To Be Argued By:
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Court of Appeals

of the

State of New York

JUAN VARGAS,

Plaintiff-Respondent,

-against-

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Deutsche Bank National Trust Company as Trustee for IndyMac INDX Mortgage Loan Trust 2005-AR11, Mortgage Pass-Through Certificates Series 2005-AR11 is an investor trust for which Deutsche Bank National Trust Company is trustee. Deutsche Bank 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.

STATUS OF RELATED LITIGATION

Under New York Court of Appeals Rule 500.13(a), Deutsche Bank states that it is unaware of any litigation related to this appeal.

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QUESTIONS PRESENTED

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 Decision and Order dated January 31, 2019, from the Appellate Division, First Department. In doing so, it presents the following questions for the Court:

Question 1: In a quiet title action to discharge a mortgage based on alleged expiration of the statute of limitations, did the Appellate Division, First Department err in holding that a default letter stating that a lender "will accelerate" the loan on a later date clearly and immediately elected the lender's option to accelerate the mortgage loan?

Answer: Yes. A statement that an event *will occur* in the future only means that it has the potential to happen, not that it is unequivocally certain to happen.

Question 2: Did the Appellate Division, First Department err in holding that, after the institution of a mortgage foreclosure lawsuit, a motion to discontinue that lawsuit did not by itself operate to revoke the acceleration of the mortgage loan?

Answer: Yes. If the judicial act of filing a foreclosure lawsuit operates to accelerate a mortgage loan, then the judicial act of discontinuing that lawsuit operates to revoke that acceleration.

PRELIMINARY STATEMENT

Because statements of future events are not present affirmative elections to accelerate installment contracts, this Court should reverse the First Department's decision finding that a default letter indicating that the lender "will accelerate" a mortgage loan is insufficient to accelerate that loan. New York has a six-year statute of limitations for foreclosure cases. *See* CPLR 213(4). It starts to run when a lender invokes the mortgage's acceleration clause. This acceleration requires a clear, unequivocal, and overt act. In 1932, this Court specifically identified such an act: filing a foreclosure complaint and lis pendens. It also held that *notice* is not *election to accelerate*. Accordingly, a notice of default letter, advising the borrower about the potential for future acceleration, cannot be an election.

The appellate departments are split on this issue. In 2017, the Appellate Division, First Department, determined that a default letter stating that the lender "will accelerate" a loan on some future date is a clear and unequivocal election to accelerate the mortgage loan. *See Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529 (1st Dep't 2017), *lv denied* 30 NY3d 960 (2017).

Here, Plaintiff-Respondent Juan Vargas filed a quiet title action. While this action was pending in the Supreme Court, the First Department decided the above *Royal Blue Realty* case. Vargas originally moved for summary judgment, alleging

that CPLR 213(4) extinguished Deutsche Bank's mortgage loan on his property. Initially, the Supreme Court, Bronx County (Rodriguez, J.), denied Vargas's summary judgment motion – holding the words "will accelerate" in a 2008 default letter did not trigger the limitations period. But, after the First Department decided *Royal Blue Realty*, Vargas filed a motion to renew. In assessing the renewed motion, the Supreme Court held that it was then "constrained to find" that this 2008 letter accelerated Vargas's mortgage loan. And it granted summary judgment in Vargas's favor. Relying upon its own opinion in *Royal Blue Realty*, the First Department then affirmed the Supreme Court's decision.

But the First Department erred. Less than a year later, the Second Department expressly rejected *Royal Blue Realty*, holding "will accelerate" is merely an expression of future intent – not a clear election to accelerate the loan. This sound reasoning is consistent with the ordinary English definition of the word "will." It also accords with the plain language in Vargas's default letter. For instance, the letter states that Vargas's lender will accelerate the loan at the *same time* that it files a foreclosure action. The default notice further uses the word "may" interchangeably with "will." And it provides Vargas with foreclosure alternatives to avoid potential election in the future.

Based upon the above, the Court should reject the First Department, and hold that Vargas's default notice did not accelerate the loan. The Court should articulate

a clear rule in this regard: A typical mortgage default notice letter (even containing the word "will") cannot accelerate a mortgage loan. Such a holding will encourage pre-foreclosure suit settlements, and promote stability – a primary policy purpose for CPLR 213(4).

Finally, even if the Court finds acceleration occurred, a 2013 order discontinuing the action nullified and revoked any purported acceleration. And it, therefore, re-set the limitations period under the statute. Accordingly, the Court should reverse the First Department's January 31, 2019 Decision and Order.

JURISDICTION

This Court has jurisdiction under CPLR 5602(a)(1)(i), because the Court granted Deutsche Bank's motion for leave to appeal. R 304.

STATEMENT OF CASE

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

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

servicer, wrote to Vargas – advising that he had a "right to cure" his default within 32 days. R 35-36. This default 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-free at 1-800-569-4287 or TDD 1-800-877-8339 for the housing counseling agency nearest you.

Id.

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 Supreme Court, Bronx County, titled *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 voluntarily discontinued the foreclosure action. R 104-106. And throughout 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 then started making his monthly 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 in the Supreme Court, Bronx County. R 83-95. Vargas claimed that Deutsche Bank's mortgage lien was time-barred. *Id.* His complaint alleged that IndyMac filed the foreclosure action on January 16, 2009, but the First Estate did not assign it 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 Supreme Court, Bronx County (Rodriguez, J.) 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 Supreme Court acknowledged 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 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 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…pursuant to [*Royal Blue Realty*]…[because] the default letter commenced the statute of limitations." R 22. To support his motion, Vargas proffered the 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 Supreme Court reexamined IndyMac's 2008 letter, and determined that the "will accelerate" language automatically 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 Supreme Court granted summary judgment – holding that, as a matter of law, the 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 appealed the Supreme Court's October 2017 order granting Vargas's motion to renew. R 3. On appeal, the Appellate Division, First Department, affirmed. *See Vargas v. Deutsche Bank Nat'l Tr. Co*., 168 A.D.3d 630, 93 N.Y.S.3d 32, 33 (2d Dep't 2019), leave to appeal granted, 34 N.Y.3d 910 (2020). Focusing on the words "will [be] accelerate[d]" and "foreclosure proceedings will be initiated,"[2] the First Department determined:

> We have held that this language constitutes a clear and unequivocal intent to accelerate the loan balance and commence the statute of limitations on the

[2]In this analysis, the First Department added the word "be," changed "accelerate" to the past tense, and omitted the words "at that time."

entire mortgage debt (*Deutsche BankNatl. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 AD3d 529 [1st Dept 2017], *lv denied* 30 NY3d 960 [2017]).

R 305-6. It also determined that when IndyMac discontinued the foreclosure action, it did not revoke acceleration. R 306.

Deutsche Bank moved for leave to appeal. R 304. The First Department denied this motion. On March 2, 2020, this Court granted leave to appeal under CPLR 5602(a)(1)(i). *Id.*

ARGUMENT

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 Supreme Court's original order was unable to conclude that this letter was a clear, unequivocal, and overt act sufficient to invoke a mortgage's acceleration clause. R 45-46. This left open the issue as to whether filing the 2009 action accelerated the loan – i.e. whether IndyMac had standing. *Id.* But, in the motion to renew, the First Department's *Royal Blue Realty* opinion "constrained" the Supreme Court – forcing it to conclude that the phrase "will accelerate" in the letter had automatically accelerated the loan. R 6-7. On appeal, the First Department – relying upon this same opinion – affirmed the Supreme Court.

But the First Department erred. Determining that the phrase "will accelerate" automatically accelerates a loan is inconsistent with the ordinary meaning of the

word "will," the context in which a lender prepares such a letter, and multiple opinions from the Second Department. Less than a year after *Royal Blue Realty*, the Second Department expressly rejected it – correctly determining that such language is not clear and unequivocal.

The Court should apply the Second Department's reasoning here: "will" indicates a future event, and not automatic acceleration. Accordingly, the Court should reverse the First Department, and hold that IndyMac's 2008 letter did not accelerate the loan.

A. This Court requires a clear unequivocal act to accelerate a mortgage loan, and not mere notice that the lender will accelerate on a future date.

Acceleration requires a clear, unequivocal, and overt act. In 1932, this Court 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) (holding that a lender's election must be "clear and unequivocal"); *Clayton Natl. v. Guldi*, 307 A.D.2d 982 (2d Dep't 2003) (same).

Accordingly, this Court 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 statute of limitations starts when a lender commences a foreclosure action. *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). In *Albertina*, this Court also made another point 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. Accordingly, New York courts have had to distinguish between notice, and an overt act electing acceleration. *See id.*

Here, IndyMac's 2008 default letter may have provided such notice, i.e., the lender will elect in the future. But "will accelerate," by definition, does not indicate that the lender is immediately electing its right to acceleration. And thus, IndyMac's 2008 default letter did not clearly and unequivocally elect to accelerate Vargas's loan. This Court should reverse the First Department.

B. A letter indicating a lender "will accelerate," is not clear and unequivocal, because it refers to a future event.

"Will accelerate" does not mean "is accelerating now." 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 acceleration." 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." This would mean that if IndyMac did not receive payment on day 32, it guaranteed acceleration on the 33rd day. But such a guarantee, in this context, is illogical. Lenders do not typically 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 varying and unspecific timeframes to gather documents and obtain counsel.

Further, during the period after the notice letter, but before a lawsuit, parties often engage in negotiations for modifications and discounted loan payoffs – as evidenced in this very letter. R 36. IndyMac proposed 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-free at 1-800-569-4287 or TDD 1-800-877-8339 for the housing counseling agency nearest you.

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

In sum, it is illogical 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. A more reasonable understanding of the letter drives the conclusion that 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 First Department, and hold that IndyMac's 2008 letter did not accelerate the loan.

C. Reading the August 2008 letter in its entirety, the lender's intent to accelerate the loan is not clear and unequivocal.

The August 2008 letter's full context demonstrates that IndyMac's alleged intent to accelerate the loan was not clear. 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, 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: (1) the lender will accelerate the loan; and (2) it will file a foreclosure action. Lenders know 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 to interpret this sentence to mean: the lender would first accelerate the loan, and then at a much later date, file a complaint. Rather, the opposite is clear: Vargas's lender will accelerate the loan "at that time" when it files a foreclosure complaint.

Further, the letter uses the words "may" and "will" interchangeably. After indicating that IndyMac will accelerate the loan on the lender's behalf, the paragraph continues to state that failure to cure "may" result in a foreclosure, and "may" result in a deficiency judgment. R 35. Vargas concedes "may" language is equivocal. R

367. So IndyMac using these two words together – in the paragraph discussing acceleration – makes it more likely to be referring to an undetermined future event.

Additionally, and as noted in the section 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 delayed the foreclosure by submitting a loss mitigation application – before September 6, 2008.

Vargas attributes significance to the words "Time is of the essence" appearing in this resolution section. But Vargas's mortgage is not a time of the essence contract. R 164-184. For this phrase to have independent legal significance beyond its ordinary meaning, it needed to pertain to a closing date in a sale contract for real property. *See Nehmadi v. Davis*, 63 A.D. 3d 1125, 1127 (2d Dep't 2009) (holding that a closing date can be made time of the essence in a *contract for the sale of real property*); *Guippone v. Gaias*, 13 A.D.3d 339, 240 (2d Dep't 2004) (same); *Mohen v. Mooney*, 162 A.D.2d 664, 665 (2d Dep't 1990) (same). Instead, IndyMac used this language in the following context:

> Time is of the essence![3] 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

[3]It is not entirely clear from the copy of this letter in Record on Appeal whether IndyMac punctuated this sentence with an exclamation point or a colon.

> agency toll-free at 1-800-569-4287 or TDD 1-800-877-8339 for the housing counseling agency nearest you. These services are usually free of charge. In the state of Colorado, please contact the Colorado Foreclosure Hotline for referral to local housing counseling agencies for free assistance.

The letter did not reference acceleration in this paragraph – or even on this page. Rather, it urged Vargas to contact Loan Resolution as soon as possible to work out a foreclosure alternative.

When read in its full context, therefore, IndyMac's letter does not demonstrate a clear intent to accelerate the loan immediately. To the contrary, it proposes a possible acceleration on a future date. Accordingly, the Court should reverse the First Department.

D. The Court should apply the Second Department's reasoning and reject *Royal Blue Realty.*

The Court should apply the Second Department's holding that the words "will accelerate" in a letter do not automatically accelerate a mortgage loan. In 2017, the First Department decided *Royal Blue Realty*. It 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." *Royal Blue Realty,* 148 A.D.3d at 529. 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 relevant default letter. *Id.*

Less than a year later, the Second Department expressly rejected this holding. *Milone v. US Bank National Association*, 164 A.D.3d 145, 152 (2d Dep't 2018). Evaluating a similar default letter, it 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.

Id. See also 21st Mtge. Corp. v. Adames, 153 A.D.3d 474, 475 (2d Dep't 2017) ("Here, a 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[.]"); *Bank of New York Mellon v. Morris*, 172 A.D.3d 1150, 1151 (2d Dep't 2019) (holding a letter stating "the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time" only references a future event); *U.S. Bank Nat'l Ass'n v. Greenberg*, 170 A.D.3d 1237, 97 N.Y.S.3d 133 (2d Dep't 2019), leave to appeal dismissed, 34

N.Y.3d 1152 (2020) (same); *Bank of New York Mellon v. Viola*, No. 2017-05382, 2020 WL 1280663 at *2 (N.Y. 2d App. Div. Mar. 18, 2020) (same); *Vitolo v. U.S. Bank National Association*, No. 2019–04240, 2020 WL 2046589 at *2 (N.Y. 2d App. Div. April 29, 2020) (same).

The Fourth Department has also concluded that a default letter, absent a clear and unequivocal statement, cannot accelerate a mortgage loan. *See Chase Mortgage Co. v. Fowler*, 280 A.D.2d 892, 894 (4th Dep't 2001). In *Fowler*, a default letter did not include language stating that the debt was due immediately. *Id.* Accordingly, the Fourth Department 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.

Very recently, the Third Department held that a letter stating that the loan "will be" accelerated on January 21, 2011 accelerated the loan on that date. *MTGLQ Investors*, *LLP v. Lunder*, No. 528503, 2020 WL 2201045 at *1 (N.Y. 3d App. Div. May 7, 2020). But, in that instance, the court relied upon "five subsequent letters" repeating and reiterating that acceleration occurred on January 21, 2011. *Id.*

In sum, this Court should adopt the sound reasoning that "future intentions may always be changed[.]" *Milone*, 164 A.D.3d at 152. And thus, a letter that does not advise that the full loan amount is "immediately due and payable" does not

constitute clear and unequivocal notice that a lender is currently electing acceleration. *Fowler,* 280 A.D.2d at 894. Accordingly, the Court should reverse the First Department.

II. THE COURT SHOULD END THE CONFUSION CREATED BY THE FIRST DEPARTMENT'S HOLDING THAT DEFAULT LETTERS TRIGGER ACCELERATION.

The Court ruling that an overt act to elect acceleration requires a lender to either file a foreclosure action, or advise that the entire loan amount is immediately due, best serves the public interest. Such a rule would encourage pre-foreclosure settlements, remove confusion surrounding default letters and acceleration, and promote stability. For these reasons, and as further set forth below, the Court should reverse the First Department, and hold that Vargas's loan was not accelerated in 2008.

A. A Court Ruling that the word "will" in a default letter does not accelerate the loan promotes pre-suit settlements.

A rule requiring a lender to either commence a foreclosure action (or contemporaneously demand the entire loan amount) to accelerate a loan promotes pre-foreclosure settlement. New York has a "strong policy of the law favoring settlement of litigation." *Ass'n, Local 237, Intern. Broth. of Teamsters v. City of New York*, 64 N.Y.2d 188, 198 (1984); *see also Hallock v. State*, 64 N.Y.2d 224, 230 (1984) ("Stipulations of settlement are favored by the courts and…[they] not only serve[] the interest of efficient dispute resolution but also [are] essential to the

management of court calendars and integrity of the litigation process." (citations omitted)).

When a lender accelerates a loan, the borrower owes the entire loan balance – rather than the payments necessary to cure. If a default letter with the phrase "will accelerate" can trigger this event, then the borrower loses the opportunity to catch-up on payments pre-foreclosure. This substantially higher amount due increases the likelihood that the lender will file a lawsuit, rather than reach a pre-suit resolution. As a result, the Court should reverse the First Department, and determine that IndyMac's 2008 letter did not accelerate the loan.

B. A clear rule requiring a foreclosure lawsuit, or immediate demand for the full loan balance, eliminates the confusion associated with default letters potentially triggering acceleration.

The Court ruling that a default letter (even if it contains the word "will") does not accelerate a mortgage loan will promote stability – a primary policy reason for the 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.

To promote this policy, a clear rule is necessary to alleviate the confusion and inconsistency resulting from the First Department's holdings. Lenders often send multiple default letters. Borrowers can cure. Loans get modified pre-foreclosure.

During a fifteen (or thirty) year loan term, multiple lenders may send more than one default notice. Searching for these letters, to calculate the precise date in which a limitation period started, is inefficient.

For example, to support his motion to renew, Vargas scoured through the court docket to obtain both the Supreme Court order – and the actual notice letter – from *Royal Blue Realty*. R 28-24. He prevailed in his motion to renew, in part, because he found that letter. R 6. Similarly, *21st Mtge. Corp. v. Adames*, 153 A.D.3d 474 (2d Dep't 2017), provides another example. When the Second Department first concluded that a default letter containing "will accelerate" language alluded to a future event, Supreme Courts below searched to find the actual default letter from *Adames*. *See e.g., U.S. Bank v. Bank of America*, 2017 WL 5957220 at fn 1, 2017 N.Y. Slip Op. 32445(U) (Sup. Ct. Queens County 2017) ("This Court took the liberty of pulling a copy of the letter from the County Clerk Minutes for that action.").

Searching for default letters to parse their contents, is not an efficient use of attorney, party, or judicial resources. And more significantly, the surprise to all parties associated with discovering an unknown "will accelerate" letter undermines the very policy considerations behind a statute of limitations. *See Blanco*, 90 N.Y.2d at 773. A surprise, or upheaval, is even more likely since more then a half-dozen appellate opinions have held that a default letter containing the words "will," or lacking an immediate demand, does not trigger the limitations period. *See e.g.*

Milone, 164 A.D.3d at 152; *Greenberg,* 170 A.D.3d at 1237; *Fowler*, 280 A.D.2d at 894; *Vitolo,* WL 2046589 at *2

As a result, the First Department's opinions (in *Vargas* and *Blue Royal Realty*) create confusion surrounding the typical pre-foreclosure default letter. A clear rule is necessary to eliminate this uncertainty. Accordingly, the Court should hold that, to elect the acceleration option in a mortgage, a lender must either: (1) file a foreclosure action; or (2) contemporaneously demand the entire loan balance. With such a rule, a typical pre-suit letter – sent to notice the default and offer 30-days to cure – cannot elect acceleration. And thus, for the reasons set forth above, the Court should reverse the First Department, and determine that IndyMac's 2008 letter did not accelerate the loan.

III. INDYMAC'S VOLUNTARY DISCONTINUANCE NULLIFIED AND REVOKED ANY PURPORTED ACCELERATION.

The converse of a foreclosure action's commencement is its discontinuance, and therefore, even if the Court finds acceleration occurred with the 2008 letter, or the filing of the 2009 foreclosure action, IndyMac's 2013 discontinuance nullified and revoked election to accelerate.[4] Accordingly, "the discontinuance of an action the further proceedings in the action are arrested not only, but what has been done

[4]The legal significance of a discontinuance in a foreclosure action is currently before the Court in *Freedom Mortgage Corporation v. Engel*, APL-2019-00114 and *Ditech Financial v. Naidu*, APL 2020-00023, and Appellant agrees with and adopts the arguments raised by the lenders in those cases.

therein is also annulled, so that the action is as if it never had been." *Loeb v. Willis*, 100 N.Y. 231, 235 (1885); *see also Newman v. Newman*, 245 A.D.2d 353, 354 (2d Dep't 1997) ("[w]hen an action is discontinued, it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified."). It further follows logically that if judicial action accelerates a loan (*see Albertina*, 258 N.Y. at 476), taking judicial action to discontinue such an action must nullify acceleration.

Moreover, a discontinuance can also revoke acceleration – evidencing a lender's intent to de-accelerate the loan. *See NMNT Realty Corp. v. Knoxville 2012 Tr.*, 151 A.D.3d 1068, 1069-1070 (2d Dep't 2017); *Capital One, N.A. v. Saglimbeni*, 170 A.D.3d 508, 509 (1st Dep't 2019). Federal courts interpreting New York law agree. *See U.S. Bank, N.A. v. Adhami*, No. 18-cv-530, 2019 WL 486086, at * 5 (E.D.N.Y. Feb. 6, 2019) (holding that withdrawing a prior foreclosure action is an affirmative act of revocation); *OneWest Bank, N.A. v. Simon*, No. 14-cv-6622, 2019 WL 1320275, at *10 (E.D.N.Y. Mar. 22, 2019) (agreeing with decisions holding that voluntarily discontinuing a foreclosure action revokes acceleration of the mortgage loan).

Here, IndyMac filed a motion to voluntarily discontinue the 2009 action. R 104. And it obtained an order discontinuing the 2009 action on November 25, 2013. R 104-106. So, even if the 2008 letter or 2009 action accelerated the loan, IndyMac

nullified and revoked that acceleration within six-years by taking judicial action. As a result, the Court should reverse the First Department, and determine that acceleration was nullified and revoked.

CONCLUSION

This Court should reverse the First Department's January 31, 2019 Decision and Order, hold that IndyMac's 2008 letter did not accelerate Vargas's mortgage loan, and that any purported acceleration was nullified and revoked.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR 500.13(c)(1) that the foregoing brief was prepared on a computer using Microsoft Word.

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