Bronx County Clerk's Index No.: 302647/16

Court of Appeals State of New York

JUAN VARGAS,

Plaintiff-Respondent,

-against-

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Defendant-Appellant.

DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPELS

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STATE OF NEW YORK
COURT OF APPEALS

---X

JUAN VARGAS,

Plaintiff-Respondent,

-against-

DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR11, MORTGAGE PASS-THROUGH CERTIFICATES Series 2005-AR11,

Defendant-Appellant.

---X

Bronx County Clerk's
Index No. 0302647/2016

Appellate Division
1st Department
Index No. 302647/2016

NOTICE OF MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS

PLEASE TAKE NOTICE that upon the accompanying memorandum of law, DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR11, MORTGAGE PASS-THROUGH CERTIFICATES Series 2005-AR11 will move this Court at the Courthouse locate at 20 Eagle Street, Albany, New York 12207, at 10:00 a.m. on July 22, 2019 or soon thereafter for an order pursuant to CPLR 5602(a) granting leave to appeal the Appellate Division, First Department's Order, entered June 10, 2019, denying leave to appeal the Appellate Division, First Department's Court's Decision and Order to affirm the Order of the Supreme Court, Bronx County (Julia

I. Rodriguez, J.) granting Plaintiff Juan Vargas's cross motion for summary judgment and declaring Plaintiff's property free and clear of all liens and encumbrances, entered on October 23, 2017.

Dated: New York, New York
July 2, 2019

GREENBERG TRAURIG, LLP

By: ____________________
Brian Pantaleo, Esq.
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Attorneys for Defendant-Appellant Deutsche Bank

DISCLOSURE STATEMENT (22 N.Y.C.R.R. § 500.1[f])

Deutsche Bank Trust Company is a wholly-owned subsidiary of Deutsche Bank Holdings, Inc., which is a wholly-owned subsidiary of Deutsche Bank Trust Corporation, a wholly-owned subsidiary of Deutsche Bank AG (NYSE:DB), a banking corporation organized under the laws of the Federal Republic of Germany. No publicly held corporation owns 10% or more of Deutsche Bank AG's stock.

STATE OF NEW YORK
COURT OF APPEALS

--X

JUAN VARGAS,

Plaintiff-Respondent,

-against-

DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR11, MORTGAGE PASS-THROUGH CERTIFICATES Series 2005-AR11,

Defendant-Appellant.

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Bronx County Clerk's
Index No. 0302647/2016

Appellate Division
1st Department
Index No. 302647/2016

MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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INTRODUCTION

Defendant-Appellant Deutsche Bank files this motion for leave to appeal. This is a quiet title action to strike a mortgage on statute of limitations grounds, involving the purely legal issue of whether a default letter stating the lender "will accelerate" a loan invokes a mortgage's acceleration clause. The First Department held that it does. And the Second Department has expressly rejected that holding.

This decisive department split implicates an important legal issue. Since 1932, this Court has required acceleration notice to be clear and unequivocal. If the same words in letter accelerate the loan in one department, but do not in the other departments, it is not clear – by definition. Clarity, therefore, requires uniformity.

Further, the split has far-reaching consequences for mortgages statewide. To foreclose upon a secured interest in property, most residential mortgage holders must send a default letter. Because these letters are so prevalent, the department split affects at least two-in-three residential mortgages in the state. Both lenders and borrowers need a clear rule alerting them as to the language that accelerate their mortgage loans.

Finally, the Court also held that Plaintiff-Respondent Juan Vargas's lender did not revoke acceleration. A clear rule determining what revokes revocation is also necessary to help borrower and lenders understand their legal rights – what language

or conduct revokes acceleration. In this sense, acceleration and revocation go hand-and-hand.

Therefore, for the reasons set forth below, this Court should grant leave to appeal.

TIMELINESS

On October 23, 2017, Vargas served Deutsche Bank with Notice of Entry of the Bronx County, Supreme Court (Julia I. Rodriguez, J.) Order granting final summary judgment in Vargas's favor ("Final Judgment"). A copy of which is attached as hereto Exhibit A. On November 17, 2019, Deutsche Bank filed a Notice of Appeal to the Appellate Division, First Department, appealing the Final Judgment. (*See* Exhibit B).

On August 15, 2018, Deutsche Bank perfected its appeal by filing an appellate brief under the First Department's Rules of Practice. (*See* Exhibit C). The First Department issued a Decision and Order affirming the Final Judgment on January 31, 2019. (*See* Exhibit D). On March 1, 2019, Deutsche Bank filed a Motion for Leave to Appeal to the Court of Appeals with the First Department, and served the motion upon Vargas's counsel. (*See* Exhibit E). The First Department denied this motion. And, on June 10, 2019, Vargas served a Notice of Entry of the First Department's Order Denying Leave to Appeal upon counsel for Deutsche Bank. (*See* Exhibit F).

Deutsche Bank files this motion for permissive leave to appeal under within 30-days of receiving service of that Notice of Entry. As such, this motion is timely under CPLR 5513(b).

JURISDICTION

This Court has jurisdiction over this motion and proposed appeal under CPLR 5602(a)(1)(i). The Final Judgment was a final determination canceling Deutsche Bank's lien upon Vargas's property.[1] The action originated in the Supreme Court in Bronx County (Julia I. Rodriguez, J.). The Decision and the Order of the Appellate Division, First Department on January 31, 2019 was a final determination affirming the Final Judgment. The Appellate Division's Decision and Order is not appealable by right. As such, this motion seeks leave to appeal to The Court of Appeals. And this Court has jurisdiction to grant permission to appeal a final judgment under CPLR 5602(a)(1)(i).

QUESTION PRESENTED

Is a lender's letter indicating that it "will accelerate" accelerate the balance on a mortgage loan, on a later date, clear unequivocal notice that it is actually accelerating the loan?

[1] The Final Judgment resulted from Vargas bringing the issue in this appeal before the Supreme Court in a Motion to Renew. In earlier proceedings, the Supreme Court denied both parties' motions for summary judgment, because factual issues existed. But after the First Department's *Royal Blue* opinion, the trial court found: "the Court is constrained to find that, based upon the language in the default let, plaintiff's entire mortgage debt was accelerated...and the statute of limitations commenced at that time." (Exhibit A, pages 1-2).

LEAVE TO APPEAL SHOULD BE GRANTED

I. STANDARD OF REVIEW: THIS APPEAL PRESENTS A NOVEL AND IMPORTANT QUESTION OF LAW AS EVIDENCE BY A SPLIT AMONG APPELLATE DEPARTMENTS.

In determining whether to grant leave to appeal to the Court of Appeals under CPLR 5602, appellate courts examine the legal and public policies issues that the appeal raises, and their novelty, difficult, and importance. *See In re Shannon B.*, 70 N.Y.2d 458, 462 (1987) (granting leave on an "important issue"); *People ex rel. Wood v. Graves*, 226 A.D. 714, 714 (3rd Dept. 1929) ("Motion to appeal granted as the questions of law presented are of general public importance and ought to be reviewed by the Court of Appeals.") *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949) (granting leave because of "[t]he importance of the decision" and "its far-reaching consequences"). Accordingly, courts will most often grant leave to appeal to address "novel and difficult questions of law having statewide importance." COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK OF THE COURT: 2010, at 2 (2011).

When two appellate departments disagree on the same issue, it can have far-reaching consequences statewide. The Rules of Practice of the Court of Appeals anticipate this – requiring a motion for leave to make a concise statement "that the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division."

22 NYCRR § 500.22 (c)(4)); *see also Funk v. Barry*, 89 N.Y.2d 364, 366 (1996) (Granting leave to appeal when the "Court acknowledged a split in authority among the Appellate Division Departments[.]"); *Quantum Corporate Funding, Ltd. v. Westway Industries, Inc.*, 4 N.Y.3d 211, 215 (2005) ("On appeal, the Appellate Division, Second Department, reversed the dismissal, acknowledging that its holding conflicts with the First Department's decision in *Fidelity*. Quantum then won summary judgment in Supreme Court. To resolve the split between Appellate Division departments, we granted Guaranty's motion for leave to appeal directly to this Court (*see* CPLR 5602[a][1] [ii]).").

Here, as set forth below, the appellate departments are split on an important legal issue with far-reaching consequences for New York borrowers and lenders. And thus, the Court should grant leave for this appeal.

II. THE DEPARTMENT SPLIT UNDERMINES A COURT OF APPEALS MANDATES THAT NOTICE OF ACCELERATION SHOULD BE CLEAR AND UNEQUIVOCAL.

This Court requires acceleration notice to be clear and unequivocal, and a split between appellate departments undermines such a mandate. In 1932, the Court of Appeals first addressed what lender conduct invokes the acceleration clause in a mortgage loan. *See Albertina Realty Co. v Rosbro Realty Corp.*, 258 N.Y. 472, 476 (1932). In *Albertina,* it determined – and it has been well settled since – that acceleration requires "an unequivocal overt act." *Id.*; *see also Wells Fargo Bank,*

N.A. v. Burke, 94 A.D.3d 980, 982-83 (2d Dep't 2012) ("Furthermore, the borrower must be provided with notice of the holder's decision to exercise the option to accelerate the maturity of a loan…and such notice must be 'clear and unequivocal'" (citations omitted)); *Clayton Natl. v Guldi*, 307 A.D.2d 982 (2d Dep't 2003) (same).

The First Department has now determined that the letter stating that the lender "will accelerate" accelerates the loan. *See Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529 (1st Dept 2017), *lv denied* 30 NY3d 960 (2017). And in the instant appeal, relying on that holding, the First Department reiterated:

> We have held that this language constitutes a clear and equivocal intent to accelerate the loan balance and commence the statute of limitations on the entire mortgage debt (*Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529 [1st Dept 2017], lv denied 30 NY3d 960 [2017]).

(*See* Exhibit D, page 35). Moreover, in 2017, this Court denied leave to appeal *Royal Blue*.

But since that time, Second Department has expressly rejected *Royal Blue* – and by extension, the First Department's holding in the instant appeal as well. *See Milone v. US Bank National Association*, 164 A.D.3d 145, 152 (2d Dep't 2018). The *Milone* court held:

> The language in the letter, that the plaintiff's failure to cure her delinquency within 30 days "will result in the acceleration" of the note, was merely an expression of future intent that fell short of an actual acceleration (*see Bank of Am., N.A. v. Luma*, 157 A.D.3d 1106, 69 N.Y.S.3d 170; *21st Mtge. Corp.*

> *v. Adames*, 153 A.D.3d 474, 60 N.Y.S.3d 198). The notice to the plaintiff was not clear and unequivocal, as future intentions may always be changed in the interim. In making this finding, we respectfully disagree with our colleagues in the Appellate Division, First Department, who addressed similar language and held otherwise in *Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529, 48 N.Y.S.3d 597.

(emphasis added) *Id.*

So this express split between departments makes it unclear whether "will accelerate" means the lender is accelerating the loan in 30 days, or simply contemplating a future event. If the same notice language can be interpreted two different ways, in deferent departments, by definition it is not clear and unequivocal – as this Court requires. *See Albertina*, 258 N.Y. at 476. And thus, the Court of Appeals should resolve this split between its appellate departments.

III. THE LANGUAGE THAT ACCELERATES A MORTGAGE LOAN IS ALSO UNCLEAR IN THE OTHER DEPARTMENTS.

Confusion and inconsistency has arisen in the other departments as well. Notably, the *Milone* court relied upon the Third Department's recent decision in *Bank of America v. Luma*, 157 A.D.3d 1106, 1107 (3d Dep't 2018) to support the premise that a "will accelerate" letter is an expression of future intent – and not clear and unequivocal. *Milone* 164 A.D.3d at 152. In *Luma*, the Third Department evaluated cases from the other departments to determine that a letter that did not "indicate that immediate payment was demanded" did not invoke the mortgage's acceleration clause. *Id.* at 1106-7. Specifically, *Luma* cited the Fourth Department's

holding in *Fowler*, requiring for acceleration that "all sums due under the note and mortgage were *immediately* due and payable[.]" (emphasis added) *Chase Mortgage Co. v. Fowler*, 280 A.D.2d 892, 894 (4th Dep't 2001). These cases are also consistent with the Third Department's holding in *Pidwell*, which stated:

> ...if Duvall [the foreclosure defendant] failed to make certain payments in the future, it *would* 'result in the entire balance of said Note and Mortgage being called all due and payable.' (emphasis added)

Pidwell v. Duvall, 28 A.D.3d 829, 831 (3d Dep't 2006). ("Would" is the past tense for the word "will." WEBSTER'S II NEW COLLEGE DICTIONARY 1263 (Riverside University, ed., 1995)).

So cases from the Third and Fourth Department add to the ambiguity surrounding the specific language that accelerates a loan. And, therefore, this Court should grant leave to decide this issue for the entire state.

IV. THE SPLIT BETWEEN DEPARTMENT HAS A FAR-REACHING AFFECT ON EVERY MORTGAGE LOAN IN NEW YORK STATE.

The Court should grant leave to appeal, because the decision will have far-reaching consequences for more than a million mortgages in New York. Loan originators use a Form 3033 security instruments to draft a conventional Fannie Mae/Freddie Mac mortgages. *See* NEW YORK—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT, Form 3033, available at https://www.fanniemae.com/singlefamily/security-instruments. These Form 3033 mortgages contains the following provision:

> If Lender requires Immediate Payment in Full under this Section 18, Lender will give me a notice which states this requirement. The notice will give me at least 30 days to make the required payment. The 30-day period will begin on the date the notice is given to me in the manner required by Section 15 of this Security Instrument. If I do not make the required payment during that period, Lender may act to enforce its rights under this Security Instrument without giving me any further notice or demand for payment.

Id. at ¶ 18. So, this language – requiring a 30-day default notice letter – appears in every conventional Fannie Mae/Freddie Mac mortgage in the state.

In 2017, lenders originated 274,388 new mortgages in New York State.[2] 63.9% of these loans were conventional Fannie Mae/Freddie Mac mortgages, which have the notice requirement from Form 3033.[3] In other words, almost two-in-three residential home loans originated in New York require a lender to send a default letter as a pre-condition to foreclose. Protracting the annual statistics over fifteen years (half the life of a 30-year fixed rate mortgage), more than 1.5 million mortgages in the state require default letters.

With so many loans effected, a split – and inconsistencies – among the departments creates widespread confusion about borrower and lender rights under these mortgage contracts – regarding acceleration, the statute of limitations, accruing interest, and redemption rights. And thus, Court should allow leave for The Court of

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[2] *Total Number of Residential Real Property Mortgages Originated in New York State in 2017* (November 2018), available at https://www.dfs.ny.gov/banking/rrpm_originated_nys_2017.htm.

[3] https://www.consumerfinance.gov/data-research/hmda/.

Appeals to develop a clear rule setting forth a uniform acceleration language for mortgages through New York State.

V. FOR THE SAME REASON, THE COURT SHOULD ALSO GRANT LEAVE ON THE REVOCATION ISSUE.

For the reasons set forth above, the Court should also address the language, or conduct, that revokes a mortgage loan's acceleration. Here, the lender discontinued the foreclosure action, and sent a revocation letter. But the First Department determined these acts did not revoke acceleration. Specifically, it held:

> Moreover, given defendant's continued efforts, including sending letters attempting to collect from plaintiff the accelerated mortgage debt and informing him that any payments made in contribution to the entire debt "will not be deemed a waiver of the acceleration of [his] loan," there is no basis for a finding that discontinuance of the prior foreclosure action constituted an affirmative act by defendant to revoke the acceleration (see *NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept 2017]).

(See Exhibit D, page 35).

In deciding this revocation issue, the First Department squarely acknowledged this was an issue in the instant appeal. In other words, when it comes to a clear and unequivocal standard, acceleration and revocation, go hand-and hand.

Further, *Knoxville*, the Second Department noted that a "lender may revoke its election to accelerate…by an affirmative act of revocation occurring during the six-year statute of limitations period[.]" *Knoxville*, 151 A.D.3d at 1070. And that a motion for discontinuance in a foreclosure action raised "triable issue of fact" as to whether the lender engaged in an affirmative act – revoking acceleration. *Id.*

Therefore, a Court of Appeals opinion concerning revocation will have a far-reaching effect. Revocation analysis impacts *every* accelerated mortgage loan. And every loan in foreclosure was accelerated. From 2006 to 2009, the number of foreclosures filed annually in the New York Unified Court System jumped from 26,706 to 47,664. Office of the State Comptroller (OSC), *The Foreclosure Problem Persists* (August 2015), available at https://osc.state.ny.us/localgov/pubs/research15.htm. By February 2015, foreclosures pending in the state reached 92,070. *Id.* at * 2. This caseload represented 1.13 percent of housing units –or 1 in 88 units – statewide. *Id.* at *3.

Because revocation potentially impacts 1 in 88 homes in New York State, this Court should grant leave to allow the Court of Appeals to develop uniform jurisprudence as the "affirmative acts" that revoke acceleration as well. Deutsche Bank, therefore, respectfully requests the Court to grant leave to appeal on this issue as well.

CONCLUSION

Therefore, for these reasons set forth above, the Court should grant leave to appeal.

Dated: New York, New York
July 2, 2019

GREENBERG TRAURIG, LLP
Attorneys for Defendant-Appellant

By: ______________________
Brian Pantaleo, Esq.
MetLife Building, 200 Park Avenue
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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No. 302647/16

Juan Vargas,
Plaintiff,

-against-

Deutsche Bank National Trust Company,

Defendants.

DECISION & ORDER
GRANTING RENEWAL

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's motion to renew, pursuant to CPLR 2221(e)(2).

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation	3

Plaintiff's motion pursuant to CPLR 2221(e)(2) to renew this Court's Decision and Order dated April 5, 2017 ["the Order"], is **granted**, and upon renewal, the Order is hereby **vacated and recalled** and defendant's motion to dismiss the complaint, pursuant to CPLR 3211(a)(7), and plaintiff's cross-motion for summary judgment are decided as follows:

In the Order dated April 5, 2017 this Court found that a letter dated August 5, 2008 indicating that plaintiff's debt will be accelerated if he fails to cure his default within 32 days was "insufficient to establish as a matter of law that the mortgage debt was accelerated in September of 2008 rather than on January 16, 2009, when the foreclosure action was commenced by the filing of a summons and complaint." However, in *Deutsche Bank Nat. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529, 48 N.Y.S.3d 597 (2017) (rendered after plaintiff's cross-motion was submitted), the First Department found that letters stating that a loan balance "will" be accelerated unless the debtor cures his defaults within 30 days provide "clear and unequivocal notice" that the loan balance "will" be accelerated at the end of that 30-day period, and that, therefore, the statute of limitations began to run on the entire mortgage debt at the end of that 30-day period. As such, the Court is constrained to find that, based upon the

EXHIBIT "A"

language in the default letter, plaintiff's entire mortgage debt was accelerated in September of 2008 and the statute of limitations was commenced at that time. Accordingly, as plaintiff notes, the 2009 foreclosure action and subsequent discontinuance is of no moment.

In any event, defendant's own actions evidence that it did not consider the discontinuance of the January 2009 action in November 2013 to constitute a revocation of the acceleration of plaintiff's mortgage debt. Notably, in a letter to plaintiff's attorney dated July 8, 2014, defendant's attorney indicated that the total amount due on the mortgage debt, $475,261.87, must be paid on or before August 1, 2014. Also, contrary to defendant's contention, the three payments made by plaintiff on April 4, 2016, May 3, 2016 and June 6, 2016, respectively, do not restart the statute of limitations. In order that part payment shall have the effect of tolling a time-limitation period, it must be shown that there was a payment of a portion of an admitted debt, made and accepted as such, accompanied by circumstances which amount to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder. *See Lew Morris Demolition Co., Inc. v. Board of Education of the City of New York,* 40 N.Y.2d 516, 355 N.E.2d 369 (1976); *Banco Do Brasil v. State of Antigua and Barbuda,* 268 A.D.2d 75, 707 N.Y.S.2d 151(1st Dept. 2000). Here, plaintiff did not enter into a loan modification agreement with defendant and there exists no other written acknowledgment by plaintiff of the outstanding mortgage debt. The court also notes that plaintiff made no payments to defendant after June 6, 2016. As such, the six-year period within which defendant could timely commence a foreclosure action has expired.

Based upon the foregoing, defendant's motion to dismiss the complaint, pursuant to CPLR 3211(a)(7), is denied. Plaintiff's cross-motion for summary judgment is granted, and it is hereby

ORDERED, ADJUDGED AND DECREED that the Defendant and every person claiming thereunder are barred from all claims to an estate or interest superior to Plaintiff's interest in the subject property; and it is further

ORDERED, ADJUDGED AND DECREED that the mortgage to 530 Coster Street, Bronx, New York 10474, Block 2768, Lot 376, County of Bronx, City and State of New York,

dated May 9, 2005 and filed with the Office of the City Register of the City of New York on July 12, 2005 in CRFN#: 20050003888373 is unenforceable; and it is further

ORDERED, ADJUDGED AND DECREED that the subject property is free from any and all liens or encumbrances of any kind existing in favor of or claimed by the Defendant.

Dated: Bronx, New York
October 12, 2017

Hon. Julia I. Rodriguez, J.S.C.

NOTICE OF ENTRY

PLEASE take notice that the within is a true copy of an Order and Decision with Notice of Entry

duly entered in the office of the clerk of the within named Court on October 19, 2017

Dated: October 23, 2017

Yours, etc.
STEINBERG & ASSOCIATES

Attorneys for: Plaintiff, Juan Vargas

Office and Post Office Address
80-02 Kew Gardens Rd., Suite 300
Kew Gardens, New York 11415

TO: MARK GOLAB, ESQ.
MCCABE, WEISBERG & CONWAY, PC
145 Huguenot Street, Suite 210
New Rochelle, New York 10801
Email: MGolab@mwc-law.com
KMilan@mwc-law.com

Attorneys for: Defendant, Deutsche Bank National Trust Company

NOTICE OF SETTLEMENT

PLEASE take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the Judges of the within named Court, at

on

at M.

Dated:

Yours, etc.
STEINBERG & ASSOCIATES

Attorneys for:

Office and Post Office Address
80-02 Kew Gardens Rd., Suite 300
Kew Gardens, New York 11415

To:

Attorneys for:

Index Number: 302647 Year: 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

JUAN VARGAS,

Plaintiff,

– against –

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Defendant.

ORDER AND DECISION
WITH NOTICE OF ENTRY

Signature (Rule 130-1.1-a)

Herbert Noel Steinberg, Esq.

STEINBERG & ASSOCIATES
Attorneys and Counselors at Law

Attorneys for: Plaintiff, Juan Vargas

Office and Post Office Address, Telephone
80-02 Kew Gardens Rd., Suite 300
Kew Gardens, New York 11415
TEL: *(718) 263 – 2922*
FAX: *(718) 575 – 4070*

To:

Attorneys for:

Service of a copy of the within is hereby admitted

Dated:

Attorneys for:

SUPREME Court of the State of New York

County of BRONX

VARGAS, JUAN

-against-

NOTICE OF APPEAL

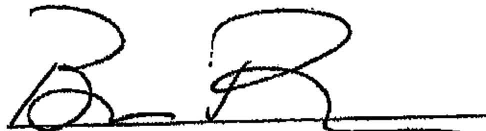
Index No.: 0302647/2016

DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR11, MORTGAGE PASS-THROUGH CERTIFICATES Series 2005-AR11

PLEASE TAKE NOTICE that *(insert your name)* DEUTSCHE BANK NATIONAL hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from a *(insert judgment, order, decree, etc.)* Decision & Order of the Supreme Court, Bronx County, dated October 12, 2017.

Dated: New York, New York
November 17, 2017

Yours, etc.,



Signature

GREENBERG TRAURIG, LLP

(Print Name) Brian S. Pantaleo

(Address) The MetLife Building, 200 Park Ave.

(Telephone Number) New York, NY 10166

(212) 801-9200

To: *(Insert below the name and address of the clerk of the trial court and the names and addresses of all opponents)*

Clerk of Court
Supreme Court of the State of New York
851 Grand Concourse
Bronx, NY 10451

Herbert Noel Steinberg, Esq.
Steinberg & Associates
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Kew Gardens, New York 11415

EXHIBIT "B"

Pantaleo, Brian (OfCnsl-WPB-LT)

From:	Isaac Brown <isaac@appellatepress.com>
Sent:	Wednesday, August 15, 2018 6:39 PM
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Bronx County Index Number: 302647/16

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Bronx County Clerk's Index No.: 302647/16

New York Supreme Court

Appellate Division—First Department

JUAN VARGAS,

Plaintiff-Respondent,

-against-

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

Defendant-Appellant Deutsche Bank National Trust Company as Trustee for IndyMac INDX Mortgage Loan Trust 2005-AR11, Mortgage Pass-Through Certificates Series 2005-AR11, appeals the trial court's order granting Plaintiff-Respondent Juan Vargas's summary judgment – on his motion to renew.

This appeal raises a single issue upon which at least two appellate departments disagree:

- Issue: Is a lender's letter, stating that it "will accelerate" a loan on a later date – as a matter of law – clear and unequivocal notice that the lender *is accelerating* the loan?
- Answer: No. A statement that an event *will occur* does not mean that that the event is actually happening.

PRELIMINARY STATEMENT

New York has a six-year statute of limitations for foreclosure actions. *See* CPLR § 213(4). It starts to run when a lender invokes its mortgage's acceleration clause. This acceleration requires a clear and unequivocal act, alerting the borrower that the lender is immediately accelerating the loan. In 86 years, the New York Court of Appeals has specifically identified only one act that accelerates a loan: filing a foreclosure complaint and lis pendens. Since that time – and more

frequently after the foreclosure crisis – New York's appellate departments have examined whether any other lender conduct could accelerate a mortgage loan.

The appellate departments are split on this issue. Although the First Department recently determined that a letter stating that a lender "will accelerate" a loan is clear and unequivocal notice – three other departments disagree.

Here, this First Department's opinion – i.e., *Royal Blue Realty* – was the basis for the trial court granting summary judgment in this quiet title lawsuit. Originally, the trial court denied Vargas's summary judgment motion, because it could not say that a letter containing the words "will accelerate" triggered the limitations period. After *Royal Blue Realty*, however, the trial court acknowledged that it was "constrained to find" that this 2008 letter accelerated Vargas's mortgage loan.

But this Court is under a lessor constraint. It may reexamine its own precedent when an earlier holding leads to an unworkable rule. Moreover, the Appellate Division is a single statewide court divided into departments for administrative convenience. Opinions from other departments may persuade this Court to reconsider *Royal Blue Realty*. And these opinions – including a clear split in the Second Department's *Adames* case – are far more compelling.

The Second Department, for instance, held that a notice letter using the words "will accelerate" only referenced a possible future event. This letter,

therefore, could not accelerate the loan. Moreover, by its ordinary English definition, the word "will" does not mean acceleration is certain to occur. So holding that "will accelerate" language actually accelerates a loan departs from a Court of Appeals imperative requiring a clear and unequivocal act.

Further, the specific letter in this case – suggesting that the lender will accelerate the loan if the default was not cured in 32 days – does not make the lender's intent to accelerate clear. Rather, it uses the word "may" interchangeably with "will." It also indicates that the lender will accelerate the loan at the *same time* that it files a foreclosure action – which did not happen on day 33. And in 2008 – where lenders were regularly offering foreclosure alternatives – acceleration exactly 33 days after the default notice would have been unlikely.

Finally, it is bad policy to hold that such language in a notice letter accelerates a loan. The trial court's order, if applied statewide, undermines the very stability in the course of events that CPLR § 213(4) is supposed to provide borrowers and lenders. And it leads to inconsistent results – making the same mortgage unenforceable in different locations in the state.

As a result, the Court should hold that such a letter did not accelerate Vargas's loan, reverse the trial court, and remand this matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

On May 9, 2005, Vargas borrowed $308,000.00. R 159-163.[1] He executed a promissory note for that amount on the same date. *Id.* Vargas's lender, First Estate Funding Corporation, secured the loan with a mortgage on the property located at 530 Coster Street, Bronx, New York. R 164-184. First Estate recorded this mortgage with the Bronx County Clerk's office on July 12, 2005. *Id.*

In 2007, Vargas defaulted on his payment obligations under this note and mortgage. R. 86, ¶ 6. On August 5, 2008, IndyMac Bank, FSB, First Estate's loan servicer, wrote to Vargas – advising that he had a "right to cure" his default within 32 days. R 35-36. This letter further stated:

> If you do not cure your default, we will accelerate your mortgage with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. Failure to cure your default may result in the foreclosure and sale of your property. A deficiency judgment may be obtained against you to collect the balance of the loan.

R 35. The letter also invited him to contact the Loan Resolution Department. R. 36. Specifically, it proposed:

> Should you have any questions concerning this notice please contact Cindy McGovern at Loan Resolution at 866-354-5947. Additionally, you may also contact a HUD-approved Housing Counseling agency toll-toll free at 1-800-569-4287 or TDD 1-800-877-8339 for the housing counseling agency nearest you.

Id.

[1] "R" refers to the Record on Appeal.

The record is silent on whether Vargas actually contacted Loan Resolution. But he did not cure. R 140. And on January 16, 2009, IndyMac – on its own behalf – filed a foreclosure complaint in the action *IndyMac Federal Bank FSB v. Vargas, et. al.*, Index No. 380086/09. R. 135-190.

The record is also unclear whether IndyMac held the note when it filed this lawsuit. R 63 & 203. Vargas's note has two indorsements. R 63. The most recent indicates that IndyMac indorsed the note in blank. *Id.* More significantly, the second indorsement is from First Estate to IndyMac. *Id.* And it has no date. *Id.* The only evidence on the record demonstrating when First Estate indorsed the note to IndyMac is a January 20, 2009 assignment to IndyMac. R 203. This assignment memorializes a transaction that occurred four days after IndyMac commenced the foreclosure lawsuit on January 16, 2009. R 135.

On November 25, 2013, IndyMac discontinued the foreclosure action. R 104-106. But in 2014, attorneys for Vargas and IndyMac remained in communication about a loan payoff. R 39-40. On March 6, 2015, IndyMac assigned this loan to Deutsche Bank. R 41. And Deutsche Bank continued discussing loan repayment options with Vargas. R 47-49. On March 25, 2016, Vargas completed a HAMP loan modification application. R 47-49. Vargas even started making his loan payments again in April 2016. R 118.

But in July 2016, Vargas stopped. *Id.* He, instead, filed the underlying quiet title action against Deutsche Bank. R 83-95. Vargas claimed that Deutsche Bank's mortgage lien was time-barred. *Id.* In doing so, his own complaint alleged that IndyMac filed the foreclosure action on January 16, 2009, but it did not receive assignment of the loan until January 20, 2009. R 85-86, ¶¶ 5-9.

On October 31, 2016, Deutsche Bank moved to dismiss. R 70-71. Among its arguments, Deutsche Bank asserted that IndyMac's 2009 foreclosure action did not accelerate the loan, because IndyMac lacked standing to file it. R 62-65. Vargas cross-moved for summary judgment on January 9, 2017. R 222. In this cross motion, Vargas argued that IndyMac's 2008 letter accelerated his loan, triggering the statute of limitations. R 238-238.

On April 5, 2017, the Honorable Julia I. Rodriguez denied both motions. R 41-46. Specifically, the trial court explained:

> ...Deutsche Bank contends that the prior acceleration of the mortgage by IndyMac is a nullity because IndyMac lacked standing to sue plaintiff at that time. Plaintiff contends that even if the prior acceleration of the mortgage by the commencement of the 2009 foreclosure action were a nullity, that is of no moment because the debt was accelerated when plaintiff fail[ed] to cure the default within the 32-days period set forth in the August 5, 2008 letter. Hence, according to plaintiff, the statute of limitations began to run at that time. However, the Court does not find the August 5, 2008 letter to be sufficient, in itself, to establish as a matter of law that the debt was accelerated in September of 2008 rather than...when the foreclosure action was commenced by the filing of the summons and complaint.

R 45. As such, the trial court recognized that factual issues existed with respect to whether IndyMac accelerated Vargas's mortgage loan. R 45-46. And it was unable to conclusively rule on whether IndyMac actually had standing to accelerate the loan in its 2009 foreclosure action. *Id.*

On July 11, 2017, Vargas filed a motion to renew his summary judgment motion. R 10-11. In this motion, Vargas argued that the First Department's March 16, 2017 decision in *Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529 (1st Dep't 2017) clarified the law. R 13-17. Specifically, Vargas asserted, "the 2009 foreclosure...is of no moment based upon the aforementioned score and pursuant to [*Royal Blue Realty*], that the default letter commenced the statute of limitations." R 22. To support his motion, Vargas dug up a trial court order from the *Royal Blue Realty* case – and the actual letter that the *Royal Blue Realty* trial court evaluated. R 28-24.

On October 12, 2017, the trial court reexamined IndyMac's 2008 letter, and determined that the "will accelerate" language actually accelerated the loan. R 7. The trial court explained:

> ...the Court is constrained to find that, based upon the language in the default letter, plaintiff's entire mortgage debt was accelerated in September of 2008 and the statute of limitations was commenced at that time. Accordingly, as plaintiff notes, the 2009 foreclosure action...is of no moment.

R 6-7. As a result, the trial court granted summary judgment – holding that, as a matter of law, the 2008 IndyMac letter accelerated the loan in September 2008. R 6-8. And it was irrelevant whether IndyMac had standing to accelerate the loan in the 2009 foreclosure action. *Id.*

Deutsche Bank appeals the trial court's October 2017 order.

ARGUMENT

POINT: I
INDYMAC'S 2008 LETTER REFERRING TO A POTENTIAL FUTURE EVENT IS NOT A CLEAR AND UNEQUIVOCAL ACT ACCELERATING A LOAN.

IndyMac's 2008 letter did not accelerate Vargas's loan. The trial court's original order was unable to conclude that this letter was a clear, unequivocal, and overt act sufficient to invoke a mortgage loan's acceleration clause. R 45-46. This left open the issue as to whether the 2009 action accelerated the loan – i.e. whether IndyMac had standing. *Id.*

But, in the motion to renew, the *Royal Blue Realty* case bound the trial court. R 6-7. As set forth below, this Court may reconsider and overrule that opinion. As such, the Court should reverse the trial court, remand this matter for further proceedings, and hold that IndyMac's 2008 letter did not clearly and unequivocal accelerate Vargas's loan – simply because it contained the phrase "will accelerate."

A. It takes a clear, unequivocal, and overt act – in contrast to IndyMac's letter – to accelerate a mortgage loan.

Acceleration requires a clear, unequivocal, and overt act. In 1932, the Court of Appeals first addressed what lender conduct invokes the acceleration clause in a mortgage loan. *See Albertina Realty Co. v Rosbro Realty Corp.*, 258 N.Y. 472, 476 (1932). In *Albertina,* the court determined – and it has been well settled since – that acceleration requires "an unequivocal overt act." *Id.*; *see also Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 982-83 (2d Dep't 2012) ("Furthermore, the borrower must be provided with notice of the holder's decision to exercise the option to accelerate the maturity of a loan...and such notice must be 'clear and unequivocal'" (citations omitted)); *Clayton Natl. v Guldi*, 307 A.D.2d 982 (2d Dep't 2003) (same).

Accordingly, the Court of Appeals found "that the unequivocal overt act of the plaintiff in filing the summons and verified complaint and lis pendens constituted a valid election." *Albertina*, 258 N.Y. at 476. And since that time, numerous cases have relied upon *Albertina* in holding that the commencement of a foreclosure action starts the running of the statute of limitations. *See, e.g. Guldi*, 307 A.D.2d at 982; *Federal Natl. Mtge. Assn. v. Mebane*, 208 A.D. 2d 892, 894 (2d Dep't 1994); *U.S. Bank Nat. Assn. v. Martin*, 144 A.D.3d 891, 891-92 (2d Dep't 2016); *PSP–NC, LLC v. Raudkivi*, 138 A.D.3d 709, 710-11 (2d Dep't. 2016).

The *Albertina* court also made another point very clear:

> To elect is to choose. The fact of election should not be confused with the notice or manifestation of such election. The complaint [expressly] recited that the plaintiff had elected.

Albertina, 258 N.Y. at 476. So, since 1932, New York courts have had to decide what – if any act – short of filing a foreclosure complaint could accelerate a mortgage loan.

Here, a letter stating that a lender "will accelerate," by definition, does not indicate that the lender is immediately invoking its right to acceleration. And, for the reasons set forth below, it does not provide clear and unequivocal notice that the lender is accelerating the loan.

B. A "will accelerate" letter should not accelerate a loan because it refers to a future event.

"Will accelerate" does not mean "is accelerating." When a word is not defined in a statute or contract, "dictionary definitions serve as 'useful guideposts' in determining the word's meaning." *People v. Aleynikov*, 148 A.D.3d 77, 84 (1st Dep't 2017); *see also Avella v. City of New York*, 29 N.Y.3d 425, 435 (using Merriam-Webster Online Dictionary to determine the meaning of terms in a contract). Accordingly, the dictionary defines the word "will" as meaning "to intend to." WEBSTER'S II NEW COLLEGE DICTIONARY 1263 (Riverside University, ed., 1995). The dictionary also identifies eight common usages. They are:

> *p.t.* **would**...Used to indicate: **1.** Simple futurity <We *will* go tomorrow.> **2.** Likelihood or certainty <You *will* rue this day.> **3.** Willingness. <*Will* you lend me your car?> **4.** Requirement or command. <You *will* give me a full report.> **5.** Intention <I *will* too quit if I want.> **6.** Customary or habitual action. <We would go days without speaking.> **7.** Capacity or ability. <This siding *will* not rust under any conditions.> **8.** Informal probability or expectation <That *will* be the delivery person.>

Id.

Based upon the usages above, the phrase "will accelerate," in IndyMac's letter, is subject to at least half-a-dozen ordinary English interpretations. The letter could mean: IndyMac "is going to accelerate in the future," "is likely to accelerate," "intends to accelerate," "habitually accelerates," "can accelerate," or "informally recognizes the probability of accelerating" Vargas's mortgage loan. These usages do not indicate unequivocally that IndyMac is immediately accelerating the loan.

In fact, the only way for the Court to conclude otherwise is for it to determine that "will" means "certain to occur." In other words, IndyMac would have to have meant that, if it did not receive payment on the 32nd day, it was guaranteeing acceleration on the 33rd day. But such a guarantee, in this context, does not make sense. Lenders do not normally file foreclosure complaints on the day after the notice period expires. *See Guldi*, 307 A.D.2d at 982 (holding filing a complaint and lis pendens accelerates the loan). They need time to gather documents and obtain counsel.

Further, during the period after the notice letter but before lawsuit, parties often engage in negotiations for modifications and payoffs on the loan – as evidenced in this very letter. R 36. IndyMac proposes that:

> Should you have any questions concerning this notice please contact Cindy McGovern at Loan Resolution at 866-354-5947. Additionally, you may also contact a HUD-approved Housing Counseling agency toll-toll free at 1-800-569-4287 or TDD 1-800-877-8339 for the housing counseling agency nearest you.

Id. So the letter, itself, anticipates loan resolution services, and counseling activities, as alternatives to accelerating the loan in September. *Id.*

In sum, it does not make sense for the Court to ascribe a guaranteed certainty to a proposed future event. Such an interpretation is contrary to ordinary English definitions and common usages. And in this context, it does not fit. A far more reasonable understanding is: the lender can (and is likely to) accelerate this loan sometime after September 6, 2008 – day 33. It is a manifestation to elect acceleration in the future. *See Albertina*, 258 N.Y. at 476. As a result, the Court should reverse the trial court, and hold that IndyMac's 2008 letter did not accelerate the loan.

C. The Court should apply the reasoning in *Adames*, *Pidwell*, and *Fowler*, and reject *Blue Royal Realty*.

The Court should address the split between the appellate departments – and hold that the words "will accelerate" do not, as a matter of law, accelerate a loan. The Appellate Division is a single statewide court divided into departments for

administrative convenience. *See Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664 (2d Dep't 1984); *Waldo v. Schmidt*, 200 N.Y. 199, 202 (1910). In fact, in the absence of a contrary rule in a trial court's own department, precedent from another Appellate Division department is binding on the trial court. *D'Alessandro v Carro*, 123 A.D.3d 1, 7 (1st Dep't 2014). So – because the Appellate Division is a single court – the Court should evaluate *Royal Blue Realty* on equal footing with the cases addressing notice letters from the other three departments. *See Mountain View*, 102 A.D.2d at 664.

But even if it does not, stare decisis principles permit the Court to overrule its own precedent "when there is a compelling justification for doing so." *People v. Lopez*, 16 N.Y.3d 375, 384 n. 5 (2011) *quoted in People v. Peque*, 22 N.Y.3d 168, 194 (2013). Such compelling justification can arise when "a holding that leads to an unworkable rule, or that creates more questions than it resolves, may ultimately be better served by a new rule." *People v. Taylor*, 9 N.Y.3d 129, 149 (2007). Similarly, overruling a rule is appropriate when it no longer withstands "the cold light of logic and experience." *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 156 (2006).

Here, *Royal Blue Realty*'s holding – that a notice letter containing the word "will" accelerates the loan – creates more questions than it resolves. And the Court

should reexamine it in light of conflicting opinions from other departments – which are more compelling and persuasive.

D. The Court should apply the reasoning in *Adames* to resolve the clear split between the First and Second Departments.

The First and Second Departments are split as to whether a notice letter indicating the lender "will accelerate," actually accelerates the loan and triggers the statute of limitations. *See 21st Mtge. Corp. v. Adames*, 153 A.D.3d 474, 475 (2d Dep't 2017); *US Bank v. Bank of America*, 2017 WL 5957220 (N.Y. Sup.), 2017 N.Y. Slip Op. 32445(U) *1-2 (Sup. Ct. Kings County 2017); *Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529, 530 (1st Dep't 2017). And the Court should apply the Second Department's reasoning.

In *Royal Blue Realty*, the First Department found that "letters from plaintiff's predecessor-in-interest provided clear and unequivocal notice that it 'will' accelerate the loan balance and proceed with a foreclosure sale, unless the borrower cured his defaults within 30 days of the letter." *Id.* Therefore, when the borrower did not cure, "the statute of limitations began to run on the entire mortgage debt." *Id.* The single page opinion in *Royal Blue Realty* offered no further analysis or reasoning. *Id.* In fact, "will" was the only word that the opinion quoted from the subject default correspondence. *Id.*

In contrast, the Second Department in *Adames* evaluated a December 13, 2006 letter stating that:

> If you have not cured the default within forty five (45) days of this notice. Litton will accelerate the maturity date of the Note and declare all outstanding amounts immediately due and payable.

US Bank, 2017 WL 5957220 at *1-2.[2] After reviewing this language, the *Adames* court found the "notice of default dated December 13, 2006, sent to Adames prior to the commencement of the 2007 action, was nothing more than a letter discussing acceleration as a possible future event, which does not constitute an exercise of the mortgage's optional acceleration clause." *Adames,* 153 A.D.3d at 475.

Here, the Court should apply the reasoning in *Adames* to IndyMac's August 2008 letter. It is more compelling then *Royal Blue Realty*'s terse holding, and is more consistent with the principle that acceleration notice must be clear, unequivocal, and convey immediacy. *See Albertina,* 258 N.Y. at 476. As set forth above, the phrase "will accelerate" does not indicate proximity in time, or absolute certainty concerning a future event. In this sense, *Royal Blue Realty* is neither workable, nor consistent with logic and experience. *See Broadnax*, 2 N.Y.3d at 156. Accordingly, the Court should reverse the trial court, and hold that IndyMac's August 2008 correspondence did not accelerate the loan.

[2] While the appellate opinion did not contain the letter's full text, the "Court took the liberty of pulling a copy of the letter from the County Clerk Minutes for that action." *US Bank*, 2017 WL 5957220 at *2. (As noted below, the Appellate Division's recent scrutiny over a "may" or "will" in a default letter has had the unintended effect of causing Supreme Court Justices to comb through dockets from other cases to find these correspondences).

E. *Blue Royal Realty* is also inconsistent with authority from the Third and Fourth Departments.

To a lesser extent, *Blue Royal Realty* also conflicts with decisions from the other departments. Both the Third Department and Fourth Department have concluded that a default letter, absent a clear and unequivocal statement, cannot accelerate a mortgage loan. *See Goldman Sachs Mortgage Co. v. Mares*, 135 A.D.3d 1121, 1122 (3d Dep't 2016); *Pidwell v. Duvall*, 28 A.D.3d 829, 831 (3d Dep't 2006), *Chase Mortgage Co. v. Fowler*, 280 A.D.2d 892, 894 (4th Dep't 2001). In *Fowler*, for example, a default letter did not include language stating that the debt was due immediately. *Id.* Accordingly, the court held:

> [P]laintiff, as mortgagee, had not validly exercised its right to accelerate the debt because the notice of default did not clearly and unequivocally advise defendant, the mortgagor, that all sums due under the note and mortgage were *immediately* due and payable[.] (emphasis added).

Id. at 894.

Likewise, in *Mares*, the default correspondence stated, "'[f]ailure to pay the total amount past due, plus all other installments and other amounts becoming due hereafter...on or before the [30th] day after the date of this letter *may* result in acceleration of the sums secured by the mortgage' (emphasis added)." *Mares*, 135 A.D.3d at 1122. The Third Department held that such language was nothing more than a letter discussing a possible future event, and did not invoke the acceleration clause in the mortgage. *Id.*

The Third Department also evaluated much stronger language in a default letter in *Pidwell*, which stated:

> ...if Duvall [the foreclosure defendant] failed to make certain payments in the future, it *would* 'result in the entire balance of said Note and Mortgage being called all due and payable.' (emphasis added)

Id. And despite this more definite language, the correspondence was still a "letter discussing a possible future event [and] did not constitute an exercise of the first mortgage's optional acceleration clause[.]" *Id.*[3]

Here, IndyMaç's letter provides no more a clear and unequivocal notice immediately electing acceleration than the letters in *Fowler*, *Mares* and *Pidwell*. Therefore, the Court should determine that IndyMac's August 2008 notice letter did not accelerate Vargas's loan, reverse the trial court's order, and remand this matter for further proceedings.

POINT: II
IN CONTEXT, THE LENDER'S INTENTION TO ACCELERATE THE LOAN ON THE THIRTY-THIRD DAY IS NOT CLEAR.

Reading the August 2008 letter in full context demonstrates that IndyMac's intent to immediately accelerate the loan, on the lender's behalf, is wishy-washy. For instance, the paragraph referencing acceleration states:

> If you do not cure your default, we *will* accelerate your mortgage with the full amount remaining accelerated and becoming due and payable in full,

---

3 "Would" is the past tense of "will." WEBSTER'S II NEW COLLEGE DICTIONARY 1263 (Riverside University, ed., 1995). So *Pidwell* and *Royal Blue Realty* are in direct conflict as well.

and foreclosure proceedings *will* be initiated *at that time*. Failure to cure your default *may* result in the foreclosure and sale of your property. A deficiency judgment *may* be obtained against you to collect the balance of the loan. (emphasis added).

R 35. Accordingly, this ("at that time") language indicates that two events will happen simultaneously – IndyMac will accelerate the loan, and it will file a foreclosure action. Since 1932, New York lenders have understood that when they file a foreclosure action, at the same time, they are also accelerating the loan. *See Albertina*, 258 N.Y. at 476. So it contradicts the letter's plain language for this, or any other, court to interpret this sentence to mean: IndyMac would first accelerate the loan, and then at a much later date, file a complaint on the lender's behalf. The letter does not let Vargas know clearly and unequivocally that his loan will automatically accelerate on the 33rd day. Rather, the opposite is clear: IndyMac will accelerate the loan "at that time" when Vargas's lender files its foreclosure complaint.

Further, and as noted above, the letter's second page provides Vargas with names, departments, and contact numbers for loan counseling and modification services. R 36. It invites Vargas to call Ms. McGovern at Loan Resolution. *Id.* This language expresses the possibility that Vargas could have worked out a modification or payoff resolution – or at least willing to delay the foreclosure by submitting a modification application – before the September 6, 2008 deadline. Under any of these scenarios, neither party would want to accelerate the loan.

Finally, the Court should read the above paragraph in full context – and not focus on just one word. After indicating that IndyMac will accelerate the loan, the paragraph continues to state that failure to cure "may" result in a foreclosure, and "may" result in a deficiency judgment. R 35. This "may" language does not provide a borrower with clear and unequivocal notice that the lender is accelerating his loan. *See Mares*, 135 A.D.3d at 1122 (holding the word "may" only indicates a future event, and does not invoke a mortgage's acceleration clause). And the paragraph discussing acceleration, here, uses the words "may" and "will" interchangeably – further confusing whether IndyMac is accelerating the loan, or just referring to a future event. *Id.*

When read in its full context, therefore, IndyMac's letter does not demonstrate a clear intent to immediately accelerate the loan. To the contrary, it proposes a possible acceleration on a future date. Accordingly, the Court should reverse the trial court holding, and remand this action for further proceedings.

POINT: III
THE HOLDING "WILL ACCELERATE" TRIGGERS THE STATUTE OF LIMITATIONS IS BAD POLICY.

It is bad policy to hold that an indefinite word like "will" in a notice letter can trigger the statute of limitations. First, such a holding is destabilizing – creating a serious concern as to how many otherwise valid mortgages have been latently extinguished throughout the state. Second, it wastes attorney, litigant, and

judicial resources to reopen and revisit foreclosure cases looking for a single phrase in a letter. Finally, it leads to inconsistency – treating otherwise identical mortgages differently throughout the state.

For these reasons, and as further set forth below, the Court should reverse the trial court, and hold that Vargas's loan was not accelerated in 2008.

A. Parsing language in a notice letter to accelerate a loan undermines the statute of limitation's purpose.

The trial court's decision that a word in a letter, such as "will," can accelerate a loan undermines stability in the course of events – a primary policy reason for statute of limitations. Statutes of limitations are designed to promote justice by preventing surprises. *Blanco v. American Tel. & Tel. Co.*, 90 N.Y.2d 757, 773, (1997). They promote "repose by giving security and stability to human affairs[.]" *Covington v. Walker*, 3 N.Y.3d 287, 293 (2004) quoting *Blanco*, 90 N.Y.2d at 773. The trial court's holding – if applied throughout the state – undermines this very goal. And its scope could be enormous.[4]

From 1932 until 2017, New York lenders (and borrowers) understood that the clear and unequivocal act of filing a foreclosure lawsuit accelerated the loan,

[4] In the past decade foreclosure actions have increased significantly statewide. From 2006 to 2009, the number of foreclosures filed annually in the New York Unified Court System jumped from 26,706 to 47,664. Office of the State Comptroller (OSC), *The Foreclosure Problem Persists* (August 2015), available at https://osc.state.ny.us/localgov/pubs/research15.htm. And, by February 2015, foreclosures pending in the state reached 92,070. *Id.* at * 2. This caseload represented 1.13 percent of housing units – or 1 in 88 units – statewide. *Id.* at *3.

and started the statute of limitations. *See Albertina*, 258 N.Y. at 476. But if the word "will" in a notice letter now accelerates a loan, countless lenders have quietly lost their rights to enforce their secured interest.

Statistically, the change in the law must affect pending foreclosure actions, and also cases where the Supreme Court has entered final judgment. It is further possible that extending the trial court's holding will influence properties – where the mortgage was redeemed after default – that are not even in foreclosure. It creates the likely scenario where a lender could accept payments on an unenforceable mortgage loan for years – only to later learn some obscure correspondence had already eradicated its interest.[5]

In short, changing the rules now – after a statewide foreclosure crisis – is confusing. And a new rule that scrutinizes the word choice in a decade-old correspondence creates instability – undermining the limitation statute's very purpose. As such, the Court should hold that IndyMac's 2008 letter did not accelerate the loan, reverse the trial court's order, and remand this matter for further proceedings.

[5] In the months leading up to this lawsuit, Vargas made regular monthly payments on his loan. R 118. Then he stopped, and filed a quiet title action. R 83-95.

B. Searching for default letters is not an efficient way to use court or litigant resources.

It is inefficient for courts to rely on notice letters to determine clear intent to accelerate. To support his motion to renew, Vargas's scoured through the court docket to obtain both the trial order – and the actual notice letter – from *Royal Blue Realty*. R 28-24. He prevailed on his motion to renew, in part, because he found that letter. R 6. Similarly, needing guidance and context for the circumstance surrounding a mortgage's acceleration, the court in *US Bank v. Bank of America* had to comb through the court file to find the letter in *Adames*. *See US Bank* 2017 WL 5957220 at*1-2.

It is not efficient for litigants, and especially for Supreme Court Justices, to fish though court dockets looking for two-page letters – where legal significance hinges on a word or phrase. These searches are counterintuitive to the well-settled policy favoring "clear and unequivocal" acceleration. *See Albertina*, 258 N.Y. at 476. It follows from that policy that, when a lender files a foreclosure complaint and lis pendens, it creates a olear record evidencing acceleration. The lender records its lis pendens, and the foreclosure action becomes public record. Loan acceleration in a default letter does not make a record – leaving lenders and borrowers uncertain if their loan has actually been accelerated.

As a result, the Court should reverse the trial court, and hold that IndyMac's 2008 letter did not accelerate the loan.

C. Holding the "will accelerate" language triggers the statute of limitations leads to inconsistent results.

The split between the appellate departments has created inconsistent results. According to the trial court, Vargas's lender accelerated the loan on his Bronx property 33 days after IndyMac's letter. But if the property was in Brooklyn, that same letter would not have accelerated the loan. *See Adames,* 153 A.D.3d at 475. Instead, the lender would have only invoked the acceleration clause when it filed a valid foreclosure action. *Id.* In Buffalo, the court would have to examine the letter and determine if 32 days was a short enough timeframe to convey that acceleration was immediate. *See Fowler*, 280 A.D.2d at 894. And a mortgage on that same property in Albany would not be accelerated based upon a letter indicating that the lender "would" – like IndyMac's letter – seek to recover the full balance on the loan. *See Pidwell,* 28 A.D.3d at 831.

New York's statutory scheme sets forth procedures for residential mortgage foreclosures statewide. *See* RPAPL § 1501, *et. seq.* Inconsistent rules in different cities – and even among boroughs – create uncertainty for mortgagees and borrowers. They also lead to arbitrary results: Adames's mortgage was enforceable, while Vargas's mortgage was not. *See Adames,* 153 A.D.3d at 475; R 8.

As such, the trial court order should conform to a more definite – a clear and unequivocal – standard for acceleration. The Court, therefore, should reverse the

trial court, hold IndyMac's 2008 letter did not accelerate Vargas's loan, and remand this action for further proceedings.

POINT: IV
BECAUSE INDYMAC'S LETTER DID NOT ACCELERATE THE LOAN, WHETHER INDYMAC HAD STANDING IN THE 2009 ACTION IS A SIGNIFICANT ISSUE IN THE CASE.

Because IndyMac's 2008 letter did not accelerate the loan, whether the 2009 action accelerated the loan is a significant issue in this case. Accordingly, the trial court erred when it determined, because IndyMac accelerated the loan in 2008, the 2009 foreclosure action "is of no moment." R 7.

If IndyMac did not have standing to file the foreclosure case, then Vargas's loan never accelerated. A foreclosure plaintiff cannot accelerate a loan when it does not have standing to foreclose. *EMC Mtge. Corp. v Suarez*, 49 A.D.3d 592, 593 (2d Dep't 2008); *Burke*, 94 A.D.3d at 983. A plaintiff has standing when, at the time it commences the foreclosure action, it is "both the holder or assignee" of the underlying mortgage and note. *OneWest Bank FSB v. Carey*, 104 A.D.3d 444, 445 (1st Dep't 2013).

Here, Vargas's own complaint sets forth that IndyMac did not have standing to bring the 2009 action – alleging that IndyMac filed its foreclosure complaint on January 16, 2009 (¶ 8), but it was not assigned the loan until four days later (¶ 5). R 85-86. And the record supports Vargas's allegations. R 135 & 203.

Further, the indorsement from First Estate is not dated. So the January 20, 2009, assignment is the only evidence on the record indicating when First Estate indorsed the note to IndyMac. R 203. If that indorsement occurred any time after January 16, 2009 – like the assignment suggests – IndyMac could not have accelerated the loan by foreclosing on the property. *See* UCC 1-201(20); *see also Hartford Acc. & Indem. Co. v American Express Co.*, 74 N.Y.2d 153, 159 (1989) (holding that merely possessing an instrument, indorsed to another entity, does not make the possessor a holder under the UCC).

As a result, this evidence suggests that the 2009 foreclosure action was a nullity. *See Burke*, 94 A.D.3d at 983. And the trial court erred when it failed to address this issue. *See* R 7. Accordingly, the Court should reverse the trial court, and remand this action for further proceedings.

CONCLUSION

Abraham Lincoln famously said, "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it." The same logic applies here: The future is uncertain. And when a loan servicer proposes that an event *will* happen, it is not 100 percent certain to occur.

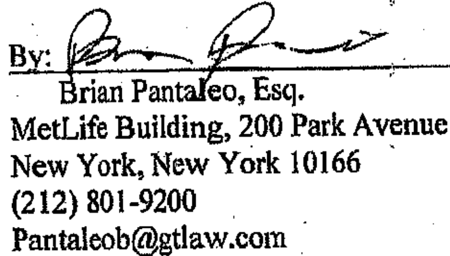
During the foreclosure crisis, loan assistance, HAMP modification, and discount loan payoffs were the norm. A 2008 communication giving Vargas 32 days to cure his default could have foreseeably started a dialog that ended with a

foreclosure alternative. Ascribing certainty to the word "will" contradicts the word's ordinary English definition, its context, and policy favoring clear and unequivocal acceleration notice.

Therefore, the Court should: (1) reverse the trial court's order; (2) hold that IndyMac's 2008 letter did not accelerate Vargas's loan; and (3) remand this action for further proceedings.

Dated: New York, New York
August 14, 2018

GREENBERG TRAURIG, LLP
Attorneys for Defendant-Appellant



By: ______________________
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APELLATE DIVISION - SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to 22 NYCCR § 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of Typeface:	Times New Roman
Point Size:	14
Footnote Point Size	14
Line Spacing:	Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authority, proof of service, certificate of compliance, or any authorized addendum contain statutes, rules regulations, etc., is 6,051.

Dated: August 14, 2018

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WPB 384284453v1

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR11, MORTGAGE PASS-THROUGH CERTIFICATES Series 2005-AR11, Plaintiff/Appellant, -against- JUAN VARGAS, Defendant/Respondent.	Bronx County Index No. 0302647/2016 **PRE-ARGUMENT STATEMENT**

Pursuant to Section 600.17 of the Rules of the Appellate Division of the Supreme Court of the State of New York, First Department, Plaintiff/Appellant DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR11, MORTGAGE PASS-THROUGH CERTIFICATES Series 2005-AR11 ("Plaintiff/Appellant") submits this Pre-Argument Statement.

1. The title of the action is as appears above.

2. The full names of the parties appear in the above caption. There has been no change in the parties.

3. Counsel for Plaintiff-Appellant is:

   Brian S. Pantaleo, Esq.
   Greenberg Traurig, LLP
   200 Park Avenue
   New York, NY 10166
   (212) 801-9200

4. Counsel Defendant-Respondent is:

Herbert Noel Steinberg, Esq.
Steinberg & Associates
80-20 Kew Gardens Road, Ste. 300
Kew Gardens, NY 11415

5. This appeal is taken from a Decision and Order of the Supreme Court of the State of New York, County of Bronx, Civil Term, Part 27 (Rodriguez, J.S.C.) dated October 12, 2017 and entered on October 19, 2017. Notice of Entry of this Order was served on October 23, 2017.

6. There are no additional appeals pending in this action, and there are no related actions or proceedings pending in this or any other court.

7. This appeal seeks to reverse an Order dismissing a foreclosure action, and clearing the property from all liens, based upon the statute of limitations.

8. Plaintiff-Appellant seeks reversal of the Decision and Order on the grounds that the trial court erred in finding that Plaintiff-Appellant provide Defendant-Respondent with clear and unequivocal notice that the entire mortgage debt was being accelerated.

Dated: New York, New York
November 17, 2017

Respectfully Submitted,

GREENBERG TRAURIG, LLP

By:
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Counsel for Defendant/Appellant Deutsche Bank National

To: Herbert Noel Steinberg, Esq.
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Attorneys for Plaintiff/Respondent Juan Vargas

EXHIBIT D

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

8276 Juan Vargas, Index 302647/16
Plaintiff-Respondent,

-against-

Deutsche Bank National Trust Company,
Defendant-Appellant.

Greenberg Traurig, LLP, New York (Brian Pantaleo of counsel), for appellant.

Steinberg & Associates, Kew Gardens (Herbert N. Steinberg of counsel), for respondent.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 19, 2017, which, upon renewal, denied defendant's motion to dismiss the complaint and granted plaintiff's cross motion for summary judgment declaring plaintiff's property free and clear of all liens and encumbrances by defendant, unanimously affirmed, with costs.

The motion court correctly determined that defendant was time-barred from commencing a foreclosure action against plaintiff's mortgaged property because more than six years had passed from the date that the debt on the mortgage was accelerated (CPLR 213[4]). The 2008 letter from defendant's predecessor-in-interest informed plaintiff that his debt "will [be] accelerate[d]" and "foreclosure proceedings will be initiated" if he failed to cure his default within 32 days of the

EXHIBIT "D"

letter. The letter highlighted that time was of the essence and it is undisputed that plaintiff did not cure his default within the time period.

We have held that this language constitutes a clear and equivocal intent to accelerate the loan balance and commence the statute of limitations on the entire mortgage debt (*Deutsche Bank Natl. Trust Co. v Royal Blue Realty Holdings, Inc.*, 148 AD3d 529 [1st Dept 2017], *lv denied* 30 NY3d 960 [2017]).

Moreover, given defendant's continued efforts, including sending letters attempting to collect from plaintiff the accelerated mortgage debt and informing him that any payments made in contribution to the entire debt "will not be deemed a waiver of the acceleration of [his] loan," there is no basis for a finding that discontinuance of the prior foreclosure action constituted an affirmative act by defendant to revoke the acceleration (*see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept 2017]).

We have considered defendant's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 31, 2019

DEPUTY CLERK

EXHIBIT E

FILE COPY

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
-- X

JUAN VARGAS,

Plaintiff-Respondent,

-against-

DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR11, MORTGAGE PASS-THROUGH CERTIFICATES Series 2005-AR11,

Defendant-Appellant.

-- X

Bronx County Clerk's
Index No. 0302647/2016

NOTICE OF MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS

PLEASE TAKE NOTICE that upon the Affirmation of Brian Pantaleo, dated February 28, 2019, and accompanying memorandum of law, DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR11, MORTGAGE PASS-THROUGH CERTIFICATES Series 2005-AR11 will move this Court at a term thereof at the Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, on at 10:00 a.m. on March 25 2019, or soon thereafter for an order granting leave to appeal the Court's Decision and Order Granted January 31, 2019 to the Court of Appeals.

PLEASE TAKE FURTHER NOTICE, that this motion will be submitted without oral argument in accordance with 22 NYCRR 1000.13(a)(6). Answering papers, if any, shall be filed with the Court and served on counsel on or before the Friday preceding the return date.

Dated: New York, New York
February 28, 2019

FILED
MAR -1 2019
SUP COURT APP. DIV.
FIRST DEPT.

ACTIVE 41797755v1

EXHIBIT "E"

FILE COPY

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

JUAN VARGAS

Plaintiff - Respondent

-against-

DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR11, MORTGAGE PASS-THROUGH CERTIFICATES,

Defendant - Appellant

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

GREENBERG TRAURIG, LLP
Attorney for Defendant-Appellant
200 Park Avenue, 39th Floor
New York, New York 10166
(212) 801-9200

Brian Pantaleo, Esq., of counsel.

Supreme Court, Bronx County, Index No. 302647/2016

FILED
MAR - 1 2019
SUP. CT. APP. DIV. FIRST DEPT.

EXHIBIT F

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on June 4, 2019.

PRESENT: Hon. Rosalyn H. Richter, Justice Presiding,
Sallie Manzanet-Daniels
Peter Tom
Marcy L. Kahn
Anil C. Singh, Justices.

---------------------------------------X

Juan Vargas,
Plaintiff-Respondent,

-against-

M-1184
Index No. 302647/16

Deutsche Bank National Trust Company,
Defendant-Appellant.

---------------------------------------X

Defendant-appellant having moved for leave to appeal to the Court of Appeals, from the decision and order of this Court, entered on January 31, 2019 (Appeal No. 8276),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

EXHIBIT "F"

NOTICE OF ENTRY

PLEASE take notice that the within is a true copy of a Order

duly entered in the office of the clerk of the within named Court on June 4 , 2019

Dated: June 10, 2019

Yours, etc.
STEINBERG & ASSOCIATES

Attorneys for:

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Kew Gardens, New York 11415

TO: BRIAN PANTALEO, ESQ.
GREENBERG, TRAURIG, LLP
MET LIFE BUILDING
200 PARK AVE.
NEW YORK, N.Y. 10166

NOTICE OF SETTLEMENT

PLEASE take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the Judges of the within named Court, at

on

at

Dated:

Yours, etc.
STEINBERG & ASSOCIATES

Attorneys for:

Office and Post Office Address
80-02 Kew Gardens Rd., Suite 300
Kew Gardens, New York 11415

TO:

Attorneys for:

SUPREME COURT OF STATE OF ny
Index Number: 0302647 Year: 2016
APPELLATE DIVISION – FIRST DEPARTMENT
COUNTY OF BRONX

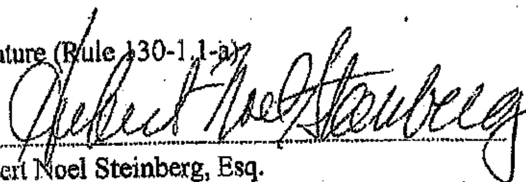
JUAN VARGAS,
Plaintiff-Respondent,

– against –

DEUTSCHE BANK NATIONAL TRUST COMPANY,
Defendant-Appellant.

ORDER WITH NOTICE OF ENTRY

Signature (Rule 130-1.1-a)



Herbert Noel Steinberg, Esq.

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Attorneys and Counselors at Law

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FAX: *(718) 575 – 4070*

TO:

Service of a copy of the within is hereby admitted.

Dated: