To Be Argued By:
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Time Requested: 20 Minutes

APL-2019-00114
Orange County Clerk's Index No. 001139/15

STATE OF NEW YORK

FREEDOM MORTGAGE CORPORATION,

Plaintiff-Appellant,

—against—

HERSCHEL ENGEL,

Defendant-Respondent,

BOARD OF MANAGERS OF THE
FOREST WAY CONDOMINIUM, CITIBANK N.A.,

Defendants.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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November 25, 2019

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PRELIMINARY STATEMENT

Herschel Engel borrowed $225,000 to purchase a condominium. He did not reside in the condo, but instead used it as an investment property, which he rented to his tenants. To increase his return on investment, Engel willfully refused to pay monthly installments on his loan, even though he was receiving rental income on the same property.

The note holder, appellant Freedom Mortgage, commenced an action in 2008 to foreclose on the loan. But Engel, acting with assistance of counsel, maneuvered to frustrate the judicial process. Despite having actual knowledge of the foreclosure complaint, Engel waited to appear until after final judgment, then moved to vacate the judgment for lack of service of process. His motion was meritless—Engel later admitted that he was served—but Freedom Mortgage nevertheless agreed to resolve the dispute "amicably" and without "further delay, expense or uncertainty." (A. 42) In January 2013, the parties settled the litigation, stipulated to vacate the judgment, and discontinued the action.

As Engel knew at the time, Freedom Mortgage did not enter into the stipulation to vacate the foreclosure judgment and discontinue the action for the purpose of making a gift of more than $200,000 to him. As

was obvious, the purpose of the settlement was to enable Engel to make back payments and resume paying monthly installments. Freedom Mortgage confirmed the purpose of the discontinuance when it sent a letter to Engel in May 2013 stating that he could cure his defaults and resume making monthly payments. Engel failed to cure his default, however, and Freedom Mortgage accelerated the loan in August 2013. It timely filed a foreclosure complaint in 2015, within two years after its 2013 claim for immediate payment in full accrued.

In his brief in this Court, Engel distances himself from the arguments he made below. His lead arguments here are arguments that he never made and that conflict with positions he took before the trial court. Engel's radical departure from his prior arguments is telling: he would rather lead with unpreserved arguments than rely on the arguments he made below. This is unwise because this Court lacks jurisdiction to reach his unpreserved arguments, which are meritless in any event.

Engel's overarching claim—raised for the first time in this Court—is that Freedom Mortgage could not revoke its acceleration and return the parties to their original terms unless it and Engel executed a written

agreement to "extend" the statute of limitations under the General Obligations Law. But his new claim fundamentally misunderstands the nature of revocation of a discretionary option. Revocation of an election to accelerate a loan is *not* an agreement to extend the statute of limitations applicable to the prior demand. Rather, it is one party's election to reinstate the pre-acceleration terms. Because Engel confuses (1) a unilateral and discretionary election to revoke with (2) a mutual contract to extend or modify a statute of limitations, the vast majority of his brief is not only forfeited and meritless, but also entirely off subject.

To the extent that Engel addresses Freedom Mortgage's actual arguments, his brief is unconvincing. He claims that Freedom Mortgage's voluntary discontinuance was an inequitable "pretext" for avoiding the statute of limitations, but nothing in the record supports that charge. To the contrary, the record shows that Engel's litigation tactics frustrated the judicial process, wasted litigation and judicial resources, and caused all of the delay in this case. Under any reasonable standard, Freedom Mortgage properly elected to revoke the 2008 demand, and therefore was entitled to accelerate again in 2013, when Engel failed to cure his defaults. Because its 2015 action was timely, this Court should reverse.

ARGUMENT

I. Engel's Arguments Are Forfeited and Irrelevant

Engel treats this appeal as though nothing that happened in the trial court matters. His arguments on appeal are not only unpreserved, they directly and unabashedly contradict the positions he took below *and* the Appellate Division's reasoning in this very case. Accordingly, this Court lacks jurisdiction to consider them. His arguments are also irrelevant because they address arguments that Freedom Mortgage never made and fail to address the ones that it did make.

A. Engel Forfeited His Primary Arguments on Appeal Because He Did Not Raise Them in the Trial Court

In the trial court, Engel filed a barebones motion to dismiss. (A. 30-32) After Freedom Mortgage filed its cross-motion for summary judgment, Engel filed a reply in which he admitted that the acceleration was revocable. Freedom Mortgage Br. 13-16. He stated that if Freedom Mortgage had wanted to revoke its election to accelerate, "*it could have* [done] so in a simple letter stating that it was revoking the acceleration." (A. 213 [¶ 18 (emphasis added)]; *see also* A. 214 [¶ 21]) His argument below was that Freedom Mortgage did *not* exercise its admitted power of

revocation. He prevailed in the Appellate Division based on that same argument. Engel 2d Dep't Br. 8.

In this Court, Engel abandons the Appellate Division's reasoning and argues for the first time that Freedom Mortgage's election to accelerate the loan in 2008 was irrevocable. Engel Br. 21-33, 49-50. He also claims that a revocation has no legal significance unless it takes the form of an executed written agreement to waive or extend the limitations period under the General Obligations Law. Engel Br. 34-38, 42, 49, 52-58, 64. Both of these new arguments contradict Engel's prior argument that Freedom Mortgage "could have" revoked its acceleration with a "simple letter." (A. 213 [¶ 18]; Engel 2d Dep't Br. 8)

Engel may not prevail in the Appellate Division on one theory and then, after sensing vulnerability on that theory, ask this Court to rule in his favor based on an unpreserved theory that contradicts his representations below. "To preserve an argument for review by this Court, a party must raise the specific argument in Supreme Court and ask the court to conduct that analysis in the first instance …." *U.S. Bank N.A. v. DLJ Mortgage Capital*, Inc., 33 N.Y.3d 84, 89 (2019) (citation and

quotation marks omitted). This Court lacks discretion to reach unpreserved arguments. *See id.*

Engel contends that he can raise new arguments on appeal regardless of whether he raised them in the trial court because they present a question of law. Engel Br. 33 n.1, 38 n.3, 56 n.4. Not so. After Freedom Mortgage argued in the trial court that the voluntary discontinuance revoked the acceleration, Engel "was required to respond and present [his] view" of the lender's revocation authority and the General Obligations Law to preserve such arguments on appeal. *DLJ Mortgage Capital*, 33 N.Y.3d at 89. Thus, this is not a case in which Engel may ask for a "rare exception" to the rule against raising new issues on appeal. *Bingham v. New York City Transit Authority*, 99 N.Y.2d 355, 359 (2003).

Moreover, if Engel had raised his new arguments in the trial court or Appellate Division (he did neither), Freedom Mortgage could have made a "factual showing or legal argument that might have undermined [Engel's] position" in opposition to the motion to dismiss, after discovery, or at trial. *Id.* Absent Engel's concession, Freedom Mortgage would have already shown and the lower courts would have already held that Engel's

new arguments are baseless. Instead, Engel asks Freedom Mortgage to address those arguments for the first time in its reply brief in this State's highest court. Given that he asks this Court to overturn a long established common-law rule that a discretionary option to accelerate is revocable, his request to upend decades of precedent based on self-contradicting and unpleaded affirmative defenses is particularly inappropriate and inequitable. *See id.* at 359-60.

B. Engel's Primary Arguments Are Irrelevant

Not only are the bulk of Engel's arguments forfeited, most of them are directed to arguments that Freedom Mortgage never made. Freedom Mortgage never argued that it and Engel executed a written agreement (or made any agreement) to waive, extend, restart, or toll the statute of limitations *applicable to the 2008 demand* for immediate payment in full. Nor did it assert that the 2008 claim "de-accrue[d]." Engel Br. 53.

Rather, Freedom Mortgage showed that the voluntary discontinuance nullified the 2008 action, thus establishing that Freedom Mortgage had elected to stop seeking immediate payment in full, *i.e.*, to revoke its election to accelerate. The dispositive legal significance of the discontinuance is the revocation of acceleration and corresponding

reinstatement of contractual terms. These contract terms, in turn, authorize the lender to demand immediate payment in full upon the borrower's default, notice of default, and failure to cure. (A. 77-78 [¶ 22]) Thus, the relevant question in this case is whether Freedom Mortgage revoked the acceleration, thereby restoring the parties to contract terms that permitted Freedom Mortgage to make a *new* demand in August 2013 for immediate payment in full.

Engel's arguments under sections 17-101 and 17-105 of the General Obligations Law fail to address that question. Those sections provide that executed written agreements to waive or extend the limitations period applicable to a mortgage foreclosure action are effective. They have no application to a case in which a lender revokes an acceleration because the purpose and effect of the revocation is not to waive or extend or restart the limitations period applicable to the demand for immediate payment in full, but instead to revoke that demand altogether.

Not surprisingly, Engel does not cite a single case in which a court held that the General Obligations Law precluded a lender from revoking a discretionary election to accelerate and returning the parties to their original terms. He relies on a "somewhat idiosyncratic case," *Petito v.*

Piffath, 85 N.Y.2d 1, 4 (1994), in which the borrower paid the full amount due on the original loan—$197,455.57—and the parties "intended to put the outstanding monetary obligations between [them] to rest." *Id.* at 9. Thus, *Petito* had no occasion to decide and did not decide whether a voluntary discontinuance revoked an acceleration and reinstated monthly installments. Accordingly, *Petito* would be inapposite here even if Engel had preserved an argument under the General Obligations Law, which he did not.

II. Engel's Arguments Are Meritless

Freedom Mortgage had the right to revoke its 2008 demand for immediate payment in full, which it elected to exercise by discontinuing the 2008 foreclosure action. The election to revoke the acceleration returned the parties to their original terms, under which Freedom Mortgage had the right to demand immediate payment in full for a second time if Engel defaulted and failed to cure his defaults after 30 days' notice. Freedom Mortgage properly accelerated the loan in 2013 and its 2015 foreclosure action was timely. As demonstrated below, Engel's arguments to the contrary are meritless.

A. Freedom Mortgage Had the Right to Revoke Its Discretionary Election to Accelerate a Loan

Countless decisions state that a lender may revoke its discretionary election to accelerate, including the Appellate Division's decision in this very case. (A. 227 ("A lender may revoke its election to accelerate ....")) No case of which Freedom Mortgage is aware holds that a lender's discretionary election to accelerate is irrevocable by default. As a matter of common law, the "exercise of an option to accelerate is not irrevocable ...." 11 Am. Jur. 2d Bills and Notes § 170.

If the Court reaches Engel's self-contradicting and unpreserved argument that the discretionary election to accelerate was irrevocable, it should reject it on the merits. This Court's decision in *Kilpatrick v. Germania Life Insurance Co.*, 183 N.Y. 163 (1905), stands for the proposition that a discretionary election is *revocable* unless and until the revocation would be inequitable, and accords with precedent nationwide.[1]

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[1] *See, e.g.*, *Denbina v. City of Hurst*, 516 S.W.2d 460, 463 (**Texas** Civ. App. 1974); *West Portland Dev. Co. v. Ward Cook, Inc.*, 424 P.2d 212, 214 (**Oregon** 1967); *Mitchell v. Fed. Land Bank*, 174 S.W.2d 671, 677 (**Arkansas** 1943); *Cal. Sav. & Loan Soc'y v. Culver*, 59 P. 292, 294 (**California** 1899); *Van Vlissingen v. Lenz*, 49 N.E. 422, 423-24 (**Illinois** 1897); *see also Boren v. United States Nat'l Bank Ass'n*, 807 F.3d 99, 105 (5th Cir. 2015) (applying Texas law).

Kilpatrick held that a lender's acceleration "became final and irrevocable *after* [the borrower's] change of position and assumption of legal obligations, the direct result of that election." 183 N.Y. at 168 (emphasis added). Thus, "only if a mortgagor can show substantial prejudice will a court in the exercise of its equity jurisdiction restrain the mortgagee from revoking its election to accelerate." *Golden v. Ramapo Improvement Corp.*, 78 A.D.2d 648, 650 (2d Dep't 1980) (citing *Kilpatrick*, *supra*).

Contracting parties may modify the common-law rule in their contract so as to provide that a discretionary option, once elected, is irrevocable, but the parties did not do so here. Freedom Mortgage Br. 21-22, 24. Contrary to Engel's unpreserved argument, paragraph 19 of the mortgage does not show that the parties intended to eliminate the note holder's discretion to revoke an acceleration. That provision gave Engel the contractual right "to have enforcement of this Security Instrument stopped" by curing his default within a specified period. (A. 76 [¶ 19]) Engel would *not* have had any right to stop enforcement of *Freedom Mortgage*'s rights *unless* the contract expressly so provided. But a party needs no contractual provision to waive its own rights. Thus, Freedom

Mortgage could waive its right to demand immediate payment in full and revoke the acceleration at its election. Freedom Mortgage Br. 20.

Similarly, Engel's unpreserved argument that a right to "decelerate" would violate the "election of remedies" doctrine (Engel Br. 31-32) is also meritless. "The doctrine of the election of remedies is a harsh rule which is not to be extended." *Metro. Life Ins. Co. v. Childs Co.*, 230 N.Y. 285, 291 (1921). In short, the rule provides only that "one may not invoke the aid of the court upon inconsistent theories." *Id.* Freedom Mortgage did not seek inconsistent remedies from the court, which explains why Engel did not plead and therefore waived any "election of remedies" defense. *Tuscan/Lehigh Dairies, Inc. v. Beyer Farms, Inc.*, 136 A.D.3d 799, 805 (2d Dep't 2016).

The doctrine of "election of remedies" is rooted in estoppel. *See Schenck v. State Line Tel. Co.*, 238 N.Y. 308, 312 (1924); 25 Am. Jur. 2d Election of Remedies § 4. To the extent Engel claims that Freedom Mortgage was equitably estopped from revoking the acceleration (and he makes no such argument), that claim would be meritless because he did not establish a "change of position and assumption of legal obligations" to his detriment based on the acceleration. *Kilpatrick*, 183 N.Y. at 168.

Engel never argued, much less showed, estoppel in the trial court. (A. 30-32, 213-216) He has not and cannot do so now.

B. Freedom Mortgage Revoked Its 2008 Demand for Immediate Payment in Full by Discontinuing the Action in Which the Demand Was Made

The dispositive question presented here is whether Freedom Mortgage revoked its 2008 demand. It did.

Consider the following reasons that a lender might voluntarily discontinue a foreclosure action:

(1) The lender has decided to give the borrower a six-figure gift.

(2) The lender wishes to use the discontinuance as a “pretext” to avoid the statute of limitations.

(3) The lender has decided that allowing the borrower to make back payments and resume monthly installments is better than litigating a demand for immediate payment in full.

Not even Engel contends that the answer here is “(1).” His answer in this Court is “(2)”—the stipulation was a “pretext” that enabled Freedom Mortgage to “avoid the statute of limitations.” Engel Br. 9-10,

41, 44. But as further demonstrated below, Engel's explanation for the stipulation makes no sense and the record contradicts it. The only option to explain the stipulation and voluntary discontinuance is "(3)": that the discontinuance revoked the demand and thereby reinstated the original contract terms and obligations. Thus, Freedom Mortgage, not Engel, was entitled to judgment as a matter of law.

1. Freedom Mortgage Revoked the Acceleration So That Engel Could Pay Past Amounts Due and Resume Paying Monthly Installments

Freedom Mortgage made its election to accelerate in a complaint filed on July 16, 2008. (A. 32 [¶¶ 5, 9], 37 [¶ 10]) Under this Court's decision in *Albertina Realty Co. v. Rosbro Realty Corp.*, an election to accelerate is effective if it is an "overt act" that demonstrates that the lender has made a choice with respect to its discretionary option. 258 N.Y. 472, 476 (1932). "To elect is to choose" and the "fact of election should not be confused with the notice or manifestation of such election." *Id.* A complaint that demands immediate payment in full demonstrates that the lender has made a choice. *See id.*

As *Albertina Realty* holds, an election is valid even if the borrower *lacks actual notice* of the election. *Id.* at 475. In that case, an election

stated in a filed complaint was effective even though the complaint had not been served on the defendant borrower. *See id.* at 475-76. An election to accelerate is adverse to the borrower; an election to revoke the acceleration is beneficial. *A fortiori*, under *Albertina Realty*, Freedom Mortgage's election to revoke made by way of court filing was also valid—even if it gave only constructive and not actual notice of the revocation. And under *Kilpatrick*, the election would lose its validity only if the borrower established that enforcing the election would be inequitable.

Here, Freedom Mortgage revoked its election to accelerate because it nullified the 2008 action in which it had made the initial election to accelerate. Thus, the filed stipulation was an overt act demonstrating that Freedom Mortgage made a choice not to pursue the lawsuit for accelerated payment. As this Court stated in *Loeb v. Willis*, when a foreclosure action is discontinued, "what has been done therein is also annulled, so that the action is as if it never had been." 100 N.Y. 231, 235 (1885). Thus, after the discontinuance, Freedom Mortgage was no longer demanding immediate payment in full.

Engel seeks to avoid *Loeb* by arguing (Br. 47-48) that Freedom Mortgage made its election to accelerate *before* filing the 2008 complaint

(so that nullifying the action did not affect the election), but his new argument directly contradicts his representations in the trial court (A. 32 [¶¶ 5, 9]) and is meritless. Nothing in the record shows that Freedom Mortgage elected to demand immediate payment in full *before* filing the 2008 complaint. Therefore, the discontinuance was an election to revoke its demand, made in the 2008 complaint, for immediate payment in full.

Engel also argues that this Court should treat its statement of law in *Loeb* as mere dicta (Engel Br. 45, 54), even though courts have been relying on this statement of law for more than 100 years. *See, e.g.*, *Newman v. Newman*, 245 A.D.2d 353, 354 (2d Dep't 1997). But *Loeb*'s statement of law explains *why* discontinued actions have no estoppel or res judicata effect and cannot be discarded or replaced with a different statement. Therefore, it is not "dicta" that Engel is free to ignore. *See* Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1256-57 (2006) (defining dicta).

In any event, the salient point is that because a discontinuance annuls the prior action, no reasonable person could think—absent evidence to the contrary—that Freedom Mortgage was still pursuing the demand made in the action that it had just discontinued. Freedom

Mortgage Br. 23. Put differently, any reasonable person would conclude that Freedom Mortgage revoked its election to accelerate by discontinuing the action. And even if the stipulation to discontinue left any doubt (it does not), the May 2013 letter eliminates it. The May 2013 letter contains a demand for past "monthly payments" due plus any future "monthly payment" that becomes due, *not* full payment. (A. 207; *see* Freedom Mortgage Br. 26-28) If Freedom Mortgage were still seeking immediate payment in full, it would not have sent a letter requesting only past monthly payments due. (A. 207)

Engel concedes that the Appellate Division "disregarded" the May 2013 letter. Engel Br. 41. He argues that this was proper because the "2013 Stipulation is the governing document." *Id.* But again, an election to revoke a discretionary option to accelerate is a unilateral act that does not require the borrower's consent. Engel conceded below that his consent was *not* needed to revoke the acceleration when he stated that Freedom Mortgage "could have [done] so in a simple letter …." (A. 213 [¶ 18]) Engel also acknowledged that LoanCare was a loan servicing agent acting on behalf Freedom Mortgage when he agreed to hold LoanCare harmless in the stipulation to discontinue. (A. 43 [¶ 4]; *see also* A. 52 [¶ 1]) Engel's

unpreserved argument that LoanCare lacked authority to act on behalf of Freedom Mortgage (Engel Br. 43) is baseless.

Engel further argues that the May 2013 letter is not evidence of revocation because it states "the amount necessary" to "reinstate [the] loan," *i.e.*, the amount of past monthly installments due. Engel Br. 43. But reinstatement of the loan is *exactly* what an election to revoke acceleration accomplishes—it reinstates the borrower's pre-acceleration contract obligations while relieving him of the obligation to pay the full amount of the debt. Thus, a lender's statement that a borrower may "reinstate [the] loan" (A. 207) and its statement that "we revoke our election to accelerate the loan"—the latter being Engel's preferred language (Engel Br. 44)—are substantively identical.

Finally, Engel contends (Br. 39) that this Court should rule in his favor because the Second Department stated in *Milone v. U.S. Bank N.A.* that a notice of "election to decelerate" must be "clear and unambiguous." 164 A.D.3d 145, 153 (2d Dep't 2018). But this standard finds no support in this Court's precedents. The Second Department reasoned that elections to accelerate or decelerate, respectively, require the equivalent notice to be "valid and enforceable." *Id.* Then, citing only its own

precedents, it stated that *both* elections require "clear and unambiguous" notice. *Id.* The Second Department's ruling conflicts with *Albertina Realty*, which held that an election was effective even though the borrower had no actual notice. 258 N.Y. at 475. The doctrine of equitable estoppel, not an unfounded "clear and unambiguous" notice requirement, protects borrowers from unfair revocation. And even if a "clear and unambiguous" notice standard applied, Engel fails to show that a reasonable person in his position would lack such notice.

2. Engel Fails to Show That the Stipulation to Discontinue Was a "Pretext" or Inequitable

Engel suggests in his brief that revoking an acceleration so as to permit a borrower to pay past amounts due and resume paying monthly installments is inherently unfair if a possibility of a "successive foreclosure action" exists. Engel Br. 11. But there is nothing inequitable about discontinuing a foreclosure action, giving a borrower another chance to make back payments, and then accelerating again after the borrower fails to cure defaults within a reasonable period of time—here, approximately six months after the revocation and reinstatement of original terms. Thus, Engel cannot show that the revocation was unfair, especially in light of his vexatious litigation conduct and willful defaults.

a. The Revocation of Acceleration Was Fair

Engel admitted in the joint stipulation that its purpose was to resolve the dispute "amicably" and "without further delay, expense or uncertainty." (A. 42) Engel's admissions show that the stipulation was *not* pretextual or inequitable. It was fair. Engel would not have signed the stipulation (through counsel) if he had any reason to believe that it was a ruse or pretext or inequitable. Engel was advised by counsel; he has never argued nor could argue that he signed the counseled stipulation under duress.

Even absent his admissions, Engel's suggestion that Freedom Mortgage sought to "avoid the statute of limitations" is illogical. Freedom Mortgage had already filed a complaint and obtained a judgment of foreclosure so there was nothing to avoid. (A. 42) After Engel's eleventh-hour attack on the judgment, the parties signed and filed the joint stipulation to vacate the judgment and discontinue the action in January 2013. (A. 42-43) If Freedom Mortgage had intended to discontinue and refile to cure a defect, it easily could have done so at any time before July 16, 2013 (six years after the initial demand). Instead, it delivered a default notice showing that the loan was *not* accelerated. (A. 207)

The cases on which Engel relies (Br. 61-62) illustrate the point. There was no voluntary discontinuance in *Deutsche Bank National Trust Co. Americas v. Bernal*, a case in which the *court* dismissed the complaint for *failure to prosecute* and then, after the dismissal, the note holder sought "to revoke the acceleration of the debt on the eve of the expiration of the statute …." 56 Misc. 3d 915, 924 (Sup. Ct. Westchester County 2017). In *U.S. Bank N.A. v. Papanikolaw*, "plaintiff tried to have it both ways—purportedly de-accelerating the very mortgage debt that plaintiff simultaneously was litigating to collect in its entirety." 62 Misc. 3d 1207(A) (Sup. Ct. Rockland County 2019).

Thus, in *Bernal* and *Papanikolaw*, the borrower established to the trial courts' satisfaction that enforcing the election to revoke would be inequitable. But Engel cannot show that Freedom Mortgage's election was inequitable. Freedom Mortgage was not trying to escape from its own failure to prosecute. To the contrary, it obtained a judgment against Engel. Nor was Freedom Mortgage simultaneously taking contradictory positions about whether it had accelerated the loan. Rather, the parties stipulated to discontinue after Engel successfully gamed the system with

his improper lack-of-service arguments. Thus, the revocation was fair, not inequitable.

Engel also argues that if Freedom Mortgage had intended to reinstate his monthly payment obligations, it would have provided more detailed information about his loan obligations on the date of the stipulation to discontinue. Engel Br. 44. The record does not establish the content of the parties' communications on the date of the stipulation, however, because Engel moved to dismiss on the pleadings. (A. 30) The record *does* show that Engel was *not* an "unsophisticated borrower" (Engel Br. 44) because he was represented by counsel, was a real estate investor, and engaged in a vexatious scheme to evade service and frustrate judicial process. He knew or should have known what his obligations were; he simply refused to honor them.

Engel further argues that this Court should infer that Freedom Mortgage's revocation was a pretext because it "relied upon the same alleged default date" in both the 2008 and 2015 foreclosure actions. This argument rests on an inaccurate premise. Freedom Mortgage based its 2015 action on Engel's defaults and his failure to cure defaults that occurred *after* it revoked the acceleration. Thus, while the 2015 complaint

alleges Engel's March 1, 2008 default on a monthly payment, it also alleges that he failed "to pay a like sum which became due and payable on the same day of each and every month thereafter *to the date hereof*" (A. 22 [¶ 13 (emphasis added)]), *i.e.*, February 13, 2015 (A. 24). Similarly, the May 2013 letter states that Engel defaulted on monthly payments "through 05-16-13." (A. 207) Engel had a reasonable opportunity after the revocation—nearly six months—to pay past monthly installments and thereby cure his defaults. He simply failed to do so.

b. Engel Reaches for Equitable Relief from the Revocation with Unclean Hands

Engel does not dispute that he collected rent from tenants while refusing to pay his mortgage loan or that he frustrated judicial process by refusing to appear in the first action until after judgment was entered, even though he had actual notice of the action. Opening Br. 4, 15. Thus, his contention that he has suffered a "detriment" or incurred an unfair "financial burden" (Engel Br. 41) requires no small degree of shamelessness. Engel willfully reneged on his loan obligations and the lender, not the borrower, suffers the injury when a borrower pockets a loan and then refuses to pay it back. That is why Freedom Mortgage is the plaintiff here. As such, Freedom Mortgage, not Engel, is entitled to

"the benefit of every possible favorable inference." *JF Capital Advisors, LLC v. Lightstone Group, LLC*, 25 N.Y.3d 759, 764 (2015). This Court should reject Engel's unsupported supposition that the revocation imposes an inequitable financial burden on him.

Engel's unclean hands are yet another reason why he cannot carry his burden to show that enforcing Freedom Mortgage's election to revoke the acceleration would be inequitable, because one who seeks equity "must do equity." *House v. Carr*, 185 N.Y. 453, 457 (1906); *see* 1 Bergman on New York Mortgage Foreclosures § 5.05 (2019) ("[T]he foreclosure process is infused with the fundamental principle of equity jurisprudence that one who seeks equity must do equity."). Allowing Engel to escape his contractual obligations because of circumstances that he caused would be grossly inequitable. *See Norwest Mortgage, Inc. v. Brown*, 35 A.D.3d 682, 684 (2d Dep't 2006) (equities did not favor the [borrowers], whose "manipulation and gaming of the system" had gone on for years (citation and quotation marks omitted)). Accordingly, he is not entitled to equitable relief from Freedom Mortgage's revocation here.

C. The Revocation of the Acceleration Reinstated the Contract on Its Original Terms

Engel asks "what impact deceleration has on past monthly payments …." Engel Br. 30, 62. He does not answer his question, other than to suggest that if the parties' contract does not specifically address it, that must mean that the option to accelerate is irrevocable. His unpreserved argument is meritless. As a matter of common law, "the holder of a note who has exercised the option of considering the whole amount due may subsequently waive this right and permit the obligation to continue in force *under its original terms for all purposes*." 11 Am. Jur. 2d Bills and Notes § 170 (emphasis added); *see also Bartram v. U.S. Bank, N.A.*, 211 So. 3d 1009, 1012 (Fla. 2016) ("Absent a contrary provision in the residential note and mortgage, dismissal of the foreclosure action against the mortgagor has the effect of returning the parties to their pre-foreclosure complaint status ….").

Returning the parties to their original terms is consistent with the common law, the parties' contract, and equitable principles. Treating the acceleration "as if it never had been" [*Loeb*, 100 N.Y. at 235] makes particular sense in this case because the discontinuance annulled the only action by which Freedom Mortgage had elected to accelerate. The

mortgage contains no contrary provision. And returning the parties to their pre-acceleration terms is fair and equitable because Engel could meet the original terms far more easily than he could meet the demand for immediate payment in full. Here, the revocation reduced the amount that Engel needed to pay by June 15, 2013 (30 days after the May 2013 letter) from $218,053.56 to $117,613.03, plus any additional monthly payments and interest that came due after the notice date. (A. 207)

Because the revocation restored the parties to their original terms, the installments were due each month on their original due date under the contract. As provided in the contract, interest accrued "both before and after any default." (A. 56 [¶ 2]) Contrary to Engel's argument, however, Freedom Mortgage could *not* immediately "re-accelerate" (Engel Br. 31) based on his past defaults on these monthly payments. Under paragraph 22 of the mortgage, Freedom Mortgage could *not* accelerate until *after* it sent a letter to Engel notifying him of the default and providing him 30 days to cure. (A. 77-78 [¶ 22]) Thus, even if Freedom Mortgage had delivered a default notice on the same day that it elected to revoke the acceleration, Engel still would have had 30 days to pay *far less* (about $100,000 less) than the amount he had owed to

Freedom Mortgage one day before the revocation. (A. 37 [¶ 11], 42) And if Engel paid the much smaller amount specified in the default notice by the date specified in the notice (June 15, 2013), Freedom Mortgage could *not* accelerate, unless and until Engel defaulted again.

The 30-day default notice requirement in the mortgage thus addresses any concern that a lender could "re-accelerate" without the borrower knowing how much it owed or when it was due. Contrary to Engel's arguments, Freedom Mortgage advised him how much he owed *to the penny*. (A. 207) In addition, he could have called the loan servicer at his convenience on any business day to obtain the same figures. (*See* A. 207 (providing telephone number)) Engel cannot complain about any difficulty in obtaining a statement of the amount necessary to pay past monthly installments because he willfully defaulted and frustrated the judicial process by willfully refusing to appear for years, even though he had actual knowledge of the lawsuit. (A. 217-18; *see supra*, at 23-24)

To the extent that Engel may be arguing that Freedom Mortgage waived his obligation to make monthly payments by accelerating the loan, such that it would be inequitable to require him to make those monthly payments after revocation (Engel Br. 30), this Court should

reject that argument. Far from waiving his monthly obligations, the acceleration called all of them due at once, as this Court's law allows. *Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 5-6 (1930). Thus, this is *not* a case in which the lender waived its right to a payment by a date certain, then turned around and sued the borrower for failing to pay by that same date. The monthly payments were due before *and* after the revocation and, as noted, the revocation restored Engel to a position in which he had at least 30 days to pay the past monthly amounts. (A. 77-78 [¶ 22])

D. Freedom Mortgage Made a New Demand in 2013 for Immediate Payment in Full Based on Engel's Post-Revocation Defaults and Failure to Cure

The parties agreed that Freedom Mortgage could "require that [Engel] pay immediately the entire amount then remaining unpaid under the Note and [mortgage]" if Engel defaulted, the lender mailed him notice of default, and Engel failed to cure the default within 30 days. (A. 77-78 [¶ 22]) Engel defaulted on his loan obligations and failed to cure his defaults after Freedom Mortgage revoked the acceleration by filing the stipulation to discontinue. Freedom Mortgage sent a 30-day default notice to Engel, *i.e.*, the May 2013 letter. (A. 207-08) Engel did not cure his defaults by the date specified in the 30-day notice.

Freedom Mortgage based the 2015 foreclosure action on Engel's failure to cure defaults *after* the 2013 "deceleration." (A. 22 [¶ 13], 137, 207) That action was different from the 2008 action, which was based on defaults on monthly payments from March 1, 2008, to July 1, 2008. (A. 37 [¶ 9]) Freedom Mortgage's claim for immediate full payment based on Engel's 2008 failure to cure defaults accrued on July 16, 2008, when Freedom Mortgage filed the complaint stating its demand. (A. 32 [¶¶ 5, 9], 37 [¶ 10]) Its claim for immediate full payment based on Engel's 2013 failure to cure defaults accrued on August 7, 2013, when Freedom Mortgage elected to accelerate the loan in a letter sent to Engel. (A. 137) Thus, Freedom Mortgage commenced the 2015 action based on Engel's 2013 defaults within two years of accrual. This was timely.

III. This Court's Ruling in Favor of Freedom Mortgage Would Promote Settlement and Serve the Public Interest

A lender's election to revoke an acceleration is beneficial to the borrower because it gives the borrower another opportunity to keep the property. Thus, and consistent with sound public policy, lenders and borrowers frequently resolve foreclosure litigation without a forced sale of the property. To effectuate this reasonable course of action, the lender discontinues the foreclosure action and thereby reinstates the original

terms. This is not "havoc" or "confusing legal purgatory," as Engel would have it (Engel Br. 11), but the expected outcome of settlement negotiations across the State.

As Freedom Mortgage showed in its opening brief, settlements of foreclosure litigation cannot work unless the lender retains its right to foreclose if the borrower defaults again. Freedom Mortgage Br. 31-32. It also showed that discontinuance is the natural outcome of settlement and that the parties to a litigation settlement can be expected to understand whether the loan has been reinstated. *See id.* The contrary inference—that a borrower may settle mortgage foreclosure litigation, execute a stipulation to discontinue, and yet *not know* whether the lender is still demanding immediate payment in full—is untenable.

Engel nevertheless argues that lenders should be forced to include the loan terms or other magic words in a stipulation to discontinue. Engel Br. 44, 61. But a ruling that a stipulation or notice of voluntary discontinuance does not revoke an acceleration unless it contains Engel's specified language or restates the loan terms would be unfair to lenders who, like Freedom Mortgage, *already* revoked an election to accelerate in good faith. When Freedom Mortgage voluntarily discontinued the 2008

foreclosure action, it could not have known that it would be blindsided by Engel's claim that the loan was still accelerated, even though the parties agreed to drop the lawsuit for accelerated payment. Moreover, some borrowers will always claim that the discontinuance was not clear enough. If they can embroil lenders in fact-intensive litigation to determine whether a voluntary stipulation to discontinue was sufficient to revoke an acceleration, lenders will be reluctant to settle because of litigation risk. The result will be fewer settlements and more foreclosures, which would be contrary to this State's policy to encourage settlement of foreclosure litigation.

Engel also conjectures that a ruling in his favor would give lenders "advance notice" that a stipulation to discontinue would not revoke an election to accelerate. Engel Br. 60. In future cases, he suggests, lenders "would have more reason to exercise due diligence" by, for example, confirming that they own the note and serving required notices. Engel Br. 60. Of course, the "advance notice" would be prospective only, and Engel's rationale makes no sense in any event. If a lender improperly filed a foreclosure complaint based on a note and mortgage that it did not own, then the case is over—the parties will not return to their original

terms because none existed. As for alleged defects in serving required notices, the lender who wishes to foreclose ordinarily can cure them and then, if necessary, file another lawsuit within the limitations period.

This case proves the point. Freedom Mortgage did not have to settle with Engel; it did so to avoid "further delay, expense or uncertainty." (A. 42) His egregious conduct—collecting rental income on a property and then refusing to pay the note holder—is undisputed. Freedom Mortgage could have filed and served an amended complaint on Engel in January 2013 to address his fabricated objection based on lack of service, which Engel admitted had been false all along. (A. 42 (admitting that Engel "was served" with the 2008 complaint)) If Freedom Mortgage had believed that the settlement exposed it to a risk that it could not foreclose again, it would not have voluntarily discontinued in 2013. It would have foreclosed then and there, as it was undisputedly entitled to do, instead of giving Engel a second chance.

CONCLUSION

This Court should reverse the Appellate Division's order and reinstate the trial court's judgment in favor of Freedom Mortgage.

Dated: November 25, 2019 Respectfully submitted,

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/s/ Brian A. Sutherland