To Be Argued By:
Patrick Broderick, Esq.
(*Time Requested*: 30 Minutes)

APL-2020-00026

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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.

REPLY BRIEF FOR 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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PRELIMINARY STATEMENT

IndyMac's 2008 default letter clearly set forth *when* the lender would accelerate the loan: "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." The letter expresses an intent to accelerate "at that time" when the lender files a foreclosure action. In this context, the word "will" points to a possible future event occurring simultaneously when the lender ultimately initiates foreclosure proceedings.

In his brief to this Court, Vargas claims that this same language automatically triggered acceleration when the default cure period ended on September 7, 2008. To reach this conclusion, Vargas must adopt his own definition for the word "will" – guaranteed to occur if he did not pay. And he must wholly ignore the words "at the time." While his response brief does both, it does not change the default letter's plain language or meaning.

Limited by this express language, Vargas primarily relies upon arguments that he did not raise before the Supreme Court, or the First Department. For the first time, Vargas claims that his mortgage – specifically section 22 – creates an acceleration trigger, which the default notice automatically invokes. But this novel argument fails as well.

Section 22 identifies two acceleration options once the lender meets all its conditions precedent. First, it may reject a payment attempting to cure default – i.e., without further demand. Second, it may file a foreclosure action. (Again, IndyMac's letter makes it clear the lender will accelerate at the time it forecloses). But the mortgage's "without further demand" language does not create an automatic trigger in the default letter. Such an interpretation is inconsistent with the mortgage's plain language, as well as New York law. Accordingly, acceleration requires an act – e.g., rejecting a late payment, or filing a complaint. A lender cannot accelerate through inaction.

Vargas's remaining arguments also lack merit. His brief confuses default with acceleration. So, despite his own purported definition of an "Acceleration Letter," he inconsistently argues that the $7,903.96 sought to reinstate *the default* meant the loan was already accelerated at the time IndyMac wrote the letter. Further, IndyMac's unsuccessful attempt to file a 2009 foreclosure action is consistent with the language in its default letter. And it belies Vargas's argument that election occurred in August or September 2008.

Moreover, if the loan was properly accelerated, the lender revoked such election. A discontinuance nullifies the acceleration act, regardless of whether a subsequent communication misconstrues that legal imperative. And the parties

argued revocation at every stage in this litigation up-and-through Deutsche Bank's motion to this Court for leave to appeal.

Finally, Vargas's brief concludes with an appeal to fairness and repose – claiming that his quiet title action was the only way for him to know if Deutsche Bank's lien was valid. But Deutsche Bank did not abandon this loan. In 2016, it attempted to modify the loan. Indeed, Vargas already made two modification payments. This litigation arises from a sophisticated borrower seeking a better deal – not repose or fairness. Therefore, the Court should reverse the First Department's January 31, 2019 Decision and Order, because Vargas's loan did not accelerate in September 2008.

ARGUMENT

I. INDYMAC'S DEFAULT LETTER EXPRESSLY STATES THAT THE LENDER WILL ACCELERATE THE LOAN "AT THAT TIME" WHEN IT INITIATES FORECLOSURE PROCEEDINGS.

IndyMac's 2008 letter states that the lender will accelerate the loan when it initiates foreclosure proceedings. Accordingly, Deutsche Bank's initial brief argues that this plain language did not automatically accelerate the loan 33-days after IndyMac wrote it. Appellant Br. 14-16. Cases from four appellate departments, as well as this appeal, focus on the word "will" in a default letter. But the words that follow this verb are equally important.

Here, the *at that time* language after "will" clearly expresses when the lender intended to accelerate the loan. *See* R 35. The full sentence reads: "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." *Id.* And thus, the letter's plain language indicates foreclosure proceeding would be initiated at the same time when lender elected acceleration.

Vargas's response brief ignores this language entirely. Respondent Br. 1-35. He fails to offer an alternative meaning, because he cannot. For this reason alone, the Court should reverse the First Department's January 2019 Decision and Order.

II. "WILL" DOES NOT MEAN GUARANTEED TO OCCUR ON A SPECIFIC DATE.

As noted in the initial brief, the word "will," in IndyMac's 2008 letter, does not mean guaranteed to occur on a date certain. Vargas concedes that had IndyMac's letter stated "may" or "would be," those words would "make it unclear when acceleration would occur." Respondent Br. at 25. So clear and unequivocal acceleration, according to Vargas, must hinge on a single word. *Id.*

In this regard, Vargas must convince the Court to accept his interpretation – "guaranteed to occur if the money wasn't paid" (Respondent Br. fn 10) – as the only

acceptable definition for "will" in the letter.[1] But, as noted in the initial brief, Vargas's proposed meaning does not conform to the word's ordinary English definition, or the context in which IndyMac uses it. *See* Appellant Br. 12. While Vargas chastises Deutsche Bank for its choice in dictionary, the Merriam-Webster's Online Dictionary that he cites, does not define "will" as "guaranteed to occur" either. *See* Merrian-Webster.com Dictionary (accessed July 8, 2020), available at https://www.merriam-webster.com/dictionary/will.[2]

Rather, Vargas argues – for the first time before this Court – that "will" must mean guaranteed to occur, because the mortgage uses the word "hundreds of times." Respondent Br. 21. Despite this claim, Vargas provides a single example from the mortgage's section 13:

> Any Person who takes over Lenders rights or obligations under this Security Instrument will have all Lenders rights…

Id. citing R 176. But, in this context, the mortgage does not use the word will to guarantee a future event. *See* R 176. Instead, section 13 alludes to the possibility that another Person takes over the Lender's mortgage rights in the future. It does

[1] Despite the language stating that acceleration and foreclosure proceedings will occur at the same time.

[2] Vargas's point in distinguishing the two dictionaries is unclear. The three additional definitions allegedly "omitted" in the 1995 source do not support Vargas's argument that "will" means guaranteed to occur. IndyMac's 2008 letter was not using the word will as a command, e.g., "you will do what I say." It also was not expressing desire or willingness, e.g. "if we will all do our best." Finally, the vague inevitably usage (e.g., "accidents will happen"), belies Vargas's claim the that letter guaranteed acceleration on September 7, 2008.

not address this Person's identity, the precise date when Person will take over, or if indeed a Person will ever take over the Lender's rights. If, however, the Person does take over, it *will* have the all the Lender's rights. So section 13 uses the verb "will" in the same way IndyMac's 2008 letter does – to describe a possible future event, not to guarantee it.

In sum, Vargas provides no reason why the Court should conflate the word "will" with "guaranteed to occur if the money wasn't paid." Respondent Br. 23 citing *Deutsche Bank Nat. Trust Co. v. Souto*, There 52 Misc.3d 1210(A), 41 N.Y.S.3d 718 (Table), 2016 WL 3909071, at *3–4 (Sup. Ct. N.Y. Cty. 2016).[3] Therefore, the Court should reverse the First Department's January 2019 Decision and Order.

III. CONSISTENT WITH INDYMAC'S DEFAULT LETTER, SECTION 22 PROVIDES FOR LENDER ELECTION AT THE TIME WHEN IT INITIATES FORECLOSURE PROCEEDINGS.

IndyMac's default letter expressed an intent to accelerate the loan "at the time" when it filed a foreclosure action. This letter, and its intent, are consistent with section 22 in Vargas's mortgage. In the response brief, Vargas now argues that section 22 created a trigger, automatically accelerating the loan on September 7,

[3] Vargas devotes significant space in his response brief to block quoting lengthy sections from the Supreme Court's Order in *Suoto*. But, when it affirmed this order, the Frist Department did not incorporate, or adopt, its reasoning and analysis in *Royal Blue Realty* – which is only three sentences long.

2008. Vargas failed to raise such an argument either in the Supreme Court (R 12-49, 205-219 & 223-245), or before the First Department (R 343-386). More importantly, this novel argument conflicts with the plain language in both the mortgage and default letter, as well as New York law. As a result, the Court should reverse the First Department's January 2019 Decision and Order.

A. IndyMac's default letter, sent under section 22, stated that acceleration would occur at the time when the lender initiates foreclosure proceedings.

IndyMac's letter did not automatically accelerate the loan on September 7, 2008. Rather, consistent with section 22 in the mortgage, it expressly stated that acceleration would occur when the lender filed a foreclosure action. Accordingly, section 22 identifies two options the lender *may* take to accelerate the loan.[4] R 179. First, it states:

> …if all of the conditions stated in subsections (a), (b) and (c) of this Section 22 are met, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument. Lender may do this without making any further demand for payment. This requirement is called "Immediate Payment in Full."

[4] This case is distinct from the pending appeals in *Clause Tortora individually and as executor of the estate of Jacqueline Squiteri v. Federal National Mortgage Association*, No. CA 18-02343, CA 19-00064 (pending before the Fourth Department) and *Ditech Financial LLC v. Rector 70 LLC,* No. 850330/2018, 2019 WL 2357562 (N.Y. Sup. Ct. June 04, 2019) (pending before the First Department) where the lenders argue that the foreclosure judgment accelerates the loan under the reinstatement clause in section 19. Vargas's 1-4 Family Rider deletes section 19. R 180.

R 179. Second, "[i]f Lender requires Immediate Payment in Full, Lender may bring a lawsuit[.]" *Id.* So the lender *may* require Immediate Payment in Full without another written demand (i.e. rejecting a late default payment), or it *may* require Immediate Payment in Full by filing a lawsuit.[5] *Id.* But the *may* language does not compel the lender to choose one option over the other. Rather, "may" indicates equivocal intent. Respondent Br. 19.

Here, IndyMac's default letter makes it clear when the lender intended to accelerate Vargas's loan. Again, it states, "we will accelerate your mortgage…and foreclosure proceedings will be initiated at that time." R 35. So IndyMac indicates it will "demand the entire amount remaining unpaid" when it files a lawsuit – the second option in section 22.

The "without further demand" language does not mean that the default notice creates an automatic trigger for Immediate Payment in Full when the time to cure expires. Vargas provides no legal or textual support for such a claim. Rather, the mortgage gives the lender an option to reject a late payment attempting to cure the default – and thus, accelerating the loan. Acceleration still requires a clear unequivocal act. *See Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 476 (1932); *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 982-83 (2d Dep't

[5] The "conditions stated in subsections (a), (b) and (c)" are conditions precedent to Immediate Payment in Full. Section 22 does not in any way state that "Immediate Payment in Full is a prerequisite to foreclosure," as Vargas argues. Respondent Br. 17.

2012). Rejecting a payment is an act. And when rejected, the lender does not have to make another written demand. But inaction cannot automatically accelerate a loan.

Even if section 22 created an automatic trigger option, Vargas's lender did not elect it. Again, IndyMac's letter unambiguously set forth that the loan would be accelerated at the same time when the lender filed a foreclosure action. As a result, Vargas's section 22 arguments fail, and the Court should reverse the First Department's January 2019 Decision and Order.

B. Section 22 contemplates a notice letter stating, "Lender *may* require Immediate Payment in Full," which Vargas concedes is not clear and unequivocal election.

The "without further demand" language does not create an automatic acceleration trigger when the cure period ends, because section 22(b)(4) contemplates "may accelerate" language in the notice letter.[6] Vargas repeatedly acknowledges that if IndyMac's letter used "may accelerate," rather than "will accelerate" the letter could not accelerate the loan. Respondent Br. 25. Specifically, he claims that if IndyMac "intended the letter to be equivocal, it would have elected

[6] As further evidence an automatic trigger was not contemplated, section 19 permits the borrower to reinstate – paying only the past due amount, rather than the fully accelerated debt – through entry of judgment. R 178. Vargas's 1-4 Family Rider deletes section 19. R 180. But had it not, entry of judgment would have been the act that the drafters contemplated would accelerate the loan.

to use the word 'may'…to convey that acceleration was just a possibility." Respondent Br. 19-20.

Consequently, section 22 requires its notices to use this "may" language. The mortgage expressly states that the lender "may require Immediate Payment in Full under this Section 22 only if all of the following conditions are met[.]" And subsection (b) requires, as a condition, the notice to say:

> … (4) That if I do not correct the default by the date stated in the notice, Lender *may* require Immediate Payment in Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale.

(emphasis added) R 179.

In other words, the mortgage contemplates a default notice that uses the word "may" to describe potential acceleration.[7] *Id.* Vargas agrees this language is equivocal, and it fails to set a specified acceleration date. Respondent Br. 20. Courts from New York's four appellate departments, likewise, have adopted this same view. *See Goldman Sachs Mortgage Co. v. Mares*, 135 A.D.3d 1121, 1122 (3d Dep't 2016) (holding a default letter stating the lender "may" accelerate was nothing more than a letter discussing a possible future event, and it did not invoke the acceleration

[7] In section 20, the mortgage refers to this section 22(b)(4) notice as a "notice of acceleration." Vargas cites no authority, or contractual language, that supports his argument that such nomenclature creates an automatic acceleration trigger. Compare the mortgage's language to a "notice of eviction" stating "YOU MAY BE EVICTED, WITHOUT FURTHER NOTICE, ON THE FOURTH BUSINESS DAY AFTER THE DATE OF THIS NOTICE." § 15:598. Notice of Eviction and warrant, G N.Y. Prac, Landlord and Tenant Practice in New York § 15:598. After day four, the marshal must still execute the warrant, and the eviction still must occur between sunrise and sunset. *See* RPAPL 749.

clause in the mortgage); *Ditech Financial, LLC v. Corbett*, 166 A.D.3d 1568, 1569 (4th Dep't 2018) ("…a letter discussing acceleration as a possible future event does not constitute an exercise of the mortgage's optional acceleration clause…"); *DLJ Mortgage Capital, Inc. v. Hirsh*, 161 A.D.3d 944, 945 (2 Dep't 2018) ("…that letter merely indicated that acceleration was a possible future event, and consequently it did not constitute an exercise of the mortgage's optional acceleration clause[.]"); *U.S. Bank Nat'l Ass'n v. Mongru*, No. 2017-08940, 2020 WL 2892605 (2d Dep't June 3, 2020) (same).[8]

So, had IndyMac followed the letter of section 22, its notice would have used "may." But this language would not have sufficiently identified the acceleration date. By instead using "will," IndyMac did not trigger some automatic acceleration date certain. Rather, section 22(b)(4), does not contemplate the lender using this verb in its default notice – let alone, that this single word could trigger automatic acceleration.[9] As such, Vargas's arguments based upon section 22 must fail, and the Court should reverse the First Department's January 2019 Decision and Order.

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[8] Even the *Souto* order, which the response brief so heavily relies upon, concedes: "The cited cases stand for the proposition that the phrase 'may accelerate' does not constitute a clear and unequivocal notice to defendants that an entire mortgage is being accelerated… would be controlling if the letter warned that plaintiff 'may accelerate[.]'"

[9] When examining the viability of notices under a mortgage contract, New York courts adhere to the "substantial compliance" doctrine. *Pennymac Holdings, LLC v. Tomanelli*, 139 AD3d 688, 689 (2d Dep't 2016); *see also Indymac Bank, F.S.B. v. Kamen*, 68 A.D.3d 931, 890 N.Y.S.2d 649, 650 (2d Dep't 2009) (finding that "the notice of default otherwise substantially complied with the terms

C. Even under section 22, election must still be clear, unequivocal, and immediate.

Vargas's new section 22 arguments do not change the well-settled standard that election must be clear, unequivocal, and immediate. *See Albertina*, 258 N.Y. at 476 (1932). Vargas claims that *Albertina* is "not applicable" in this appeal, because the only other time this Court addressed mortgage acceleration, it used the statutory form mortgage – without a section 22. Respondent Br. 27-29. This argument ignores 87-years of jurisprudence where New York courts have consistently required a clear, unequivocal, and overt act to accelerate many different types of mortgages. *See e.g.*, *Burke*, 94 A.D.3d at 982-83; *Clayton Natl. v. Guldi*, 307 A.D.2d 982 (2d Dep't 2003); *Ward v. Walkley*, 143 AD2d 415 (2 Dep't 1988); *EMC Mtge. Corp. v. Smith*, 18 A.D.3d 602 (2d Dep't 2005); *Colonie Block & Supply Co. v. Overmyer Co.*, 35 A.D.2d 897 (3rd Dep't 1970); *Mares*, 135 A.D.3d at 1122 (3d Dep't 2016). Acceleration through a clear unequivocal act, therefore, was the law when the drafters prepared section 22 in Vargas's mortgage.

Vargas also argues that nothing "in the 'clear and unequivocal' case law requires immediacy." Respondent Br. 26. This claim fails to consider the extensive authority requiring a lender to express that that "all sums due under the note and mortgage…were immediately due and payable." *Chase Mortgage Co. v. Fowler*,

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of the mortgage."). Using "will" instead of "may" does not mean that the lender failed to comply with a condition precedent as Vargas alleges Respondent's brief, page 18.

280 A.D.2d 892, 894 (4th Dep't 2001) [10] (citing 9 Warren's Weed New York Real Property, Mortgage Foreclosure, § 4.04 (4th ed); 1 Bruce J. Bergman, Bergman on New York Mortgage Foreclosures § 4.05(1)(b)); *see also Milone v. US Bank National Association*, 164 A.D.3d 145, 152 (2d Dep't 2018) ("…future intentions may always be changed[.]"); *Corbett*, 166 A.D.3d at 1569 ("…a letter discussing acceleration as a possible future event does not constitute an exercise of the mortgage's optional acceleration clause…"); *Bank of Am., N.A. v. Luma*, 157 A.D.3d 1106, 1107 (3d Dep't 2018) ("The letter accordingly failed to 'clearly and unequivocally advise defendant . . . that all sums due under the note and mortgage were immediately due and payable' so as to accelerate the debt and trigger the running of the statute of limitations." (citations omitted)).

Vargas's argument also conflicts with the plain language in the mortgage, giving the lender the option to require the borrower to "pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument." R 179. More so, he contradicts his *own* purported acceleration definition, "advancing of a loan agreement's maturity date so that payment of the entire debt is due *immediately*." (emphasis added) Respondent Br. 16, quoting *Black's Law Dictionary* (11th ed. 2019).

[10] Vargas seeks to distinguish *Fowler* arguing that the "loan in *Fowler* was obviously susceptible to immediate acceleration," because it had no notice provisions. But Vargas fails to provide any citation demonstrating that this claim is accurate – let alone obvious.

As a result, section 22 does not erase the well-settle legal requirements that election must be clear, unequivocal, and immediate. Therefore, the Court should reverse the First Department's January 2019 Decision and Order.

D. Any ambiguities in section 22, or the default letter, mean that acceleration was not clear and unequivocal.

Vargas first raising his section 22 arguments, approximately four years after he filed this lawsuit, does not portend clear and unequivocal election. Deutsche Bank maintains that both IndyMac's letter, and the mortgage, clearly expressed that the lender would accelerate the loan in connection with a subsequent event.

But to the extent that the Court identifies inconsistent meanings, as to when precisely the loan could accelerate, section 22 is (at best) ambiguous. *See Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 570 (2002) (holding a contract term susceptible to more than one meaning is ambiguous). As such, if the Court finds section 22 ambiguous, automatic acceleration on September 7, 2008 cannot be clear and unequivocal. Accordingly, the Court should reverse the First Department's January 2019 Decision and Order.

IV. BY VARGAS'S OWN DEFINITION, INDYMAC'S 2008 DEFAULT LETTER IS NOT AN "ACCELERATION LETTER."

Confusing default with acceleration, Vargas mistakenly claims that IndyMac's 2008 default letter is an "Acceleration Letter." Accordingly, the response

brief relies upon the 2009 New York State Unified Court System website for the following definition:

> Acceleration Letter: A letter sent from the lender (or its representative) to the borrower, which "calls in" the loan – effectively stating that the borrower must pay the entire loan amount by a *specific date*, otherwise the lender will file a foreclosure lawsuit. Once the mortgage has been accelerated, the lender is no longer compelled to accept arrears, though may still do so.

Respondent Br. fn 7 (citations omitted).

But IndyMac's 2008 default letter does not "call in" the loan. And it certainly does not state that Vargas "must pay the entire loan amount by a specified date." In January 2009, the entire loan balance was $297,539.63 plus $14,042.60 interest. R 187. The August 2008 default letter sought $7,903.96, or the amount the loan was in default. Further, it advised that that if Vargas paid this $7,903.96, the lender would "reinstate" the *defaulted* loan.

As such, Vargas incorrectly asserts that word "reinstate," in the default letter, means that the lender had already accelerated the loan – i.e., it gave the borrower "the right to de-accelerate a previously accelerated loan." (citations omitted) Respondent Br. 19. Applying Vargas's "reinstate" definition, the lender would have accelerated the loan before IndyMac's August 2008 letter.

Not true. The default letter states that that the lender will accept a payment – some $300,000 less than the total amount due on the loan – to reinstate anytime in the next 32-days. And thus, the loan was not accelerated in August 2008. Indeed,

Vargas's misguided definition for "reinstate" in this context undermines the very argument that he attempts to advance in this appeal: the default letter automatically accelerated the loan – 33 days later – on September 7, 2008.

Vargas boldly contends "the Acceleration Letter's use of the word 'reinstate' is dispositive on the issue of whether the Acceleration Letter accelerated the mortgage." Respondent Br. 19. If he is correct, then he concedes that the Court should reverse the First Department's January 2019 Decision and Order.

V. THE MORTGAGE IS NOT A TIME OF THE ESSENCE CONTRACT.

Vargas's mortgage is not a time of the essence contract. R 165-184. And, as discussed in the initial brief, the lender's representative could not have unilaterally imposed such a condition in a 30-year installment contract. Appellant Br. 15-16. The response brief fails to present legal, or contractual, support the contrary. As a result, the Court should reverse the First Department's January 2019 Decision and Order.

VI. SUBSEQUENT FILINGS AND CORRESPONDENCE FROM VARGAS'S LENDER DO NOT ESTABLISH A SEPTEMBER 7, 2008 ACCELERATION DATE.

Correspondences from IndyMac, and later Deutsche Bank in 2014 and 2016, do not establish that the lender accelerated Vargas's loan on September 7, 2008. Likewise, a future attempt to accelerate the loan via foreclosure does not support a

September 2008 acceleration date. Rather, it is consistent with the lender's attempt to accelerate as set forth in IndyMac's August 2008 letter.

Vargas, citing to *MTGLQ Investors*, *LLP v. Lunder*, 183 A.D.3d 967 (3d Dep't 2020), argues that these subsequent acts prove that his lender accelerated the loan on September 7, 2008. But this comparison ignores a glaring distinction. In *Lunder*, the lender's subsequent letters, all specified a January 21, 2011 acceleration date – the date that the cure period expired. *Id.* at 968-969.

Here, Deutsche Bank's future correspondences did not acknowledge a September 2008 acceleration date. In fact, the record and IndyMac's default letter indicate the contrary – election "at that time" when the lender files a valid foreclosure action. R 35. As a result, Court should reverse the First Department's January 2019 Decision and Order.

VII. DEUTSCHE BANK PRESERVED THE REVOCATION ISSUE, AND THE DISCONTINUANCE REVOKED ACCELERATION

Deutsche Bank preserved the revocation issue. Deutsche Bank raised the issue before the Supreme Court. R 60-62. The parties argued it on appeal. R 373-374. And the First Department addressed it in its decision. R 306. Further, Deutsche Bank identified this issue in its motion for leave to appeal to this Court, which Vargas opposed arguing it was not preserved, and the Court granted that motion. R 305. So the Court has jurisdiction over this issue under CPLR 5602, recognizing that revocation is a "novel and difficult questions of law having

statewide importance." *See* COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK OF THE COURT: 2010, at 2 (2011). As such, the record belies Vargas's claim that revocation has not been preserved. [11]

Further, if a discontinuance annuls the act that purported to accelerate the loan "so that the action is as if it never had been," then a lender's subsequent correspondence should not impact that nullification and revocation. *See Loeb v. Willis*, 100 N.Y. 231, 235 (1885). Accordingly, the Court should reverse the First Department's January 2019 Decision and Order.

VIII. PUBLIC POLICY DICTATES THAT A DEFAULT LETTER SHOULD NOT AUTOMATICALLY ACCELERATE A LOAN.

Vargas concludes his brief arguing for "fairness" and "repose." Respondent Br. 35. Accordingly, Vargas avers that if he "did not commence the quiet title action…he likely would still not know whether a valid lien existed on his home." *Id.* The record belies Vargas's claim.

When Vargas filed this action, the parties were modifying his loan. R 47-49. Vargas completed a HAMP loan modification application. *Id.* Deutsche Bank therefore was not a lender that had abandoned its mortgage interest. *Id.* Rather, Vargas acknowledged his debt, and even the made multiple payments towards its

[11] The parties also addressed this issue at oral argument in the First Department. *See* Appellate Division, First Judicial Department, *Oral Arguments*, January 8, 2019, available at http://www.courts.state.ny.us/courts/ad1/AD1%20Live%20Streaming/2019%20Live%20Streming%20Calendar/December/december.shtml.

modified balance. R 118. In this regard, it was Vargas – not Deutsche Bank – who acted inconsistently with his position in this appeal.

A modification would have been aligned with a legislative preference for how foreclosure disputes should resolve – "a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, including, but not limited to, a loan modification[.]" CPLR 3408(a)(f). Instead, Vargas saw an opportunity to be relieved of his entire payment obligation. And he prosecuted this case for nearly five years over a single word in a decade-old default letter.

To avoid this outcome in the future, Deutsche Bank seeks a holding that a default letter – especially a letter unequivocally stating that the loan "will" accelerate "at that time" the lender files a valid foreclosure action – is not automatic election. The Court should reverse the First Department's January 2019 Decision and Order.

CONCLUSION

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

Dated: New York, New York
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Resprctfuly submitted,

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CERTIFICATE OF COMPLIANCE

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

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