To Be Argued By:
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Court of Appeals

STATE OF NEW YORK

JUAN VARGAS,

Plaintiff-Respondent,

against

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT

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STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Plaintiff-Respondent, Juan Vargas, states that, as of the date of the completion of this brief, Juan Vargas is unaware of any litigation related to this appeal.

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By Decision and Order dated January 31, 2019, the Appellate Division, First Department affirmed the Decision of the Supreme Court, County of Bronx, dated October 12, 2017, which held that the letter, dated August 5, 2008 (the "Acceleration Letter") sent by Defendant-Appellant, Deutsche Bank National Trust Company ("Deutsche Bank," and together with its predecessors-in-interest, the "Appellant"), to Plaintiff-Respondent, Juan Vargas ("Vargas"), accelerated the mortgage loan between Appellant and Vargas—triggering the statute of limitations and rendering the mortgage loan unenforceable. Appellate appeals and in doing so presents the following question to the Court:

QUESTION PRESENTED

Issue: Whether the trial and appellate courts correctly held that clear and unequivocal notice that a mortgagee *will* accelerate a mortgage loan—triggering the running of the statute of limitations—is given where the mortgagee, (i) in 2008, by letter, declared that it "will accelerate" the borrower's loan at the end of a specific number of days and that "Time is of the Essence!"; and thereafter (ii) in 2009, commenced a foreclosure action against the borrower; (iii) in 2013, sent the borrower a letter stating that the entire amount of the mortgage loan remains due; (iv) in 2014, after discontinuance of the foreclosure action, sent the borrower payoff and reinstatement letters stating that the entire amount of the mortgage loan

remains due and informs the borrower of the amount necessary to de-accelerate the mortgage; and (v) in 2016, warned the borrower that any payments made in contribution to the entire debt will not be deemed a waiver of the prior acceleration.

Answer: Yes. A mortgagee's letter that states that acceleration "will occur" means that the event is going to take place, triggering the running of the statute of limitations, and a mortgagee's subsequent conduct consistent with such acceleration unequivocally evinces the mortgagee's election to accelerate.

PRELIMINARY STATEMENT

In August 2008, Appellant sent Vargas a clear and unequivocal letter advising him that his mortgage loan *will* accelerate. For the approximately eight years following the Acceleration Letter—until Vargas' commencement of the underlying proceeding in July 2016—Appellant continuously and conclusively proceeded consistent with its 2008 election to accelerate. Holding an unenforceable loan as a result of its own failures, Appellant now seeks a do-over, and requests that the Court determine that (i) Appellant's letter informing Vargas that his loan "will accelerate" actually did not mean that his loan will accelerate, (ii) Appellant's conduct for eight years following the Acceleration Letter, all of which was consistent with the mortgage having been accelerated in 2008, should be ignored.

The Court should affirm the First Department's finding that the clear and unequivocal language contained in Appellant's 2008 Acceleration Letter accelerated Vargas' mortgage loan and triggered the running of the statute of limitations. Moreover, as best stated by a New York bankruptcy court that recently considered facts uncannily similar to those present here:

> If the Court were to find that the statute of limitations had not expired, it would have had to overlook inherent inconsistencies in the Defendant's various arguments. In addition, the Court would have to find that a notice of default stating that the note would be accelerated by a date certain was of no consequence, and a foreclosure action pursuant to which the lender represented that it held the note was a nullity. The Defendant's core argument is that the notice of default is irrelevant and that because the Defendant did not have the legal authority to commence the first foreclosure action, that action should not count. The Court is not prepared to find that a lender, because of its own failures to either understand the law or failure to abide by the law, is entitled to a do-over in order to negate the consequences of its actions. The result of the lender's inability to follow the clear and unambiguous procedures in this matter leave the lender in a circumstance where the applicable statute of limitations has expired, leaving the note and mortgage … unenforceable.

Bernard v. Nationstar Mortg. LLC (In re Kramer), No. 17-70741-REG, 2019 WL 8953259, at *2 (Bankr. E.D.N.Y. Nov. 27, 2019). Accordingly, not only was the Acceleration Letter an overt, clear and unequivocal act accelerating the mortgage, but additionally, this Court should not countenance Appellant's attempt to "negate the consequences of its actions." *Id.*

The decision by the First Department below finding the Acceleration Letter to be clear and unequivocal as required to commence the statute of limitations, *see* R. 305–06,[1] is consistent with other First Department precedent. *See, e.g.*, *Deutsche Bank Natl. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529, 529 (1st Dep't. 2017), *lv. denied* 86 N.E.3d 553 (2017) ("The letters … provided clear and unequivocal notice that it 'will' accelerate the loan balance … unless the borrower cured his defaults within [the cure period].").

The First Department's decision below is also consistent with a recent decision issued less than two months ago in the Third Department that considered a letter with nearly identical language to the Acceleration Letter. *Compare MTGLQ Inv'rs, LLP v. Lunder*, 183 A.D.3d 967, 967 (3d Dep't., May 7, 2020) (finding a clear and unequivocal letter stating "[i]f the default is not cured on or before [a date certain], 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" triggered the running of the statute of limitations); *with* Acceleration Letter, R. at 35–36.

Further, the First Department's decision below is also consistent with all federal courts located in the New York that have considered acceleration notices similar to the Acceleration Letter. *See, e.g.*, *In re Kramer*, 2019 WL 8953259, at *4

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

(Bankr. E.D.N.Y. Nov. 27, 2019) (considering a letter nearly identical letter to the Acceleration Letter that stated, "[i]f the default is not cured on or before [date], 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" and holding that, "the [ ] Default Notice, which provides clear and unequivocal notice that the [ ] Note would become due in its entirety upon expiration of the cure period, served to accelerate the [ ] Note"); *Costa v. Deutsche Bank Natl. Tr. Co*., 247 F. Supp. 3d 329, 342 (S.D.N.Y. 2017) (The "Notice itself lit the acceleration fuse: It announced that failure to cure by [a date certain], 'will result in the acceleration of the sums secured by the above mortgage and sale of the mortgaged premises.'...This is a 'clear and unequivocal' declaration that unless the default is cured, acceleration occurs on [such date]; no further action by any party is needed.").

Moreover, from August 2008 to July 2016, Appellant continuously acted as if Vargas' mortgage loan accelerated in 2008. Courts, including the courts below in the present case, have held that continued efforts by a mortgagee to collect on a previously accelerated debt "further evinces" that acceleration occurred upon the expiration of a cure period pronounced in a mortgagee's initial letter. *See Lunder*, 183 A.D.3d at 968 ("The reiteration of this acceleration date in five subsequent letters only further evinces the acceleration date…."); *accord Fed. Nat'l Mortg.*

Ass'n v. Rosenberg, 180 A.D.3d 401, 402 (1st Dep't. 2020) ("Defendants reliance on [the] 'continued efforts' [in *Vargas*] to collect the mortgage debt is unavailing. This case is distinguishable from Vargas because in that case, the lender sent notices attempting to collect ... the accelerated mortgage debt**.**" (citation omitted)). *Rosenberg* is illustrative of the significance that the First Department ascribed to the Mortgagee's continued references to the accelerated mortgage debt in this case.

Here, as in *Kramer* and *Lunder*, a finding that the Acceleration Letter did not accelerate Vargas' mortgage loan requires the Court to disregard the Appellant's subsequent, conflicting conduct over many years. Both the trial and appellate courts expressly relied on Appellant's continued efforts in finding in favor of Vargas. In its initial decision, the trial court noted that, "in July of 2014, Deutsche Bank was still attempting to collect the accelerated amount of the mortgage debt from plaintiff." R. 45. In granting Vargas' motion to renew, the trial court again discussed Appellant's continued efforts, stating, "[i]n 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." R. 7. Similarly, the First Department expressly noted,

> [Appellant'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*."

R. 306. (emphasis added).

In the face of this substantive, persuasive and contrary case law, the Appellant relies on precedent limited to the Second Department. As set forth in detail below, none of the Second Department cases cited by the Appellant are analogous to the overwhelming facts present here, including, without limitation, (i) a clear and unequivocal letter using the word "*will*" and emphasizing, "Time is of the Essence!"; (ii) a foreclosure proceeding initiated approximately five months after sending the aforesaid Acceleration Letter (which is more than 11 years ago at present); (iii) multiple notices sent to the borrower *both* pre- and post-discontinuance of the foreclosure proceeding that seek to collect on the accelerated debt; and (iv) an additional notice sent to the borrower (also post-discontinuance) warning that "any payments made in contribution to the entire debt 'will not be deemed a waiver of the acceleration of [his] loan.'" R. 306. The correspondence referenced in sub-clause (iv) of this paragraph was sent: (x) approximately *seven and a half years* after the Appellant sent Vargas the Acceleration Letter; (y) approximately *seven years* after Appellant commenced the foreclosure action; and, undermining Appellant's contention that its discontinuance of the foreclosure proceeding in 2013 somehow revoked its prior acceleration, and (z) more than two years after the foreclosure was discontinued.

It is important to note that the Appellant, as it did below, misstates this Court's holding in *Albertina v. Realty Co. v. Rosbro Realty Corp*. 258 N.Y. 472 (1932), in

an attempt to reframe the sole issue presented in this case. Appellant states in the opening paragraph of its brief that in *Albertina*, this Court "also held that *notice* is not *an election to accelerate*." Appellant Br. at 2. This characterization is transparently off-base as this Court, in *Albertina*, expressly stated, "[i]t is unnecessary to decide just what a holder of a mortgage must do to exercise the right of election, under an acceleration clause." *Albertina*, 258 N.Y. at 476. Moreover, every court to address this issue has held that, where acceleration is at the option/election of the mortgagee, an acceleration may occur by notice of the mortgagee's election to accelerate or by the commencement of a foreclosure. *See, e.g.*, *Christiana Tr. v. Barua*, No. 2017-12206, 2020 WL 2892827, at *5 (2d Dep't. June 3, 2020) ("An acceleration may be communicated in different forms—by a letter…, by a self-executing balloon payment …, or, as relevant here, by commencing an action…").

Appellant's attempt to revisit its inconsistent and misguided argument that its voluntary discontinuance of the 2009 foreclosure constituted a revocation of its prior acceleration is unpreserved for appeal and thus not before this Court. (*See* section III, *infra*.)

STATEMENT OF THE CASE – FACTS AND PROCEDURAL HISTORY

On May 9, 2005, Juan P. Vargas borrowed $308,000.00 and executed a promissory note for that amount. R. 159–163. The loan was secured with a

mortgage (the "Mortgage") on the property located at 530 Coster Street, Bronx, New York. R 164–184. IndyMac Federal Bank, FSB ("IndyMac") was the Mortgage servicer from inception and at all relevant times herein, r. 35, 163, and became owner by assignment dated January 20, 2009. R. 202. In 2007, Vargas allegedly defaulted on his payment obligations under the Mortgage and note. R. 41.

On August 5, 2008, IndyMac sent a letter (the "Acceleration Letter") to Vargas advising him that his Mortgage loan "*will* accelerate" unless he cures his default within 32 days (the "Cure Period"). R. 35–36. The Acceleration Letter clearly and unequivocally declares:

> To cure your default, you must, on or before 32 days from the date of this letter, pay IndyMac Federal Bank FSB in the amount of $ 7903.96 plus any additional monthly payments, late charges and fees which become due.
> …
> 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.
> …
> Time is of the essence!"[2]

R. 35–36. "[I]t is undisputed that [Vargas] did not cure his default within the time period." R. 306. R. 141. On January 16, 2009, IndyMac commenced foreclosure

[2] As stated by the First Department below, "[t]he letter highlighted that time was of the essence…." R. 306. Appellant, for the first time, brazenly asserts that "[i]t is not entirely clear from the copy of this letter in Record of Appeal whether IndyMac punctuated this sentence with an explanation point or colon. Although such distinction is of no significance, it is respectfully submitted that it is entirely clear that the Appellant followed "Time is of the essence" in the Acceleration Letter with an exclamation point ("Time is of the essence!").

proceedings against Vargas (the "2009 Foreclosure"), r. 247, and on November 3, 2010, a judgment (the "Judgment of Foreclosure") was issued. R. 224. The Appellant, Deutsche Bank, first enters the picture through an "Assignment of Cause of Action" dated August 31, 2011. R. 278.

On November 23, 2011, more than one year after the Judgment of Foreclosure was entered, Appellant (not a predecessor-in-interest) filed a motion to ratify and/or amend, *nunc pro tunc*, the Judgment of Foreclosure as a result of Appellant's failure to comply with certain mandatory conditions precedent. R. 258–70. Specifically, Appellant's motion seeks relief to amend the Judgment to rectify its own errors contained in its Affidavit of Merit and Affidavit of Amount Due. R. 225. On June 22, 2012, Appellant's motion seeking to amend the Judgment of Foreclosure was denied in its entirety, with the court finding, "the filing of a false affidavit and false notarization are not mere irregularities which may be ignored or corrected." R. 270 (citations omitted). As a result, Appellant was left with a defective, non-executable judgment and had no choice but to discontinue the 2009 Foreclosure. However, once again, Appellant would wait an inordinate amount of time before moving to discontinue—approximately 17 months.

On September 12, 2013, Appellant, by the same counsel that represented Appellant in the trial court below, sent Vargas a letter (the "2013 Letter") reaffirming

that the Mortgage had previously been accelerated and continuing to attempt to collect the accelerated amount owed under Mortgage. R. 37–38.[3]

On or about November 2013—again, a period of approximately 17 months after having been denied leave to ratify and/or amend—the Appellant moved to discontinue, and on November 25, 2013, the court granted Appellant's motion and entered an order discontinuing the 2009 Foreclosure. R. 247.

Once again, however this time subsequent to the discontinuance of the 2009 Foreclosure, on July 8, 2014, Appellant sent Vargas notices (the "2014 Letter") where "[Appellant] was still attempting to collect the accelerated amount of the mortgage debt from plaintiff." R. 37–38, 45. The 2014 Letters once again state that the entire amount due on the mortgage debt ($475,261.87) was currently due and advise Vargas of the amount required to reinstate the Mortgage. R. 37–38.[4]

The six-year statute of limitations from the date of the Acceleration Letter expired on August 5, 2014. At all times during the aforesaid time periods until the running of the statute of limitations—including the approximately nine month period between discontinuance of the 2009 Foreclosure in 2013 and expiration of the statute

[3] The 2013 Letter further states "[w]e have been retained … to begin foreclosure proceedings," and informs Vargas that such proceedings may commence at any time. *Id.* On September 12, 2013, the date of the 2013 Letter, the 2009 Foreclosure remained pending. R. 247.

[4] The 2014 Letter advises Vargas that, "[u]pon … receipt of the necessary funds …, our office hereby undertakes to file a stipulation of discontinuance of the foreclosure action and/or motion to vacate judgment of foreclosure and sale and cancellation of the notice of pendency." *Id.* On July 8, 2014, the date of the 2014 Letters, the 2009 (nor any other) Foreclosure was pending, nor did any foreclosure judgment exist to vacate. R. 247.

of limitations—Appellant could have, and did not, recommence the foreclosure action.

On March 6, 2015, Appellant was assigned the mortgage. R. 41.

On or about February 2016, Appellant notified Vargas that that any payments made in contribution to the entire debt 'will not be deemed a waiver of the acceleration of [his] loan.'" R. 300, 306. This warning was contained in a modification solicitation unilaterally sent by Appellant to Vargas. R. 300.

Vargas filed the underlying quiet title action against Appellant on July 29, 2016, r. 83, asserting that Appellant's mortgage lien was time-barred. R. 84–90. On October 31, 2016, Appellant moved to dismiss the complaint arguing (i) that the discontinuance of the 2009 Foreclosure in 2013 "revoked its prior acceleration," or, in the alternative, (ii) that IndyMac lacked standing to commence the 2009 Foreclosure, or, in the alternative, (iii) that the "statute of limitations runs anew" from the last of Vargas' trial modification payments (which payments the Appellant explicitly stated would not waive the prior acceleration). R. 70–82.

Vargas cross-moved for summary judgment on January 9, 2017. R. 222. Vargas argued that the loan had been accelerated by the Acceleration Letter. R. 236. Vargas further argued that the 2013 discontinuance did not serve as a revocation under controlling case law, that the circumstances that gave rise to and surrounding discontinuance did not support a revocation finding, and that Appellant's actions

subsequent to the discontinuance evidenced that Appellant did not consider the acceleration revoked. R. 223–243. Moreover, with respect to Appellant's standing argument, Vargas argued that (i) standing to commence the 2009 Foreclosure was of no moment because the Acceleration Letter accelerated the Mortgage and (ii) assuming *arguendo* that Appellant is correct that IndyMac lacked standing, such contention is inconsistent with Appellant's other arguments, as a prior acceleration cannot be revoked by discontinuing a legally null proceeding. R. 212.

On April 5, 2017, the Supreme Court denied both motions. R 41–46. Addressing Appellant's assertion that it had revoked its prior acceleration by discontinuing the 2009 foreclosure, the court noted that such assertion is contradicted by Appellant "*still attempting to collect the accelerated amount of the mortgage debt*" in July 2014**.** R. 45 (emphasis added). Additionally, the trial court did "not find the [Acceleration Letter] to be sufficient, in itself, to establish as a matter of law that the debt was accelerated in September of 2008 rather than on January 16, 2009, when the foreclosure action was commenced." *Id.* With respect to the 2016 trial payments, the court held "issues of fact exist as to whether plaintiff entered into a loan modification." R. 45–46.

On July 11, 2017, Vargas filed a motion to renew his summary judgment motion, citing the decision in *Deutsche Bank Nat. Trust Co. v. Royal Blue Realty Holdings, Inc.*, 148 A.D.3d 529 (1st Dep't., 2017) ("*Royal Blue*") that considered a

virtually identical letter to the Acceleration Letter and clarified the law. R. 10–11, 13–17.

On October 12, 2017, the trial court determined that the language in the Acceleration Letter was "clear and unequivocal notice" and thus accelerated the loan, stating,

> [T]he 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, and subsequent discontinuance is of no moment.

R. 6–7. Appellant appealed and on January 31, 2019, the Appellate Division, First Department unanimously affirmed the decision of the Supreme Court finding the Mortgage unenforceable. R. 305–07. Thereafter, the Appellant filed this appeal. R. 304.

ARGUMENT

I. THE ACCELERATION LETTER WAS CLEAR AND UNEQUIVOCAL AND RESULTED IN ACCELERATION OF THE MORTGAGE AND THE RUNNIN G OF THE STATUTE O F LIMITATIONS.

By its plain terms, the Acceleration Letter unambiguously accelerated the Mortgage. Appellant's position is as follows: Advising a borrower that something "will" happen, does not mean that it "will" happen, and even though hindsight reveals that it did in fact happen, this Court should nevertheless find that the Appellant did not mean it.

The applicable statute of limitations for Appellant to commence an action to foreclosure on the Mortgage is six years. C.P.L.R. § 213(4) ("[A]ctions to be commenced within six years.... an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein."). It is well settled in New York that a cause of action for payment of a sum of money allegedly owed pursuant to a contract accrues when the plaintiff "possesses a legal right to demand payment" *Bank of New York Mellon v. Dieudonne*, 171 A.D.3d 34, 39 (2d Dep't. 2019), *lv. denied*, 34 N.Y.3d 910 (2020). In the context of a mortgage loan, "once the debt has been accelerated … the statute of limitations begins to run…." *Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (3d Dept. 2001). A demand will constitute an acceleration where that fact is communicated to the mortgagor in a "clear and unequivocal manner." *Nationstar Mortg., LLC v. Weisblum*, 143 A.D.3d 866, 867 (2d Dep't. 2016).

A. The Acceleration Letter is "clear and unequivocal" under the plain meaning of the language.

The Acceleration Letter expressly provides that if Vargas does not cure his default, Appellant "will" accelerate his mortgage loan. This is not equivocal (or "wishy-washy") language. The letter indicates that the 32 days is Vargas' last chance to cure. There is no indication that Appellant was debating whether or not

to accelerate the mortgage (or that Appellant was "only kidding" about the deadline), nor that that there will be any other notices sent to Vargas between the Acceleration Letter and the commencement of the foreclosure case. The letter utilized the term "will" and not "might" or "may." "In construing a contract, the document must be read as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed." *Snug Harbor Square Venture v. Never Home Laundry, Inc.*, 252 A.D.2d 520, 521 (2d Dep't. 1998).

1. The Mortgage explicitly refers to the Acceleration Letter as a "notice of acceleration."

Contrary to how Appellant references it in its brief (a "default letter"), the Mortgage expressly and exclusively refers to the Acceleration Letter as a "notice of acceleration." *See* R. 164–184 (Mortgage, §§ 20, 22). The Acceleration Letter was sent pursuant to Section 22 of the Mortgage.[5] Immediate Payment in Full under Section 22 of the Mortgage is synonymous with acceleration. *See* R. 179 (Mortgage, § 22); *Acceleration, Black's Law Dictionary (*11th ed. 2019) (defining, as applicable here, "Acceleration" as "[t]he advancing of a loan agreement's maturity date so that payment of the entire debt is due immediately").

[5] Section 22 provides, "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…. Lender may do this without making any further demand for payment. This requirement is called 'Immediate Payment in Full.'" R. 179 (Mortgage, § 22).

Section 22 requires that the Appellant send Vargas a notice stating, among other things, Vargas' default and a date at least 30 days out by which Vargas must cure the default. R. 179 (Mortgage, § 22(b)). Section 20 of the Mortgage states, in pertinent part, "[t]he *notice of acceleration* and opportunity to cure given to me under Section 22…." R. 177–78 (Mortgage, § 20) (emphasis added). Moreover, the Adjustable Rate Rider to the Mortgage similarly states, "[i]f Lender exercises the option to require immediate payment in full, Lender shall give Borrower *notice of acceleration*. The notice shall provide a period of not less than 30 days from the date the notice…." R. 183–84 (Adjustable Rate Rider, § B) (emphasis added).

By stating the amount of Vargas' arrears and providing Vargas a 32-day Cure Period, the Acceleration Letter complies with Section 22 of the Mortgage. Yet, notwithstanding that the controlling Mortgage document refers to such notice as a "notice of acceleration," the Appellant contends the Acceleration Letter is not a notice of acceleration.

Moreover, and critically, Section 22 of the Mortgage further provides that "*[i]f* Lender requires Immediate Payment in Full, Lender *may bring a lawsuit* to take away all of my remaining rights in the Property and have the Property sold." R. 179 (Mortgage, § 22) (emphasis added). Put another way, Immediate Payment in Full is a prerequisite to foreclosure under Section 22. *Id.*; *see also Costa*, 247 F. Supp. 3d at 338 ("The typical residential mortgage agreement incorporates an 'Acceleration

Clause' that provides the lender, by an affirmative act, may elect to accelerate the loan, *giving rise the ability to commence foreclosure proceedings*." (emphasis added)). If Appellant's position is to be accepted, and the Acceleration Letter did not operate to accelerate the loan at the expiration of the Cure Period, query how Appellant commenced the foreclosure action on January 16, 2009 without first fulfilling this precondition? Not only is acceleration a precondition to "bring[ing] a lawsuit" under the Mortgage, but the Mortgage explicitly provides that a foreclosure may commence "without further notice or demand on Borrower." R. 179 (Mortgage, § 22).[6]

2. <u>The Acceleration Letter Informs Vargas of the Amount Required to Reinstate the Mortgage</u>.

Tellingly, in the first paragraph of the Acceleration Letter, the Appellant states, "[t]he total amount required to reinstate your loan as of the date of this letter is … [$]7903.96." R. 35–36. A reinstatement provision "gives the borrower the contractual option to de-accelerate the mortgage when certain conditions are met." *Bank of New York Mellon v. Dieudonne*, 171 A.D.3d 34, 39, (2d Dep't. 2019), *lv. denied*, 34 N.Y.3d 910 (2020); *see also Wells Fargo Bank, N.A. v. Portu*, 179 A.D.3d

[6] *See also In re Kramer*, 2019 WL 8953259, at *11–13 ("To find that the language in the [ ] Default Notice was insufficiently clear and unequivocal to accelerate the [ ] Note would also render the three subsequent foreclosure actions violative of the terms of the [ ] Mortgage. Under its terms, only a notice of default could trigger acceleration of the [ ] Note, and was a prerequisite to commencing a foreclosure action. That notice gave rise to the right to commence a foreclosure action, which, if brought properly, would stop the clock on the six-year statute of limitations.").

1204, 1207 (3d Dep't. 2020) (noting that reinstatement gives the borrower the right to de-accelerate a previously accelerated loan). Therefore, the Acceleration Letter's use of the word "reinstate" is dispositive on the issue of whether the Acceleration Letter accelerated the Mortgage. Had the Mortgage not have been accelerated, there would be nothing to "reinstate."

3. "Time is of the essence!"

The language in the Acceleration Letter is even more explicit and absolute than the language contained in similar cases that have considered a letter stating "will accelerate," and found same to be "clear and unequivocal" language, sufficient to trigger the running of the statute of limitations. Appellant's Acceleration Letter emphatically declares "Time is of the essence!" R. 36. A "time is of the essence" warning gives "clear, distinct, and unequivocal notice that time is of the essence…." *Nehmadi v. Davis*, 63 A.D.3d 1125, 1127, (2d Dep't. 2009).

Here, "[t]he letter highlighted that time was of the essence…," which the First Department considered additional evidence that the Appellant's election to accelerate contained in the Acceleration Letter was clear and unequivocal. R. 306.

Moreover, Appellant sent the Acceleration Letter directly to the borrower, and the Appellant was is in the superior and sophisticated position to comprehend the meaning and legal impact of words and phrases such as "reinstate" and "[t]ime is of the essence!" If Appellant intended the letter to be equivocal, it would have elected

to use the word "may," or similar words to convey that acceleration is just a possibility.[7] The Acceleration Letter put Vargas on notice that if he did not cure his arrears "by a specified date," the Mortgage will accelerate. Put another way, time was of the essence!

Further, Appellant asks this Court to accept that the Acceleration Letter emphatically states, "Time is of the Essence!" only in relation to "urg[ing] Vargas to contact Loan Resolution"—something Vargas has the ability to do at any time, including post-acceleration. Every day in courthouses throughout New York State, mortgagors and mortgagees engage in loan resolution and loss mitigation discussions subsequent to acceleration.[8] Interpreting "Time is of the essence!" to

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[7] Notably, at the time of the commencement of the 2009 Foreclosure, the website for the New York State Unified Court System, a resource for lay persons at risk of foreclosure, contained the following definition of an "Acceleration letter:"

> 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 specified 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."

See R. 368–69 (emphasis added) (citing NYCourts.gov, *Paths of a Foreclosure in New York State*, at *3, (Jan. 2010), formerly available at https://www.nycourts.gov/courthelp/pdfs/NEDAP_ForeclosurePathsNYS.pdf.).

[8] For this and the following reason, Appellant's contention that "the [Acceleration] letter, itself, anticipated loan resolution services, and counseling activities, as alternatives to accelerating the loan in September," is likewise, at best, disingenuous. Appellant's Br. at 13. The federal government mandates Appellant to provide such loss mitigation notice under section § 1715u(a) of the National Housing Act, 12 U.S.C. § 1715u(a), and "the HUD regulations provide for formidable consequences for lenders' noncompliance." *Home Mortg., Inc. v. Neal*, 398 Md. 705 (2007) (citing *Treble Damages for Failure To Engage in Loss Mitigation*, 70 Fed.Reg. 21, 573 (Apr. 26, 2005). The Appellant's compliance with HUD regulations does not offer an iota of support for the proposition that it was anticipated that in September, the parties would engage in loss mitigation discussions.

only apply to the loan resolution paragraph defies credulity and the law and simply fails to comport with the practical interpretation of the Acceleration Letter, and reality. *See Snug Harbor*, 252 A.D.2d at 521 ("In construing a contract, the document must be read as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed.").

4. Will means will.

Appellant's contortion of the plain meaning of the word "will" yields an unworkable rule that is wholly inconsistent with both what transpired in this case between Vargas and the Appellant and applicable law. By way of example, the Mortgage entered into between Vargas and Appellant's predecessor-in-interest uses the word *will* hundreds of times. R. 164–184. Section 13 of the Mortgage provides,

> Any Person who takes over Lender's rights or obligations under this Security Instrument will have all of Lender's rights…

R. 176. This provision in the Mortgage is applicable to the Appellant as the Appellant was assigned the Mortgage after its inception (*i.e.*, Appellant is a "Person[9] who t[ook] over Lender's rights or obligations"). Applying Appellant's manufactured definition of the word *will*, upon the assignment to Appellant, it is only a *possibility* that at some time *in the future* after the assignment that Appellant

[9] *See* Mortgage, R. 171 ("In this Security Instrument, the word 'Person' means any individual, organization, governmental authority or other party.").

obtained the original lender's rights under the Mortgage. Put another way, Appellant *may* (or may not) have ever held an interest in the Mortgage.

In a further attempt to distract from the plain meaning of "will" as used in the Acceleration Letter, Appellant tellingly cites a 1995 edition of Webster's college dictionary, rather than citing the current Merriam-Webster Online Dictionary. *See Avella v. City of New York,* 29 N.Y.3d 425, 435 (using Merriam-Webster Online Dictionary to aid interpreting the meaning of words in a contract). In addition to the selected common usages cited by Appellant, *see* Appellant Br. at 12, Merriam-Webster Online Dictionary includes the following definitions of the word "will", all of which were conveniently omitted from the Appellant's Brief:

- "used to express desire, choice, willingness, consent, or in negative constructions refusal"
- "used to express a command, exhortation, or injunction"
- "used to express inevitability"

See Merriam-Webster, *"Will,"* Merriam-Webster.com Dictionary (accessed July 5, 2020), available at https://www.merriam-webster.com/dictionary/will.[10]

[10] As stated herein and consistent with Section 22 of the Mortgage, the Acceleration Letter uses the word "will" in relation to the guaranteed Mortgage acceleration (such acceleration being a precondition to commencement of a foreclosure under the Mortgage) in comparison to in the following sentence using the word "may" in connection with its commencement of a foreclosure. In other words, in referencing the commencement of a foreclosure, the Acceleration Letter is referring to a "possible future event." But in referencing acceleration, "…the letter uses the term 'will,'" which indicates that a future event is "guaranteed to occur if the money wasn't paid." R. 30–34 (*Souto*, 41 N.Y.S.3d at 718).

B. A mortgagee's letter stating that the mortgage "will" accelerate if certain defaults are not cured within a specific number of days accelerates the mortgage where the mortgagor fails to cure.

The Appellant proffers many of the same legal arguments that court after court in New York have rejected by distinguishing words such as "may," that discuss a possible future event, and words of certainty, such as "will."

1. *Royal Blue* is well-reasoned and applicable.

The Court should adopt the reasoning of the First Department with respect to the clear and unequivocal language. *See* R. 305–06; *Royal Blue*, 148 A.D.3d 529 (1st Dep't. 2017).

In *Royal Blue*, the borrower relied on an acceleration letter on all fours with the Acceleration Letter here in arguing that its mortgage loan with Deutsche Bank was time-barred.[11] The trial court in *Royal Blue,* rejecting all of the same arguments that the Appellant advances here, held,

> This is not a wishy-washy notice. The Court finds that the phrase "will accelerate the Loan balance" means that plaintiff will accelerate the loan balance. It means that unless plaintiff gets the money within thirty days, the note come due and foreclosure will be the next step. There is no indication that plaintiff is only kidding about the thirty day deadline, and that as long as the payment is received before the foreclosure action is commenced, the default will be cured. There is no

[11] The trial court in *Royal Blue* stated the issue as follows: "The motion turns on whether the letter … constitutes unequivocal notice that the note accelerated without the need for any other action or notices if payment was not received within thirty days." R. 31. The letter at issue in *Royal Blue* stated, in pertinent part, "[i]f [Mortgagee] is not in possession of the amount that is necessary to cure the default within 30 days of the date of this notice, [the Mortgagee] will accelerate the Loan balance and proceed with foreclosure." R. 28–29.

> indication that there will be any other notices between the letter in the borrower's hands and the commencement of the foreclosure case. The thirty days is the last chance to cure.
> …
> [T]he instant letter said "[Mortgagee] will accelerate the Loan balance and proceed with foreclosure;" it did not say "[Mortgagee] will accelerate the Loan balance by proceeding with foreclosure."
> …
> Here, the [ ] letter notified its recipient that the loan "will accelerate" if the default was not cured within 30 days. There is no indication that plaintiff was debating whether or not to accelerate the mortgage – the letter did not employ verbs such as "might" or "may" or suggest that a future step would be taken before the loan would be accelerated.
> …
> [T]he letter uses the term "will," which indicates that a future event is going to take place rather than that it might *possibly occur*.
>
> The [ ] letter is a clear and unequivocal statement that the loan "will accelerate" in 30 days if the delinquency was not cured. Therefore, it is not a possible future event, but a future event that is guaranteed to occur if the money wasn't paid. When the payment was not made within 30 days…the loan accelerated the next day….

R. 30–34 (*Souto*, 41 N.Y.S.3d at 718).

2. <u>New York courts hold that a letter stating "will accelerate" is clear and unequivocal</u>.

Ample case law holds that a letter stating "will accelerate" constitutes clear and unequivocal notice. *See, e.g.*, *Lunder*, 183 A.D.3d at 968 ("A plain reading of the notice does not provide any suggestion that, except for curing the default, the outstanding debt would not be accelerated on that date."); *Royal Blue*, 148 A.D.3d at 529 (1st Dep't. 2017) ("The 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."); *see also In re Kramer*, 2019 WL 8953259, at *4 (Bankr. E.D.N.Y. Nov. 27, 2019); *Costa*, 247 F. Supp. 3d at 342 (S.D.N.Y. 2017). Moreover, the breadth of case law that holds language such as "may" or "would be" contained in an acceleration letter are letters expressing "a possible future event" are consistent with the cases (cited above) that distinguish the word "will." *See, e.g.*, *Mcintosh v. Fed. Nat'l Mortg. Ass'n*., No. 15 CV 8073, 2016 WL 4083434, at *5 (S.D.N.Y. July 25, 2016) (finding mortgagor's notice merely stating that the mortgage "may" or "could" accelerate at several points in time insufficient to accelerate); *Goldman Sachs Mortg. Co. v. Mares*, 135 A.D.3d 1121, 1122 (3d Dept. 2016) (finding letter stating should the borrower fail to cure its default, the lender "may" accelerate the borrower's loan "falls far short of providing clear and unequivocal notice to defendants that the entire mortgage debt was being accelerated"). Unlike the case at bar, in these cases, it was unclear when acceleration would occur.

3. *Chase Mortgage Co. v Fowler*, 280 A.D. 2d 892 (4th Dept. 2001) is consistent and distinguishable.

Appellant's argument that the Fourth Department's decision in *Chase Mortgage Co. v Fowler* supports its position that the Acceleration Letter did not accelerate the Mortgage is without merit, and similar arguments relying on *Fowler* have been rejected by several courts. *See, e.g., Costa v. Deutsche Bank,* 247 F. Supp.

3d at 338. Appellant's reliance on *Fowler* is misplaced as Appellant fails to appreciate the meaning of Section 22 of the Mortgage and misreads *Fowler* and other precedent to hold that any election to accelerate must not only be clear and unequivocal, but also immediate. This is not the case. The loan in *Fowler* was obviously susceptible to immediate acceleration, unlike, as stated above, the Mortgage in this case, which first requires compliance with, among other things, the notice provisions of Section 22 of the Mortgage. Here, Section 22 requires, among other things, written notice and at least a 30-day cure period be provided to the borrower. *See* R. 179 (Mortgage, § 22); *see also Wells Fargo N.A. v. Burke*, 94 A.D. 2d 980 (2d Dep't. 2012) ("As with other contractual options, the holder of an option may be required to exercise an option to accelerate the maturity of a loan in accordance with the terms of the note and mortgage."). Appellant's mischaracterization of *Fowler* is another attempt to find support where it does not exist.

The Appellant contends that "[w]ill accelerate" does not mean "is accelerating now." Appellant's Br. at 11. But it does not have to. Nothing in the "clear and unequivocal" case law requires immediacy. As stated, New York law is well settled that a cause of action for payment of a sum of money allegedly owed pursuant to a contract accrues when the plaintiff "possesses a legal right to demand payment." *Dieudonne*, 171 A.D.3d at 39 (2d Dep't. 2019). Appellant, under Section 22 of the

Mortgage, could not possess such legal right until it sent the Acceleration Letter and a cure period of at least 30 days lapsed, but no "further notice or demand on Borrower" was required. R. 179 (Mortgage, § 22). In other words, while immediate acceleration after a default is not permitted by the Mortgage, once the aforementioned preconditions were satisfied, the Mortgage accelerated and the statute of limitations began to run.

4. *Albertina v. Rosbro Realty Corp. is not applicable*.

Contrary to what Appellant would have this court accept, the issue in the case at bar is not whether a loan may be accelerated by notice to the borrower, but rather, whether the language contained in the Acceleration Letter is clear and unequivocal. Also contrary to Appellant's interpretation, this Court's decision in *Albertina v. Realty Co. v. Rosbro Realty Corp.* did not find that the filing of a summons and complaint is the only act sufficient to accelerate a mortgage. 58 N.Y. 472 (1932).[12] A comparison to the text of *Albertina* reveals the speciousness of Appellant's

[12] Appellant's recurring argument that because a foreclosure was not filed exactly on the 33rd day after the date of the Acceleration Letter, the Acceleration Letter did not accelerate the Mortgage, misstates or misunderstands the law and conflates acceleration with commencement of a foreclosure action. *See* Appellant Br. at 3, 13; *see also* R. 30–34 (*Souto*, 41 N.Y.S.3d at 718) ("The instant letter said '[the Mortgagee] will accelerate the Loan balance and proceed with foreclosure;' it did not say '[the Mortgagee] will accelerate the Loan balance *by* proceeding with foreclosure.'"). Appellant's position that "[l]enders need time to gather documents and obtain counsel" is in accord with precisely what occurred here, as, apparently, upon the expiration of the Cure Period, Appellant began to "gather documents and obtain counsel" because shortly thereafter (approximately five months), Appellant commenced the foreclosure. Accordingly, notwithstanding the legality of the 2009 Foreclosure, its commencement evinces the Appellant's intent and election to accelerate in the Acceleration Letter.

contention. *Compare* Appellant Br. at 2 (This Court "also held that *notice* is not *an election to accelerate*."); *Albertina*, 258 N.Y. at 476 ("It is unnecessary to decide just what a holder of a mortgage must do to exercise the right of election, under an acceleration clause."); *see also In re Kramer*, 2019 WL 8953259, at *2 (In *Albertina*, this Court "also made clear that the filing of a verified complaint is not the only way to accelerate a debt").[13]

The Court in *Albertina* cautioned litigants not to confuse "the fact of election" with "notice or manifestation of such election," *see Albertina*, 258 N.Y. at 476, which the Appellant somehow confuses with a finding that the filing of a complaint is the sole method sufficient to accelerate a mortgage loan. However, as stated, this Court in *Albertina* only found that filing a complaint—the method of acceleration at issue in *Albertina*—is one of the ways for a mortgagee to exercise an acceleration option.[14] The Court's decision in *Albertina* was grounded in determining the intent

[13] In *Albertina*, three days after the mortgagee commenced a foreclosure, but prior to service of the summons and complaint, the borrower attempted to make a payment on the mortgage, which the mortgagee refused to accept. *Albertina*, 258 N.Y. at 474. Although the borrower argued that filing the complaint, without service, is insufficient to effectively accelerate the mortgage—and, in turn, precludes the borrower from remitting payment of less than the accelerated amount—the Court rejected this construction of the law as "too narrow" and held that a mortgage is accelerated when the lender elects to exercise its right of acceleration. *Id*. at 475.

[14] Additionally, in *Albertina*, this Court noted that "[t]he acceleration clause used in the mortgage is the statutory clause provided by Schedule M of section 258 of the Real Property Law," and by using the statutory acceleration clause, the parties were "bound by the statutory construction given that form." *Albertina*, 258 N.Y. at 476. There are critical distinctions between the statutory clause provided by Schedule M of section 258 of the Real Property Law and Section 22 of the Mortgage in the case at bar, including, without limitation, that pursuant to Section 22 of the Mortgage, notice is required in order to accelerate. *See* R. 179 (Mortgage § 22(b)). *Albertina* is simply not

of the party exercising their acceleration option, which, here, the plain meaning of the Acceleration Letter, together with Appellant's subsequent conduct over the next decade, make abundantly clear.

5. The Second Department cases are distinguishable and/or incorrectly decided.

As one court that considering a notice with language identical to the Acceleration Letter ("will accelerate") stated,

> To the extent some New York State courts have found that language similar to that in the [ ] Notice of Default are insufficient to accelerate the [ ] Note, the Court declines to follow them. For example, in *Bank of New York Mellon v. Maldonado*, 97 N.Y.S.3d 162, 165 (2d Dep't 2019), which is cited by the Defendant, the Appellate Division held that the language "was merely an expression of future intent that fell short of an actual acceleration" and it did not constitute an exercise of the acceleration clause in the mortgage. (citing *Milone,* 83 N.Y.S.3d 524; *DLJ Mtge. Capital, Inc. v. Hirsh*, 78 N.Y.S.3d 160 (2d Dep't 2018); and *21st Mortg. Corp. v. Adames*, 60 N.Y.S.3d 198 (2d Dept 2017)). However, the Court did not give any rationale for finding that the language in the notice was an expression of future intent and did not act to accelerate the debt, and the cases the Court cited in support do not clearly involve notices containing language identical to the [ ] Default Notice.

In re Kramer, 2019 WL 8953259, at *11–13 (Bankr. E.D.N.Y. Nov. 27, 2019).

In *Adames*, the Second Department became the first court in New York to find that a letter stating the loan "will" accelerate at the end of a cure period was not sufficient to accelerate the loan. *21st Mortg. Corp. v. Adames*, 153 A.D.3d 474, (2d

applicable to a mortgage that contains the Immediate Payment in Full provision (Section 22), which requires that the "Lender send to [the borrower] … a notice." *Id.*

Dept. 2017). However, *Adames* and its progeny lack many of the extraordinary facts present here that unequivocally support finding that Appellant intended to, and did, accelerate Vargas' Mortgage loan.

II. APPELLANT'S ACTIONS SUBSEQUENT TO THE ACCELERATION LETTER PROVIDE INDISPUTABLE EVIDENCE THAT APPELLANT HAD ACCELERATED THE MORTGAGE.

The trial and appellate courts were correct in finding that Appellant's own actions belie their current position that the loan is not accelerated. The 2013 Letter once again states that the *entire loan amount* was currently due. R. 37–38. The 2014 Letters, sent approximately eight months after the discontinuance of the 2009 Foreclosure in 2013, similarly indicate that the entire amount of the Mortgage loan was due and provide Vargas the amounts necessary to reinstate the Mortgage. R. 37–38. Appellant, in 2016, notified Vargas that that any payments made in contribution to the entire debt 'will not be deemed a waiver of the acceleration of [his] loan.'" (the "2016 Modification Letter," and together with the 2013 Letter and the 2014 Letters, the "Subsequent Acceleration Letters"). R. 300, 306. The Subsequent Acceleration Letters are noteworthy for the following reasons:

(i) At the trial and appellate courts, the Appellant first argued that the 2013 discontinuance of the 2009 Foreclosure revoked the prior acceleration. R. 75. The Appellant could not, and did not, address having sent the Subsequent Acceleration Letters.

(ii) Appellant next asserted that the 2009 Foreclosure was a legal nullity as a result of standing issues. Upon production of the Acceleration Letter, the

Appellant argued, as it does again here, that the Acceleration Letter did not accelerate the Mortgage.

(iii) Taken together, Appellant's arguments are impossible to square with the Subsequent Acceleration Letters that acknowledge the prior acceleration. Assuming *arguendo* Appellant's assertions are correct that the 2009 Foreclosure was a legal nullity (although rejected by the trial court[15]) and that the Acceleration Letter did not accelerate the Mortgage, according to Appellant's revisionist history, acceleration has not occurred at any time over the more than 13 years since Vargas' default, which, again, is impossible to square with the Subsequent Acceleration Letters.

Simply put, Appellant's arguments are inconsistent and nonsensical. *See In re Kramer*, 2019 WL 8953259, at *2 ("If the Court were to find that the statute of limitations had not expired, it would have had to overlook inherent inconsistencies in the [Appellant's] various arguments."). Appellant's continued efforts to collect the accelerated Mortgage debt evince that acceleration occurred upon the expiration of the Cure Period. *See Wells Fargo Bank, N.A. v. Ferrato*, 183 A.D.3d 529 (1st Dep't. May 28, 2020) (Mortgagee "proceeded to collect on the accelerated loan amount in a fifth foreclosure action filed shortly after it made its motion to revoke acceleration." (citing *Vargas*); *Lunder*, 183 A.D.3d at 968 ("The reiteration of this acceleration date in five subsequent letters only further evinces the acceleration date….").[16]

[15] This argument was rejected by the trial court, "no evidence was submitted that establishes that IndyMac lacked standing to sue plaintiff at the time." R. 45.

[16] *See also Fed. Nat. Mortg. Ass'n v. Mebane*, 208 A.D.2d 892, 894 (2d Dep't. 1994) (noting that, "rather than seeking to revoke the prior election to accelerate, the plaintiff made a failed attempt … to revive the prior foreclosure action" and "the plaintiff continues to seek recovery of the entire mortgage debt pursuant to the acceleration clause."); *accord Fed. Nat'l Mortg. Ass'n v. Rosenberg*,

III. THE DISCONTINUANCE ISSUE IS UNPRESERVED

Appellant's second question presented—whether the 2013 discontinuance constituted a revocation of Appellant's prior acceleration—is unpreserved and is not before this Court. First, as the Appellant stated in its brief to the Appellate, Division, First Department,

> 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?

R. 314 (emphasis added). Second, as stated in Appellant's Pre-Argument Statement, dated November 17, 2017, "Plaintiff-Appellant seeks reversal of the Decision and Order on the grounds that the trial court erred in finding that Plaintiff-Appellant provide [sic] Defendant-Respondent with clear and unequivocal notice that the entire mortgage debt was being accelerated. R. 2, ¶ 8; *see also People v. Colon*, 580 N.E.2d 754, 755 (1991) (noting that the Court of Appeals "cannot review the unpreserved [ ] issue."); *Bingham v. New York City Transit Auth.*, 786 N.E.2d 28, 30 (2003) (declining to opine on an issue not presented below, stating, "[a]s we have many times repeated, this Court with rare exception does not review questions raised for

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180 A.D.3d 401, 402 (1st Dep't. 2020) ("Defendants reliance on [the] 'continued efforts' [in *Vargas*] to collect the mortgage debt is unavailing. *This case is distinguishable from* Vargas *because in that case, the lender sent notices attempting to collect ... the accelerated mortgage debt.*" (citation omitted) (emphasis added)).

the first time on appeal. Unlike the Appellate Division, we lack jurisdiction to review unpreserved issues in the interest of justice. A new issue—even a pure law issue—may be reached on appeal only if it could not have been avoided by factual showings or legal countersteps had it been raised below….").[17]

Notwithstanding Appellant failing to preserve this issue, in the event this Court decides to consider same, it must be noted that Appellant's argument is wholly without merit, contradictory and belied by their own actions. First, the Acceleration Letter triggered the running of the statute of limitations. Second, notwithstanding that the Appellant has taken the position before both courts below that the 2009 Foreclosure was a legal nullity because Appellant's predecessor-in-interest (allegedly) lacked standing, Appellant argues that the voluntary discontinuance (in 2013) of the 2009 Foreclosure—the same action Appellant claims is a legal nullity—somehow de-accelerated Vargas' mortgage. Clearly, this argument must be rejected as, among other reasons, "a party must also have standing to effect a de-acceleration of the debt." *See Barua*, 2020 WL 2892827, at *3 (2d Dep't., June 3, 2020) (citations omitted) ("[R]ecognizing that the foreclosure of mortgages encumbering residential

[17] This issue is unpreserved, notwithstanding the First Department's discussion of the discontinuance in dicta (which did not form the basis for the court's holding), which was "necessarily made as a matter of discretion in the interest of justice." *See People v. Allende*, 137 N.E.3d 1091, 1092 (2019), *reconsideration denied*, 139 N.E.3d 848 (2020).

properties involves elements of equity, … a de-acceleration cannot be utilized as a mere pretext to avoid the onerous effect of the statute of limitations.").[18]

In addition, a finding that the 2013 discontinuance revoked acceleration in the case at bar is particularly inappropriate in light of: (i) Appellant's own failures gave rise for its need to discontinue the 2009 Foreclosure; (ii) Appellant's 2013 motion to discontinue failed to address acceleration; (iii) the 2014 Letters and the 2016 Modification Letter continued to acknowledge the prior acceleration and were sent post-discontinuance, undermining Appellant's revocation claim; and (iv) as of the date of the filing of this brief, Appellant has failed to vacate the lis pendens filed against Vargas' property. *See id*. at *4 ("Other evidence of a valid de-acceleration may include … the voluntary vacatur of a lender's filed lis pendens.").

CONCLUSION

Over the past two decades, New York law has been focused on protecting against potential abuses in the mortgage industry. In this case, if Vargas did not commence the quiet title action in 2016, nearly a decade after his default, he likely would still not know whether a valid lien existed on his home. To date, not only has the Appellant failed to commence a foreclosure proceeding in the nearly seven years

[18] Moreover, "mere voluntary discontinuance of a foreclosure action is insufficient, in itself, to constitute an affirmative act of revocation." *See Ferrato*, 183 A.D.3d ar 529 (1st Dep't. May 28, 2020); *Barua*, 2020 WL 2892827, at *3 (2d Dep't. June 3, 2020) ("[T]his Court has repeatedly held that a lender's mere act of discontinuing an action, without more, does not constitute, in and of itself, an affirmative act revoking an earlier acceleration of the debt.").

since the 2009 Foreclosure was discontinued in 2013, but a review of the public records reveals that the lis pendens on Vargas' property has never been vacated.

New York Courts have long upheld the goals that support statutes of limitations – fairness and repose. *Blanco v. Am. Tel. & Tel. Co*., 689 N.E.2d 506, 514 (N.Y. 1997) (fairness); *Cubito v. Kreisberg*, 419 N.Y.S.2d 578, 581 (App. Div. 1979), *aff'd*, 415 N.E.2d 979 (N.Y. 1980) (repose).

For all of the above reasons, it is respectfully submitted that this Court should affirm the Decision and Order dated January 31, 2019, of the the Appellate Division, First Department.

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Dated: July 5, 2020
Great Neck, New York

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CERTIFICATE OF COMPLIANCE

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

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