UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ABPAYMAR, LLC,

Plaintiff, Case No. 8:14-cv-00424-JSM-TBM

vs.

NATIONSTAR MORTGAGE, LLC,

Defendant
_____/

PLAINTIFF ABPAYMAR, LLC'S RESPONSE IN OPPOSITION TO DEFENDANT NATIONSTAR MORTGAGE, LLC'S MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

Plaintiff, ABPAYMAR, LLC ("**Abpaymar**"), by and through undersigned counsel and pursuant to United States District Court, Middle District of Florida Local Rule 3.01(b), hereby files this its response in opposition to Defendant Nationstar Mortgage, LLC's Motion to Dismiss and Incorporated Memorandum of Law (hereinafter the "**Nationstar Motion to Dismiss**"), and respectfully requests that this Court deny the Nationstar Motion to Dismiss, and as grounds therefor states as follows:

Introduction

Abpaymar is the owner of real property located at 2744 Deer Track Way in Palm Harbor, Pinellas County, Florida (the "**Property**"). Nationstar Mortgage, LLC ("**Nationstar**") is the current assignee of record of a mortgage originally recorded at Book 15678, Page 313 of the Official Records of Pinellas County, Florida on March 9, 2007 (the "**Mortgage**"). Nationstar's predecessor in interest accelerated the balance due under the Note for which the Mortgage is

security on January 31, 2008 and filed suit to foreclose that Mortgage in the case styled Nationstar Mortgage, LLC v. Bierbaum, Pinellas County Case No. 2008-CA-1493 (the "**Foreclosure Suit**"). However, the Foreclosure Suit was dismissed for lack of prosecution on August 8, 2013, and no subsequent foreclosure lawsuit has been filed by Nationstar (or any other entity).

On January 27, 2014, Abpaymar filed its Complaint requesting that this Court quiet title as to the Mortgage. Because the debt secured by the Mortgage was accelerated more than five years ago, any attempt to foreclose is barred by §95.11(2)(c), *Fla.Stat.* Further, because the acceleration of the loan was the equivalent of the Mortgage reaching maturity, §95.281, *Fla.Stat*., prevents any further causes of action for breach of the Mortgage from accruing. The Mortgage is an invalid lien and Abpaymar is entitled to have such removed from the chain of title of the Property.

As discussed in more detail, *infra*, Abpamar's Complaint sufficiently states a cause of action to quiet title as the Mortgage creates an invalid cloud on Abpaymar's title and this Court should therefore deny the Nationstar Motion to Dismiss.

Procedural Background

1. In 2007, Carl and Ingrid Bierbaum, the previous owners of the Property, granted a mortgage to Mortgage Electronic Registration Systems, Inc., as Nominee for Amnet Mortgage, Inc. After a series of assignments, the Mortgage was ultimately assigned to Nationstar.

2. The Mortgage contains an optional acceleration clause, which states:

> If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.[1]

[1]Nationstar sought judicial notice of the Mortgage in the Nationstar Motion to Dismiss, so this language in the Mortgage is appropriately considered for purposes hereof. In this same vein, this Court should take judicial notice of all public records referenced herein.

3. On January 31, 2008, based on the Bierbaums' failure to make monthly mortgage payments, Nationstar's predecessor in interest elected to accelerate the amounts owed pursuant to the Mortgage and filed the Foreclosure Suit. The Complaint in the Foreclosure Suit plainly reflected the acceleration of the balance due.

4. The Foreclosure Suit was filed in early 2008 yet remained inactive for long periods of time. In fact, there was no record activity at all in the ten months preceding a March 26, 2013 notice of intent to dismiss for lack of prosecution and the 60 days thereafter, and Nationstar did not show good cause for this failure to prosecute. As a result, consistent with established precedent, *see Chemrock Corp. v. Tampa Elec. Co.*, 71 So. 3d 786 (Fla. 2011), the Foreclosure Suit was dismissed for lack of prosecution under *Fla.R.Civ.P.* 1.420(e). Nationstar moved for rehearing of that ruling, but that motion was denied and Nationstar did not appeal.

5. Meanwhile, based on the Bierbaums' failure to pay assessments owed to Hawks Landing Preserve Association, Inc. (the "**Association"**) recorded a lien against the Property on July 27, 2011 at Pinellas County Official Records Book 17313 Page 1568.

6. Nationstar and its predecessor in interest did nothing to resolve the lien or protect its alleged security interest in the Property. As such, on March 27, 2012, the Association filed suit to foreclose its lien in Pinellas County Case No. 12-2742-CI ("**Lien Foreclosure Suit**"). A Notice of Lis Pendens was recorded upon the filing of that suit at Book 17515, Page 1348 of the Official Records of Pinellas County, Florida.

7. The Association prevailed in the Lien Foreclosure Suit, a Final Judgment was entered, and an online sale was conducted on March 26, 2013. Inland Assets, LLC, a New Mexico LLC, as Trustee ("**Inland**"), was the high bidder. When there were no objections to the sale (by Nationstar or any other entity), the Pinellas County Clerk of Court issued a Certificate of Title to

Inland, which title was recorded on April 15, 2013 at Book 17963, Page 456 of the Official Records of Pinellas County, Florida. Thereafter, Inland conveyed its interest in the Property via Quit Claim Deed to Abpaymar, as recorded on October 3, 2013 at Book 18182, Page 1342 of the Official Records of Pinellas County, Florida.

8. After acquiring the Property, Abpaymar filed the instant lawsuit to quiet title as to the Mortgage.

9. Abpaymar's quiet title suit is founded on the failure of Nationstar to timely foreclose on the Mortgage ***after electing to accelerate*** all the amounts due and owing, which at the same time advanced the maturity of the Mortgage.

10. Because Nationstar did not timely pursue its judicial remedies, both the applicable statute of limitations and statute of repose render the Mortgage an invalid lien and justify its removal from the chain of title. Alternatively, even if this Court somehow believes Abpaymar cannot quiet title, it should be granted leave to bring an action for declaratory relief, seeking a declaration that the statute of limitations bars foreclosure of the Mortgage.

Memorandum of Law In Opposition to Nationstar Motion to Dismiss

For this Court to determine Abpaymar sufficiently pled its cause of action to quiet title on the Property, the Complaint must allege: (1) Abpaymar holds title to the Property; (2) the Mortgage is part of the chain of title of the Property; and (3) the Mortgage is an invalid lien. *See Stark v. Frayer*, 67 So.2d 237, 239 (Fla 1953). It is abundantly clear that Abpaymar has sufficiently done so, as the Complaint contains each of these elements. In particular, the Complaint shows why the Mortgage (cloud) is invalid by identifying the date the Mortgage was accelerated and alleging the Mortgage is invalid because no foreclosure was commenced within the time frame mandated by Florida law. While Nationstar argues it is "impossible" for the Mortgage to be invalid

for these reasons, Nationstar's position in this regard is more appropriately addressed under Rule 56, *Fed.R.Civ.P.*

1. **<u>Standard of Review</u>:**

It is well settled, even by case law relied on by Nationstar, that this Court must review the Nationstar Motion to Dismiss in the light most favorable to Abpaymar. *Bell Atlantic v. Twombly,* 127 S.Ct. 1955 (2007). Every inference that can be fairly deduced from the Complaint is accepted as true for the purposes of analyzing the Nationstar Motion to Dismiss. *Id.* at 1965. This includes this Court presuming that the general allegations in Abpaymar's Complaint embrace the specific facts that are necessary to support the claim. *Steel Co. v. Citizens for a Better Environment,* 118 S.Ct. 1003 (1998).

2. **<u>Florida Law Limiting Time Frame Within Which a Party Can Bring a Civil Action</u>:**

Once Nationstar chose to exercise its (***optional***) right to accelerate the Mortgage, §95.11(2)(c), *Fla.Stat.* (the "**Statute of Limitations**") and §95.281, *Fla.Stat.* (the "**Statute of Repose**") set the time frame within which Nationstar could pursue the judicial remedy of foreclosure. The long-standing policy behind passing laws which limit the time frame within which a party can bring a civil action is that over time, "a defendant's right to be free of the shadow of a claim prevails over a plaintiff's right to recover." *Burnett v. New York Central Railroad Co.*, 380 U.S 424, 85 S.Ct. 1050 (1965); *see also, Farris v. United States,* 877 F.Supp. 1549 (M.D. Fla. 1994). This policy is consistently applied throughout the United States in both state and Federal courts and at its heart, the message is clear: protecting both people and entities from the effects of stale claims. *See, e.g., Guaranty Trust Co. of New York v. United States,* 304 U.S. 126, 58 S.Ct. 785 (1938). Undoubtedly, the Florida legislature enacted the Statute of Limitations and Statute of Repose to further this same policy in Florida *vis a vis* mortgage foreclosures. In fact, one Florida

court expressly applied such a rationale in the foreclosure context, explaining:

> Statutes of limitation are intended to encourage the enforcement of legal remedies before time dilutes memories, witnesses move to greener pastures, and parties pitch out (or "delete," in the electronic age) old records. Under Park Finance's theory, the statute of limitations applicable to a secured loan in Florida would be almost ten years rather than five years. A creditor could hold collateral for almost five years after default, then liquidate it, and then wait another five years to sue for a deficiency. …
>
> Collection lawsuits precipitate adverse credit reports, and those can further hamper a consumer's ability to get on with her life. Consumers should not be exposed to a double ration of worry. A creditor holding a security interest in personal property can and should initiate its various remedies within the generous five-year period allowed by our Legislature. For all these reasons, we conclude that the statute of limitations was not correctly applied, that the petition for certiorari should be granted, and that the order below should be quashed.

Arvelo v. Park Fin. of Broward, Inc., 15 So. 3d 660, 663-664 (Fla. 3d DCA 2009).

A. §95.011(2)(c) – Statute of Limitations:

The Statute of Limitations requires that an action to foreclose on real property be commenced within five years of the accrual of the cause of action. Prior to exercising its option to accelerate, a new cause of action accrued each month that the payment due under the Mortgage went unpaid. However, when Nationstar accelerated the Mortgage on January 31, 2008, it declared the full amount owed under the Mortgage due and payable immediately. Therefore, no additional monthly payments ever came due, and since no foreclosure lawsuit was initiated within five years from January 31, 2008, the Statute of Limitations prevents enforcement of the cause of action.

Under established law, foreclosure is barred by the Statute of Limitations when a bank accelerates the balance due then fails to file a foreclosure suit within five years. *See American Bankers Life Assurance Co. of Fla. v. 2275 West Corp.*, 905 So. 2d 189 (Fla. 3d DCA 2005) (reversing foreclosure judgment and remanding with instructions to grant judgment for homeowners based on the statute of limitations); *Central Home Trust Company of Elizabeth v.*

Lippincott, 392 So.2d 931 (Fla. 5th DCA 1980) ("The statute of limitations may commence running earlier on an installment note for payments not yet due, if the holder exercises his right to accelerate the total debt because of a default or other reason. … To constitute an acceleration after default, where the holder has the *option* to accelerate, the holder or payee of the note must take some clear and unequivocal action indicating its intent to accelerate all payments under the note, and such action should apprise the maker of the fact that the option to accelerate has been exercised. Examples of acceleration are a creditor's sending written notice to the debtor, making an oral demand, and alleging acceleration in a pleading filed in a suit on the debt."); *USX Corp. v. Schilbe*, 535 So. 2d 719 (Fla. 2d DCA 1989) ("foreclosure of the mortgage is time barred by section 95.11(2)(c) and the enforceable life of the mortgage lien ended by operation of section 95.281 prior to the commencement of their action"); *Greene v. Bursey*, 733 So. 2d 1111 (Fla. 4th DCA 1999) ("Where the installment contract contains an optional acceleration clause, the statute of limitations may commence running earlier on payments not yet due if the holder exercises his right to accelerate the total debt because of a default."); *Locke v. State Farm Fire & Cas. Co.*, 509 So. 2d 1375 (Fla. 1st DCA 1987) ("It has been held that the statute of limitations on a mortgage foreclosure action does not begin to run until the last payment is due unless the mortgage contains an acceleration clause. In the instant case, the mortgage, which provides for installment payments with the last payment due in May, 2008, contains an *optional* acceleration clause. In such a case no acceleration occurs until the holder of the mortgage exercises his right to accelerate."); *Monte v. Tipton*, 612 So. 2d 714 (Fla. 2d DCA 1993) ("The statute of limitations on a mortgage foreclosure action does not begin to run until the last payment is due unless the mortgage contains an acceleration clause. Mrs. Tipton did not exercise her right to accelerate until she demanded the total principal balance and interest by letter dated March 12, 1991, less than two months prior to

filing suit."); *Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257 (Fla. 3d DCA 2012) ("The complaint alleges that the full unpaid principal amount was due by virtue of a default on July 1, 1997. [The bank's] officer swore in his affidavit that default occurred on July 1, 1997, and 'the then title holder to the Note accelerated payment of the entire amount due and owing on the Note and Mortgage.' It appears on the face of the existing record, then, that acceleration likely occurred over five years before this lawsuit was filed in late November 2002.").

As if Florida law were not clear enough, and to show how application of the Statute of Limitations in this context is not reasonably in dispute, this Court should look at how courts throughout the United States have adjudicated this issue. Quite clearly, the law is clear. Under the jurisprudence of every virtually state in America,[2] where an installment contract has an acceleration clause, and that acceleration takes place, the statute of limitations begins to run at that point. *See Smith v. FDIC*, 61 F.3d 1552 (11th Cir. 1995) ("Under Florida law, when promissory note secured by mortgage contains an optional acceleration clause, foreclosure cause of action accrues, and statute of limitations begins to run, on date acceleration clause is invoked or on stated date of maturity, whichever is earlier."); *Wheel Estate Corp. v. Webb*, 679 P.2d 529 (Ariz. 1983) (statute of limitations barred suit on installment contract); *Navy Federal Credit Union v. Jones*, 930 P.2d 1007 (Ariz. 1996) (exercise of optional acceleration clause barred claim under statute of limitations)*; In re. Bennett*, 292 B.R. 476 (N.D. N.Y. 2003) ("Under New York law, statute of limitations on claim for breach of installment note which contained optional acceleration clause began to run when lender elected to exercise the acceleration clause, rather than upon the earlier, initial default on an installment payment."); *City of Lincoln v. Herschberger*, 725 N.W. 2d 787

[2]Though Abpaymar does not cite a decision from each state on this issue, its undersigned counsel represents that he researched this issue and did not find any case law to the contrary.

(Neb. 2007) ("We conclude that the statute of limitations began to run on the date the acceleration clause was exercised. Because the City's petition was filed less than 5 years after the City exercised its right to acceleration, the City's claim against the Hershbergers is not barred by the statute of limitations."); *Sparta State Bank v. Covell*, 495 N.W. 2d 817 (Mich. 1993) ("when an installment contract does not contain an acceleration clause, claims based upon a breach of the installment contract accrue, and the statute of limitations begins to run, as each separate installment falls due. In the absence of an acceleration clause, claims on an installment contract do not accrue until the installment becomes due. However, a different result is reached when an installment contract contains an acceleration clause and the acceleration clause is exercised."); *Cadle Co. v. Prodoti*, 716 A.2d 965 (Conn. 1998) ("It is undoubtedly true that the statute of limitations clock begins to run irreversibly when an optional acceleration clause is exercised by a demand of full payment before all installments become due."); *Clayton Nat'l, Inc. v. Guldi*, 307 A.D. 2d 982 (N.Y. 2003) (statute of limitations barred foreclosure suit filed in 2000 where prior suit filed in 1992); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W. 3d 562 (Tex. 2001) ("Promissory note holder's agreement that predecessor had accelerated note and that the statute of limitations began to run on that date amounted to a judicial admission of the acceleration date in a response to a summary judgment motion and in a counter-motion for summary judgment."); *Loiacono v. Goldberg*, 240 A.D. 2d 476 (N.Y. 1997) ("Once mortgage debt is accelerated, entire amount is due, and statute of limitations begins to run on entire mortgage debt."); *Ferrari v. Citation Securities, Inc.*, 2000 WL 329068 (Tex. 2000) ("If a lender accelerates a note, the statute of limitations begins to run from the date of an effective acceleration."); *Lavin v. Elmakiss*, 302 A.D. 2d 638 (N.Y. 2003); *Ryerson v. Hemar Ins. Corp. of America*, 200 S.W. 3d 170 (Missouri 2006) ("Lender's assignee's cause of action for payment on an installment note accrued, and ten-year statute of limitations began to run,

when borrower defaulted and lender accelerated payments due on the note, effectively causing the last installment payment due and owing."); *Oaklawn Bank v. Alford*, 845 S.W. 2d 22 (Ark. 2000) ("After appellee defaulted and appellant accelerated the debt, appellant's cause of action on the debt evidenced by the note did not depend upon any further contingency or condition precedent. ... We, therefore, agree with the circuit judge in his finding that the statute of limitations began to run when appellant accelerated the debt and that it barred appellant's complaint."); *Burney v. Citigroup Global Markets Realty Corp.*, 244 S.W. 3d 900 (Tex. 2008) (statute of limitations began to accrue upon acceleration, barred foreclosure); *Hassler v. Account Brokers of Larrimer County*, 274 P.3d 547 (Col. 2012) (" if an obligation that is to be repaid in installments is accelerated either automatically by the terms of the agreement or by the election of the creditor pursuant to an optional acceleration clause—the entire remaining balance of the loan becomes due immediately and the statute of limitations is triggered for all installments that had not previously become due"); *American Mut. Building & Loan Co. v. Kesler*, 137 P.2d 960 (Idaho 1943) ("Where mortgagee availed itself of benefits of acceleration clause in mortgage, future installments were immediately matured for all purposes, and statute of limitations then began to run against unmatured installments and continued to run against past due installments."); *Evans v. Kilgore*, 21 So. 2d 842 (Ala. 1945) ("A mortgagee's election to mature entire indebtedness, evidenced by notes secured by mortgage, as of date on which first of notes became due, matured all notes for all purposes on such date, so that action for balance due thereon was barred by statute of limitations six years thereafter."); *Uland v. Nat'l City Bank of Evansville*, 447 N.E. 2d 1124 (Ind. 1983) ("Where note contained optional acceleration clause and bank, by virtue of letter sent to maker, who was in default in monthly note payments, exercised option to accelerate payments, but parties thereafter entered into agreements to reinstate note, initial exercise of option to accelerate was thereby

revoked, and ten-year statute of limitations commenced to run only at time note was due, rather than on earlier date of exercise of option to accelerate."); *EMC Mortg. Corp. v. Patella,* 279 A.D. 2d 604 (N.Y. 2001) ("Six-year limitations period applicable to foreclosure action brought by original mortgagee started to run when mortgagee notified mortgagors that their debt was being accelerated, and continued to run when that action was dismissed, so that subsequent foreclosure action brought by mortgage's assignee was untimely, where original mortgagee did not revoke its election to accelerate."); *Driessen-Rieke v. Steckman*, 409 N.W. 2d 50 (Minn. 1987) ("Creditors' call on debentures, as provided under debenture agreement, advanced maturity date on underlying debts secured by debentures; thus, statute of limitations for foreclosure on mortgage that had been issued by debtor when call was made, in return for creditors' forbearance for 45 days, began to run from date of mortgage plus 45-day grace period, and creditors' subsequent foreclosure action was time barred"); *Asset Acceptance, LLC v. Morgan*, 2007 WL 949251 (Mich. 2007) ("If an acceleration clause is exercised, the entire unpaid balance under the contract becomes due, and the statute of limitations period no longer runs separately after each installment becomes due."); *Baseline Financial Services v. Madison*, 278 P.3d 321 (Ariz. 2012) ("When an installment contract contains an optional acceleration clause, an action as to future installments does not accrue until the holder exercises the option to accelerate."); *Koeppel v. Carlandia Corp.*, 21 A.D. 3d 884 (N.Y. 2005) ("We agree with the Supreme Court that this action is barred by the six-year statute of limitations applicable to an action to foreclose a mortgage. The six-year statute of limitations began to run upon the acceleration of the mortgage debt."); *U.S. Leasing Corp. v. Everett, Creech, Hancock & Herzig*, 363 S.E. 2d 665 (N.C. 1988) ("A cause of action for breach of contract accrues at time of breach which gives rise to right of action for purposes of applying limitations period, and, in case of obligation payable by installments, statute of limitation runs against each

installment individually from time it becomes due, unless creditor exercises a contractual option to accelerate debt in which case statute begins to run from date acceleration clause is invoked.").

In the face of all of these authorities, Nationstar asserts that the dismissal of the Foreclosure Suit does not preclude a subsequent foreclosure action based on a new default. (Nationstar Motion to Dismiss at p. 7). While Abpaymar agrees with this statement of law, i.e. the dismissal of a foreclosure lawsuit does not prevent the re-filing of a new suit, such a statement mischaracterizes the issue at hand.

The question at bar is not the impact of the dismissal of the Foreclosure Suit on Nationstar's ability to bring a new suit. Rather, the issue is whether Nationstar can foreclose on the mortgage in the face of the applicable Statute of Limitations (having accelerated the balance due in January of 2008 and failed to initiate suit in the ensuing, five-year period). In that regard, a closer look at the case law relied upon by Nationstar reveals that those rulings are all consistent with how Abpaymar would have this Court apply the Statute of Limitations. Quite simply, Nationstar cites no case supporting its assertion that it can avoid application of the Statute of Limitations on the facts at bar.

In *Olympia Mortgage Corp. v. Pugh,* for example, a second foreclosure lawsuit was filed within three years of the first suit, i.e. within three years of acceleration. 774 So.2d 863 (Fla. 4th DCA 2000). Hence, nothing in *Pugh* supports the view that a bank can accelerate a mortgage, wait more than five years, then file suit in the face of the Statute of Limitations. *Id.*

Likewise, *Singleton v. Greymar Associates* is of no help to Nationstar. 882 So.2d 1004 (Fla. 2004). There, the issue was whether a second mortgage foreclosure suit was barred by res judicata when the first mortgage foreclosure was dismissed with prejudice. Though the Florida Supreme Court allowed the second such suit to be brought even after the first was dismissed with

prejudice, that second lawsuit was filed some 18 months after acceleration. *Id.* Tellingly, the statute of limitations was not even mentioned in *Greymar* – not once, not even in *dicta*. *Id.* Hence, there is no way to read *Greymar* to support the view that a bank can accelerate, wait more than five years, and still foreclose in the face of the Statute of Limitations.

Star Funding Solutions, LLC v. Krondes is similar as, in that case, the first foreclosure suit was filed on May 18, 2010 and the Fourth District's opinion was issued less than three years later. 101 So.3d 403 (Fla. 4th DCA 2011). Clearly, that case had nothing to do with statute of limitations. Of course, neither did *PNC Bank, N.A. v. Neal,* 2013 WL 5779048 (Fla 1st DCA Oct. 25, 2013).

In sum, all of the cases cited by Nationstar are plainly distinguishable, as none answered the question at hand, i.e. whether a bank such as Nationstar can accelerate the balance due under a note/mortgage, wait more than five years, then initiate suit in the face of the statute of limitations. In light of the cases cited, *supra*, it seems clear the Statute of Limitations bars any such effort.

Finally, Nationstar seems to suggest (without any case citations) that the mere fact that the Foreclosure Suit was dismissed somehow enables it to file suit again. It seems clear, though, that just because *Greymar* authorizes a new foreclosure lawsuit after the first suit was dismissed with prejudice is not the same thing as authorizing a new foreclosure lawsuit more than five years post-acceleration. In fact, many courts have concluded that the dismissal of a foreclosure lawsuit has no impact on the running of the statute of limitations. *See Wood v. Fitz-Simmons*, 2009 WL 580784 (Ariz. 2009) ("An affirmative act by the lender is necessary to revoke the acceleration of a debt once that option has been exercised. And, where a debt has been accelerated by the filing of a lawsuit, a trial court's dismissal of the action is not by itself sufficient to revoke the acceleration and extend the limitations period."); *Federal Nat'l Mortg. Ass'n v. Mebane*, 208 A.D. 2d 892 (N.Y. 1994) ("Contrary to Metmor's contention, although a lender may revoke its election to accelerate

all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon, the record is barren of any affirmative act of revocation occurring within the six-year Statute of Limitations period subsequent to the service of the complaint in the prior foreclosure action, wherein the holder of the mortgage notified the borrowers of its election to accelerate. It cannot be said that a dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate."); *Clayton Nat'l, Inc. v. Guldi*, 307 A.D. 2d 982 (N.Y. 2003) ("Contrary to the plaintiff's contention, the dismissal of the 1992 action for lack of personal jurisdiction did not constitute an affirmative act by the lender to revoke its election to accelerate.").[3]

B. §95.281 – Statute of Repose:

Section 95.281, *Fla.Stat.*, is Florida's statute of repose on liens encumbering real property. While the Statute of Limitations is procedural, the Statute of Repose is a substantive statute that bars enforcement of an accrued cause of action or prevents accrual of a cause of action where the final element necessary for the cause of action occurs beyond the time period established by the statute. *See, e.g., Houck Corporation v. New River, Ltd.,* 900 So.2d 601 (Fla. 2d DCA 2005). Similar to the policy behind enactment of the Statute of Limitations, the Statute of Repose provides a secondary limitation on the right of an individual or entity to file suit to foreclose on a mortgage. The Statute of Repose (like other similar statutes) is "designed to protect defendants" and further "foster the elimination of stale claims, and certain about a plaintiff's opportunity for recover and a defendant's potential liabilities. *Lozano v. Montoya Alvarez,* 134 S.Ct. 1224 (2014). The Florida Supreme Court in *Fireston Tire & Rubber Co. v. Acosta,* 612 So.2d 1361, 1363 (Fla. 1992)

[3] Even if this Court thought it was possible to revoke an acceleration, that fact is plainly outside the four corners of the Complaint and could not be resolved via the Nationstar Motion to Dismiss.

observed that "[t]he purpose of a statute of repose is to cut off he right of action after a specified time measured, from the delivery of a product or the completion of work, regardless of the tie of the accrual of the cause of action or the notice of the invasion of a legal right." These cases are just two of thousands that echo the same principle: finality is a necessary part of our judicial system.

The Statute of Repose provides in relevant part:

> (1) The lien of a mortgage or other instrument encumbering real property, herein called mortgage … shall terminate after the expiration of the following periods of time:
>
> a. If the final maturity of an obligation secured by a mortgage is ascertainable from the record of it, 5 years after the date of ***maturity***.

§95.281(1)(a), *Fla.Stat.* (emphasis added). The inclusion of the term maturity is something this Court must focus on in connection with the issues confronted by Abpaymar's Complaint and the Nationstar Motion to Dismiss. There is no doubt that under Florida law, once a lender elects to accelerate the amounts due under a Mortgage, once the acceleration occurs it is the equivalent is the instrument reaching maturity. *Cadle Co. v. Rhoades*, 978 So. 2d 883 (Fla. 3d DCA 2008) ("loan matured when creditor accelerated debt"); *Casino Espanol de la Habana, Inc. v. Bussel*, 566 So. 2d 1313 (Fla. 3d DCA 1990) ("When a lender elects to accelerate payment on a note, the lender accelerates the maturity of the note itself. When Casino defaulted and Bussel sued to recover the entire amount due under the note, the maturity date of the note accelerated to the present-the date of default and the notice."); *Baader v. Walker*, 153 So. 2d 51 (Fla. 2d DCA 1963) ("If acceleration under acceleration clause was optional with plaintiffs, maturity did not occur until exercise of such option."); *Clark v. Lachenmeier*, 237 So. 2d 583 (Fla. 2d DCA 1970) ("accelerate maturity of the whole debt") *Stockman v. Burke*, 305 So. 2d 89 (Fla. 2d DCA 1974) ("accelerate maturity of the whole debt"); *Florida Nat'l Bank of Miami v. Bankatlantic*, 589 So. 2d 255 (Fla. 1991) ("once a lender accelerates maturity"); *Douglas Props. v. Stix*, 159 So. 1 (Fla. 1935) ("the

complainant has elected to accelerate the maturity of all the indebtedness ..."); *Clay v. Girdner*, 138 So. 490 (Fla. 1931) ("accelerate the maturity of the whole debt"); *Althouse v. Kenney*, 182 So. 2d 270 (Fla. 2d DCA 1966) ("acceleration of maturity"); *Kreiss Potassium Phosphate Co. v. Knight*, 124 So. 751 (Fla. 1929) ("accelerate the maturity of the debt").

This 90+ years of case law in Florida all support the proposition that once acceleration occurs, it is the equivalent of the mortgage reaching the maturity reflected on its face. Further, there is no question that the filing of the Foreclosure Suit constituted acceleration (one of record – although not required to be) of the Mortgage. *August Tobler, Inc. v Goolsy*, 67 So.2d 537 (Fla. 1953); *Murray v. Stalnaker,* 16 So.2d 650 (Fla. 1944); *South Dade Farms, Inc. v. Atlantic Nat. Bak of Jacksonville,* 222 So.2d 275 (Fla 3d DCA 1969).

Abpaymar's Complaint alleges that the Mortgage was accelerated on January 31, 2008. The Nationstar Motion to Dismiss does not contradict this, and regardless, the allegation in the Complaint is deemed true for purposes of analyzing the Nationstar Motion to Dismiss. Therefore, under the relevant Statute of Repose (in addition to the Statute of Limitations) it is clear that Abpaymar sufficiently states a cause of action to quiet title in the Complaint. Because the Mortgage matured on January 31, 2008, the Statute of Repose will (further) bar enforcement of the Mortgage. It is clear therefore that Abpaymar has sufficiently stated a cause of action to quiet title as to the Mortgage and the Nationstar Motion to Dismiss must be denied. This becomes even more evident in light of the case of *Greene v. Bursey,* 733 So.2d 1111 (Fla. 4th DCA 1999)(citing *United States v. First City Capital Corp.*, 53 F.3d 112 (5th Cir. 1995). While the *Bursey* court was analyzing whether a claim was barred by the relevant statute of limitations, it indicated that a Plaintiff could not unreasonably delay the performance of an element of the cause of action which would result in its accrual. *Id.* at 1115. The spirit of the *Bursey* case echos that of the Florida case

law explaining the policy behind the enactment of the Statute of Limitations and Statute of Repose. Finality and eliminating uncertain trumps the indefinite ability to bring a lawsuit.

Conclusion

For the reasons outlined above, Abpaymar respectfully submits that the Nationstar Motion to Dismiss should be denied. Alternatively, should this Court entertain dismiss of the Complaint, Abpaymar respectfully would request that the Nationstar Motion to Dismiss be granted with leave to amend its Complaint to include a count for declaratory relief.

WHEREFORE, Plaintiff, Abpaymar, LLC, respectfully requests that this Court enter an order denying the Nationstar Motion to Dismiss, and for such other and further relief as may be just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to Counsel for Nationstar Mortgage, LLC: Rebecca N. Shwayri (rebecca.shwayri@akerman.com), and Julie S. Sneed (jsneed@akerman.com), Akerman, LLP, 401 E. Jackson Street, Suite 1700, Tampa, FL 33602-5250; and William P. Heller, (williamheller@akerman.com) Las Olas Centre II, Suite 1600, 350 East Las Olas Blvd., Fort Lauderdale, FL 33301-2229.

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