not properly raised below, the Court should still hold that Deutsche Bank maintains its mortgage lien on the Property until March 1, 2041. While a party may not generally present a theory for the first time on appeal, Florida law recognizes an exception when the appealed ruling constitutes "fundamental error." "Fundamental error . . . is error which goes to the foundation of the case or goes to the merits of the cause of action. … [F]or error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process." *Hooters of Am., Inc. v. Carolina Wings, Inc.*, 655 So. 2d 1231, 1235

(Fla. 1st DCA 1995) (internal citations omitted). Here, the lower court's nullification of the Note and Mortgage constitutes fundamental error because it wrongfully deprives Deutsche Bank of its right to recover its $1.4 million lien on the Property. As discussed above, Florida law clearly establishes that Deutsche Bank maintains a lien on the Property until March 1, 2041.[9]

The Court should also consider Deutsche Bank's additional two arguments that emanate from the principles announced in *Singleton*, a seminal case that Deutsche Bank raised in the lower court. Deutsche Bank recognizes that the following arguments were not specifically raised in the lower court: (1) there was no acceleration of the Mortgage because there was no final judgment; (2) a new statute of limitations to foreclose the Mortgage began once the Association acquired title to the Property. These arguments, however, merit consideration because they are consistent with *Singleton's* premise that the terms of a mortgage dictate the commencement of the statute of limitations to pursue a foreclose action. As discussed above, Sections 19 and 22 of the Mortgage provide that acceleration is incomplete until the entry of a final judgment because until that time, the Borrower maintains his right to halt acceleration via reinstatement. Additionally, Section 18 of the Mortgage provides that the Association's acquisition of title

[9] It is noteworthy that the lower court did not address Florida's statute of repose, Section 95.281, or *Houck* when it improperly cancelled the Note and Mortgage.

without Deutsche Bank's consent constitutes a separate and distinct default. *See Kaan*, 2013 WL 5944074, at *3 (holding that even if the statute of limitations barred enforcement based on payment defaults, the lender could still enforce its lien should the borrower breach the mortgage by transferring the property without the lender's consent).

III. CONCLUSION

For the foregoing reasons, Deutsche Bank respectfully requests that the Court enter an Order: (1) reversing the lower court's Summary Judgment Order; (2) holding that the statute of limitations does not bar Deutsche Bank's right to enforce the Note and Mortgage; (3) holding that Deutsche Bank maintains a valid mortgage lien on the Property until March 1, 2041; (4) remanding this matter to allow Deutsche Bank to proceed with its foreclosure action; and (5) awarding Deutsche Bank its attorneys' fees and costs pursuant to the terms of the Mortgage.

Dated: August 25, 2014

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APPELLANT'S MOTION FOR REHEARING EN BANC, OR, IN THE ALTERNATIVE, MOTION FOR CERTIFICATION

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO: 3D14-575

DEUTSCHE BANK TRUST COMPANY AMERICAS,
AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE
INVESTMENT TRUST 2006-2,

Appellant,

v.

HARRY BEAUVAIS, AND AQUA MASTER ASSOCIATION, INC.,
A NON-PROFIT FLORIDA CORPORATION,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA
L.T. CASE NO: 12-49315-CA-05

APPELLANT'S MOTION FOR REHEARING EN BANC, OR, IN THE ALTERNATIVE, MOTION FOR CERTIFICATION

Pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331(d), Appellant Deutsche Bank Trust Company Americas, as Indenture Trustee for American Home Mortgage Investment Trust 2006-2 ("Deutsche Bank") respectfully requests the Court to order a rehearing en banc of the panel's December 17, 2014 opinion because this case and related issues are of exceptional

importance. First, the outcome of this case and its issues significantly impacts the community and will affect the ability of other litigants to seek their own remedies. Second, the panel's opinion directly conflicts with state and federal opinions applying Florida Supreme Court precedent which have addressed the statute of limitations. Third, this case and the issues therein impact Florida jurisprudence regarding the statute of limitations.

In the alternative, Deutsche Bank respectfully requests the Court to certify that (1) the panel's opinion passes upon a question of great public importance; and (2) the panel's opinion is in direct conflict with *U.S. Bank Nat. Ass'n v. Bartram*, 140 So. 3d 1007 (Fla. 5th DCA 2014), *cert. granted*, Nos. SC14-1265, SC14-1266, SC14-1305 (Fla. Sept. 11, 2014). In support thereof, Deutsche Bank states as follows:

I. REHEARING EN BANC IS PROPER BECAUSE BOTH THE CASE AND ISSUES ARE "OF EXCEPTIONAL IMPORTANCE"

A rehearing en banc of the panel's opinion is appropriate because "the case or issue is of exceptional importance." Fla. R. App. P. 9.331(d)(1).[1] As discussed

[1] Rule 9.331(d)(1) was recently amended to add the "or issue" language; previously, the language had only read, "the case is of exceptional importance." The legislative history indicates that this language was broadened in reaction to "[s]ome disagreement … in the case law" as to what the "case is of exceptional importance" phrase means. Eduardo I. Sanchez et al., Appellate Court Rules Committee, *In Re: Amendments to the Florida Rules of Appellate Procedure, Three-Year Cycle Report of the Appellate Court Rules Committee*, at 16 (Feb. 3, 2014) (citing *Univ. of Miami v. Wilson*, 948 So. 2d 774, 788-92 (Fla. 3d DCA

below, both this case and the issues in this case are exceptionally important for three reasons.

A. FIRST, this case, and the issues therein, are "exceptionally important" because of their impact on a large part of the community.

As this Court has set forth, a case is of "exceptional importance" if:

> (1) the outcome of the case (or its notoriety) is of greater moment or impact within the community rather than its effect upon the law of the state, **and** either (a) the case is important beyond the effect it will have on the litigants or (b) will affect the ability of other potential litigants to seek their own remedies, **or** (2) the outcome of the case may reasonably and negatively influence the public's perception of the judiciary's ability to render meaningful justice.

University of Miami v. Wilson, 948 So. 2d 774, 791 (Fla. 3d DCA 2006) (Shepherd, J., concurring) (emphasis original).

This standard is satisfied here. Because the South Florida area has exceptionally high foreclosure rates,[2] "the outcome of the case (or its notoriety) is

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2006)), *available at* http://www.floridabar.org/cmdocs/cm205.nsf/WDOCS/713727942EEEC409852577FA0049B4C5.

[2] In the first six months of 2014, there were 5,031 foreclosure filings in Miami-Dade County. *See* Clerk of the Courts of Miami-Dade County, Florida, *2014 Foreclosure Filing Statistics*, *available at* http://www.miami-dadeclerk.com/property_mortgage_foreclosures.asp. Based on these 5,031 foreclosure filings, RealtyTrac—a real estate information company that tracks foreclosure statistics—reported that "Miami posted the nation's highest metro foreclosure rate: 1.65 percent of all housing units (one in 61) with a foreclosure filing during the first half of the year." *U.S. Foreclosure Decreases 2 Percent in June to Lowest Level Since July 2006, Before Housing Bubble Bust*, RealtyTrac, July 15, 2014, *available at* http://www.realtytrac.com/content/foreclosure-market-

of greater moment or impact within the community," and the case is "important beyond the effect it will have on the litigants." *Wilson*, 948 So. 2d at 791. Furthermore, because this case involves statute of limitations issues, it clearly "will affect the ability of other potential litigants to seek their own remedies." *Id*. As this Court has now, for the first time, determined that there is a distinction between a dismissal with or without prejudice in connection with the application of the statute of limitations, the Court's opinion significantly impacts the tens of thousands of foreclosure cases that may have been dismissed under either scenario.

With thousands of foreclosures actions in Miami-Dade County (there have been 8,656 foreclosure filings in 2014 alone so far[3]), the panel's decision could very well affect thousands of litigants in the community. For example, it is likely

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report/june-and-midyear-2014-us-foreclosure-market-report-8111. This trend has continued in the third quarter of 2014, with the Miami Herald reporting that "[t]he Miami area had the highest foreclosure rate among the nation's 20 largest metropolitan areas, with one in every 359 homes receiving some type of filing in August." Martha Brannigan, *Florida still leads in foreclosure activity*, Miami Herald, Sept. 11, 2014, *available at* http://www.miamiherald.com/news/business/article2085626.html. Based on the August 2014 foreclosure statistics, the Miami Herald reported that "[t]he Miami area's foreclosure rate, which measures the percentage of mortgages in some stage of foreclosure, is still *more than triple* the national rate." Martha Brannigan, *Miami Chipping Away at Foreclosures*, Miami Herald, Oct. 23, 2014 (emphasis added), *available at* http://www.miamiherald.com/news/business/real-estate-news/article3332508.html.

[3] *See* Clerk of the Courts of Miami-Dade County, Florida, *2014 Foreclosure Filing Statistics, available at* http://www.miami-dadeclerk.com/property_mortgage_foreclosures.asp.

that many of the pending and to-be-filed foreclosure actions represent a subsequent foreclosure action that the lender filed against the same borrower based on a new default.[4] Under the panel's decision, these lenders now are faced with the prospect that their current action may be barred by the statute of limitations because their first action was dismissed without prejudice, while other actions dismissed with prejudice may proceed.

To the extent some of the foreclosure actions represent the lender's *first* foreclosure action against the borrower, the panel's decision also carries significant practical ramifications. Prior to the panel's decision, the lenders would normally seek a dismissal of their foreclosure action if they were unable to proceed (e.g., no proper notice of acceleration, inability to obtain original note), and would seek such dismissal *without* prejudice. Now, under the panel's decision, lenders are, for the first time, forced into the scenario wherein they are encouraged to seek a dismissal *with* prejudice, in order to avoid the implications of this opinion.[5]

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[4] In reaction to the 2007 debt crisis, "many lenders voluntarily dismissed up to *thousands* of foreclosure actions, thinking it better to collect their original loan documents and refile another day" and "the courts involuntarily dismissed *innumerable* foreclosure actions to clear their overcrowded dockets." Andrew J. Bernhard, *Deceleration: Restarting the Expired Statute of Limitations in Mortgage Foreclosures*, 80 Fla. B.J. 30, 31 Sept./Oct. 2014 (emphasis added), *available at* http://www.floridabar.org/cmdocs/cm205.nsf/WDOCS/713727942EEEC409852577FA0049B4C5.

[5] As another practical ramification, the panel's decision allows for absurd results. A lender who dismisses two successive foreclosure actions without prejudice would be able to file a ***third*** foreclosure action because the second dismissal would

Moreover, the only decisions of this State prior to this opinion to consider the impact of a dismissal without prejudice as opposed to a dismissal with prejudice have expressly held that the distinction is "not material" or is "irrelevant" to the determination of the running of the statute of limitations. *See supra*, §I.B.

This case, therefore, presents "a textbook example" of an exceptionally important case that impacts a large portion of the community. *See Fla. Dept. of Agric. & Consumer Servs. v. Lopez-Brignoni*, 114 So. 3d 1135, 1136 (Fla. 3d DCA 2013) (Logue, J., dissenting) (a decision that impacts "83,630 homeowners whose trees were destroyed and the budget of the State of Florida" is a "textbook example" of a case that should be considered en banc under the *Wilson* standard); *see also In re Doe*, 973 So. 2d 548, 555-56 (Fla. 2d DCA 2008) (Casanueva, J., concurring) ("Cases of exceptional importance that merit en banc consideration have to do with the issues that impact a larger share of the community… .").[6] It

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operate as a dismissal with prejudice. *See* FLA. R. CIV. P. 1.420(a)(1) (providing that a second dismissal operates as an adjudication on the merits, i.e., dismissal with prejudice). In contrast, another lender who only dismisses a foreclosure action once would be barred from proceeding with a successive foreclosure action because the initial dismissal was without prejudice. It is difficult to reconcile how a lender who dismisses an action twice may enforce its mortgage, but a lender who only dismisses once is barred from doing so under the panel's opinion.

[6] Federal Rule of Appellate Procedure 35 likewise provides for en banc determination if "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2). The federal cases interpreting the "exceptional importance" standard under Rule 35 suggest "two general types of cases that the federal courts have found worthy of en banc review: (1) *cases that may affect large numbers of persons*, and (2) cases that interpret fundamental legal or constitutional

also impresses the need for the Court to provide guidance to the lending industry as it wades through the uncharted consequences of this opinion. As stated in *Lopez-Brignoni*: "A mistake now will hurt tens of thousands of homeowners and even more taxpayers. In such circumstances, we would be prudent to follow the old adage of carpenters '*to measure twice and cut once*.'" 114 So. 3d at 1136 (emphasis added).

B. SECOND, the "exceptional importance" standard is also satisfied because the panel's opinion conflicts with a rule of law announced by other courts.

Another way in which a case may satisfy the "exceptional importance" standard under Rule 9.331(d) is if the panel's opinion conflicts with a rule of law announced by other courts. *See State v. Diamond*, 553 So. 2d 1185, 1199 (Fla. 1st DCA 1988) (Ervin, J., concurring) ("I consider that the case at bar falls within the 'exceptional importance' category, because I regard the panel's decision…to conflict with a rule of law announced in certain decisions of the Florida Supreme Court … and of the Second District Court of Appeal.").

This standard is met here. The panel has already certified conflict with *Evergrene*, a Fourth District Court of Appeal decision. *See Deutsche Bank Trust Co. Ams. v. Beauvais*, 2014 WL 7156961, at *10 (Fla. 3d DCA Dec. 17, 2014)

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rights." *In the Interest of D.J.S. et al.*, 563 So. 2d 655, 657, n.2 (Fla. 1st DCA 1990) (emphasis added).

("We certify conflict with *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So. 3d 954, 956 (Fla. 4th DCA 2014).").

Additionally, the panel's focus on a dismissal without prejudice versus a dismissal with prejudice squarely conflicts with the Fifth District Court of Appeal. *Beauvais*, 2014 WL 7156961 at *6 (emphasis added). In *Bartram*, the Fifth District Court of Appeal concluded that the distinction between an initial foreclosure action being dismissed "without prejudice" as opposed to "with prejudice" is "***not material***." *Bartram*, 140 So. 3d at 1013 n.1 (emphasis added) ("We acknowledge that the Bank suffered a dismissal with prejudice of its earlier foreclosure action, unlike the dismissal [without prejudice] in *Dorta*, but conclude that ***the distinction is not material*** for purposes of the issue at hand.").[7] In its opinion, however, this Court found that the "without prejudice" and "with prejudice" distinction is a "***dispositive*** distinction" and stated:

> In *Bartram* (as in *Singleton*), a new default (and therefore a new cause of action) existed ***only*** because the dismissal of the first action was

[7] It is unclear whether the trial court's dismissal of the first foreclosure action in *Bartram* was in fact with or without prejudice. Of note, all three petitioners in the *Bartram* case have argued to the Florida Supreme Court that the order was "without prejudice," not "with prejudice." *See* Initial Br. of Patricia Bartram, 2014 WL 5858489, *12, n.12 (Fla. Nov. 5, 2014) ("Although the sole footnote in the [5th DCA's] opinion seems to indicate that the dismissal of U.S. Bank's foreclosure was with prejudice,…the dismissal was actually without prejudice."); Initial Br. of Plantation at Ponte Vedra, Inc., 2014 WL 5858491 (Fla. Nov. 5, 2014); Initial Br. of Lewis Brooke Bartram, 2014 WL 5858492 (Fla. Nov. 7, 2014).

> with prejudice, constituting an adjudication on the merits and a determination that there was no valid acceleration.

Beauvais, 2014 WL 7156961, at *6 (emphasis added). These statements by the Court are directly contrary to the opinion of *Bartram*.

Federal courts interpreting Florida Supreme Court and District Court of Appeal opinions have similarly rejected any distinction between a dismissal without prejudice and a dismissal with prejudice. For example, in *Espinoza v. Countrywide Home Loans Servicing, L.P.*, the Southern District of Florida concluded that the distinction between "without prejudice" and "with prejudice" is "***irrelevant***" and found no persuasive reason why it should "impact the enforceability of the underlying debt." Case No. 14–20756–CIV–Altonaga, 2014 WL 3845795, at *4 (S.D. Fla. Aug. 5, 2014) (emphasis added). The *Espinoza* court further noted:

> Nor does the Court discern why a mortgagee's decision to accelerate the loan by letter, file a foreclosure lawsuit, and then dismiss it without prejudice—as here—differs from a mortgagee's decision to accelerate the loan by filing a foreclosure lawsuit and then dismissing it without prejudice—as in *Dorta*.

Id. Interpreting *Singleton v. Greymar Assoc.*, the Middle District of Florida in *Dorta v. Wilmington Trust Nat'l Ass'n* also explained that an unsuccessful foreclosure action—for any reason—does not prevent the lender from seeking foreclosure based on a separate default:

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

Case No. 5:13-cv-185-Hodges, 2014 WL 1152917, at *5-7 (M.D. Fla. Mar. 24, 2014) (emphasis added) (internal footnote omitted).

Besides directly and expressly conflicting with *Evergrene*, *Bartram Espinoza* and *Dorta*, the panel's opinion also implicitly conflicts with the approximately 15 other federal and state cases that have considered this issue and did not raise the distinction between "without prejudice" and "with prejudice" as an important distinction, let alone as dispositive.

Moreover, this Court's distinction between a dismissal with and without prejudice is incompatible with *Singleton* and *Olympia*. In *Olympia*, the Fourth District Court of Appeal stated: "By voluntarily dismissing the suit, Olympia in effect decided not to accelerate payment on the note and mortgage at that time." *Olympia Mortg. Corp. v Pugh*, 774 So. 2d 863, 866 (Fla. 4th DCA 2000). The Florida Supreme Court in *Singleton* quoted the crucial portion of *Olympia* with

approval as follows: "We disagree that the election to accelerate placed future installments at issue." 882 So. 2d 1004, 1007 (Fla. 2004) (quoting *Olympia*, 774 So. 2d at 866). It is simply not possible to reconcile these clear and unequivocal statements with the opinion in this case.

C. THIRD, this case and its issues are "exceptionally important" to Florida jurisprudence regarding the statute of limitations.

A rehearing en banc is proper if the case impacts "the jurisprudence of the State as a judicial precedent." *See State v. Georgoudiou*, 560 So. 2d 1241, 1247-48 (Fla. 5th DCA 1990) (Cowart, J., dissenting) ("'Exceptional importance' must be interpreted to mean a case exceptionally important to the jurisprudence of the State as a judicial precedent.").

The panel's decision greatly impacts the jurisprudence of this state regarding the statute of limitations in the mortgage foreclosure context. Specifically, the panel's decision is the first of its kind in the State to hold that the distinction between an initial foreclosure action being dismissed "without prejudice" and being dismissed "with prejudice" is an issue, much less a determinative issue. If the panel's decision is allowed to stand, it would set a judicial precedent regarding the "with or without prejudice" distinction that could affect the developing jurisprudence in Florida regarding this issue, including the Florida Supreme Court's current consideration of the *Bartram* case.

II. IN THE ALTERNATIVE, THE COURT SHOULD CERTIFY THAT THE PANEL'S OPINION PASSES UPON A QUESTION OF GREAT PUBLIC IMPORTANCE, AND IS IN DIRECT CONFLICT WITH *BARTRAM*

Should the Court not grant a rehearing en banc, Deutsche Bank requests the Court to make two certifications as set forth below.

A. The panel's decision passes upon a question of great public importance.

Florida Rule of Appellate Procedure 9.030(a)(2)(v) allows discretionary jurisdiction of the Florida Supreme Court to review decisions of district courts of appeal that "pass upon a question certified to be of great public importance."

A determination for the first time that the running of the statute of limitations is impacted by whether the first foreclosure action was dismissed with or without prejudice and that a dismissal without prejudice causes the statute of limitations to continue to run, but a dismissal with prejudice does not, is a decision of great public importance impacting numerous foreclosure actions. Prior to this opinion of the panel, a litigant relying on existing decisions would have properly determined that a dismissal of the lawsuit was a termination of the prior acceleration, and whether or not such a termination was with or without prejudice would simply be irrelevant.

As discussed above, because foreclosure actions are prevalent in the Miami area (and Florida in general), the issue in this case impacts a large portion of the

community, and is therefore "of great public importance." *See* discussion *supra* Part I.A.

B. The panel's decision directly conflicts with *Bartram*.

Florida Rule of Appellate Procedure 9.030(a)(2)(vi) allows discretionary jurisdiction of the Florida Supreme Court to review decisions of district courts of appeal that "are certified to be in direct conflict with decisions of other district courts of appeal."

As explained above, the panel has already announced its conflict with the Fourth District Court of Appeal's *Evergrene* decision. *See Beauvais*, 2014 WL 7156961, at *10. The panel's decision also directly conflicts with the Fifth District Court of Appeal's decision in *Bartram*. In this case, the panel held that the "without prejudice" and "with prejudice" distinction is a "***dispositive*** distinction." *Beauvais*, 2014 WL 7156961 at *6 (emphasis added). By contrast, in *Bartram*, the Fifth District Court of Appeal held that such a distinction is "***not material for purposes of the issue at hand***." *Bartram*, 140 So. 3d at 1013 n.1 (emphasis added). [8]

[8] Also, as explained above, it is possible that the initial foreclosure action in *Bartram* was dismissed without prejudice, not with prejudice. *See supra* note 7 and accompanying text. This could serve as an additional ground to certify conflict between the panel's opinion and the *Bartram* decision.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Deutsche Bank respectfully requests the Court to grant a rehearing en banc of the panel's December 17, 2014 opinion, or, in the alternative, certify that (1) the panel's opinion passes upon a question of great public importance; and (2) the panel's opinion is in direct conflict with *Bartram*.

Required Statement Under Rule 9.331(d)(2)

I express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic mail and U.S. Mail this 2nd day of January 2015, to the below-named addressees:

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CERTIFICATE OF COMPLIANCE

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

s/ William P. McCaughan
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