Supreme Court of New Jersey

BANK OF AMERICA, N.A., Plaintiff-Respondent, v. THOMAS MAHER, Defendant-Petitioner.	**DOCKET NO.: 089438** Civil Action ON PETITION FOR CERTIFICATION FROM SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION: **Docket No. A-001708-22-T1** SAT BELOW: **Hon. Thomas W. Sumners, Jr., P.J.A.D.** **Hon. Lisa Rose, J.A.D.**

BRIEF OF *AMICUS CURIAE*
LEGAL SERVICES OF NEW JERSEY

FILING FEES WAIVED *R. 1:13-2*

LEGAL SERVICES OF NEW JERSEY
100 Metroplex Drive, Suite 101
P.O. Box 1357
Edison, New Jersey 08818-1357
Phone: (732) 572-9100
Fax: (732) 572-0066

On the Brief:

Dawn K. Miller, Esq.
DKMiller@lsnj.org
Attorney ID No.: 002521987

Rebecca Schore, Esq.
RSchore@lsnj.org
Attorney ID No.: 046221991

Maryann Flanigan Sutherland, Esq.
MFlanigan@lsnj.org
Attorney ID No.: 901332012

David McMillin, Esq.
DMcMillin@lsnj.org
Attorney ID No.: 046461990

Robert Casagrand, Esq.
RCasagrand@lsnj.org
Attorney ID No.: 0268922007

Dhairya Bhatia, Esq.
DBhatia@lsnj.org
Attorney ID No.: 43958204

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PRELIMINARY STATEMENT

This case is a debt collection action based on a 2006 second mortgage made by plaintiff's predecessor in interest, Countrywide Bank, N.A., filed more than nine years after the account went into default. It is not the longest delay LSNJ has seen in bringing such actions, though it is in many respects emblematic of the problems that arise.

The epidemic resurgence of long-dormant second mortgages was recently addressed by the Consumer Financial Protection Bureau (CFPB), whose website proclaims: "If you were contacted by a debt collector for a mortgage that you haven't heard about in years, then you might have a 'zombie mortgage.'"[1] On December 3, 2020, the Bureau issued an advisory opinion explaining that many second mortgages – like the one at hand – were originated at the height of the subprime mortgage crisis and were charged off as a loss when property values plummeted in its wake. Some were sold to debt buyers for pennies on the dollar. Years later, as the economy slowly recovers, collection attempts have resumed:

> When a borrower defaults on a second mortgage, the mortgage holder may be able to initiate a foreclosure even if the borrower is current on the first mortgage. However, the second mortgage holder only receives proceeds from the foreclosure sale

[1] https://www.consumerfinance.gov/about-us/blog/zombie-second-mortgages-when-collectors-come-for-long-forgotten-home-loans/ (last visited January 8, 2025).

> if there are any funds left after paying off the first mortgage. As a result, many second mortgage holders of piggyback loans, recognizing that a foreclosure would not generate enough money to cover even the first mortgage, charged their defaulted loans off as uncollectible and ceased communicating with the borrowers. Some sold the loans to debt buyers, often for pennies on the dollar. Such sales often occurred unbeknownst to borrowers, who continued to receive no communications regarding the loans. Many borrowers, having not received any notices or periodic statements for years, concluded that their second mortgages had been modified along with the first mortgage, discharged in bankruptcy, or forgiven.
>
> In recent years, as home prices have increased and borrowers have paid down their first mortgages, after years of silence, some borrowers are hearing from companies that claim to own or have the right to collect on their long-dormant second mortgages.[] These companies often demand the outstanding balance on the second mortgage, plus fees and interest. . . .

85 FR 77987 (December 3, 2020).

The CFPB's advisory opinion declared that many such debts are time-barred under state statutes of limitations and reaffirmed that the Fair Debt Collection Practices Act (FDCPA) and its implementing Regulation F prohibit debt collectors from suing or threatening to sue to collect a time-barred debt.

This Court should reverse the trial court and Appellate Division decisions because New Jersey law is well-settled that a cause of action for breach of contract accrues on breach. To hold that a lender may extend a statute of limitations by strategically delaying exercise of acceleration is both inequitable and contrary to New Jersey law.

If, however, the Court holds that a lender's cause of action for the entire amount of a debt payable in installments only accrues when the lender accelerates, or the maturity date is reached, it is critically important for the Court to expressly distinguish and limit its holding to closed-end debt with a maturity date and to make clear that it is not applicable to open-end debt such as credit card debt. To hold otherwise would functionally eliminate the statute of limitations on open-end debt.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

This is a breach of contract action to collect a debt arising from a home equity line of credit secured by a secondary mortgage on residential property after foreclosure of the primary mortgage.[2]

Although not in the record below, this Court may take judicial notice that on January 10, 2014 Plaintiff-Respondent Bank of America filed a foreclosure action against Defendant-Appellant Mr. Maher in the matter of Bank of America v. Maher et al., SWC-F-001166-14. As a matter of public record, paragraph 8 of Bank of America's January 10, 2014 foreclosure complaint accelerated the debt. It said, in part:

[2] No court has evaluated whether this matter is governed by N.J.S.A. 2A:50-1 – N.J.S.A. 2A:50-12 which governs enforcement of certain debts secured by mortgages after foreclosure.

> Plaintiff herein, by reason of said default, elected that the whole unpaid principal sum due on the aforesaid obligation and mortgage referred to in Paragraphs 1 and 2 above, with all unpaid interest and advances made thereon, shall now be due. The date of default is December 25, 2011.

Bank of America voluntarily dismissed its foreclosure complaint on September 4, 2014.

On June 19, 2017, the primary mortgagee filed a foreclosure complaint to foreclose its mortgage, U.S. Bank Trust as Trustee for LSF9 Master Participation Trust v. Maher et al., Docket No, SWC-F-015104-17 (Pa125). Bank of America was named as a defendant, served, and defaulted. Final judgment of foreclosure entered against the defendants on September 21, 2017 (Pa127 – Pa129).[3] The property was sold at sheriff's sale on July 9, 2018 to the primary mortgagee for $1,000 (Pa130 - Pa137). As a matter of public record a writ of possession was executed against the defendant on July 7, 2019, displacing him from the residential property.

On January 7, 2021, plaintiff Bank of America filed a single count complaint in this matter, Bank of America v. Maher et al., Docket No. MON-

[3] The trial court denied the defendant's motion to vacate entry of judgment on March 2, 2018. The Appellate Division affirmed the trial court's denial on February 4, 2019. This Court denied the defendant's petition for certification on September 10, 2019. U.S. Bank Trust as Trustee for LSF9 Master Participation Trust v. Maher, 239 N.J. 82 (2019).

L-000054-21 alleging Breach of Contract (Pa40 - Pa72). Specifically, the complaint alleged that "Defendant's contract was breached, accelerated and charged off on 3/23/15 as a result of Defendant's failure to abide by the Contract's minimum payment requirements. (Pa41, Para. 7).

Initially, Bank of America repeatedly attempted service of the complaint on Mr. Maher at the address of the foreclosed property. These service attempts – made long after execution of the writ of possession – were unsuccessful. After filing a certification of substituted service, notice of entry of default and an unsuccessful motion for entry of final judgment, ultimately Bank of America agreed to vacate entry of default and on May 9, 2022 the defendant filed a pro se Answer asserting sixteen Affirmative Defenses including that the suit was time barred under N.J.S.A. 12A:3-118 and that the suit was time barred under N.J.S.A. 2A:14-1 (Pa179 – Pa188).

On June 10, 2022, Bank of America filed a motion for summary judgment. (Pa189 – Pa190; Pa263). On August 16, 2022, Mr. Maher opposed plaintiff's first motion for summary judgment and filed a cross-motion to dismiss the complaint on the basis that it was filed outside the statute of limitations. (Pa255 – Pa262). The trial court denied both motions on November 4, 2022. (Pa368 – Pa377). It denied the plaintiff's motion for summary judgment on procedural grounds for failure to comply with R. 4:46-

2. It denied defendant's motion to dismiss the complaint on substantive grounds, holding that the complaint was timely filed.

Arbitration was held on November 16, 2022. The arbitrator declined to make an award to either party. (Pa335).

On November 7, 2022, Bank of America filed a second motion for summary judgment (Pa412 – Pa422). On December 27, 2022, Mr. Maher again opposed entry of summary judgment and cross-moved to dismiss the complaint on the basis that it was time-barred (Pa338 – Pa344).

Evidence Presented on Plaintiff's November 7, 2022 Motion for Summary Judgment

Plaintiff's evidence in support of its November 7, 2022 Motion for Summary Judgment (Pa327 – Pa334)[4] included two affidavits: (A) the November 3, 2021 affidavit of an officer of Bank of America, Destane Williams, captioned a "Declaration of Damages" (hereinafter "the Bank of America Affidavit") (Pa1 – Pa4)[5], which contained four exhibits: (1) a May 11, 2006 Secondary Mortgage Loan Home Equity Line Agreement and Disclosure Statement (hereinafter the "the "Note") (Pa5 – Pa16); (2) a May 11,

[4] It is difficult to ascertain the proofs before the trial court from the Appendix, but the original motion is available through e-courts.
[5] A clearer copy is attached to Plaintiff's Complaint at Pa40-Pa43

2006 Mortgage (hereinafter the "Mortgage"; collectively, the note and mortgage are referred to herein as "the agreement between the parties" or "the HELOC") (Pa17 – Pa23); (3) a November 2, 2018 Assistant Secretary's Certificate of Bank of America, National Association as to merger of the original lender, Countrywide Bank, with Bank of America (Pa24 – Pa25); and (4) an October 21, 2019 account ledger (hereinafter the "ledger") (Pa26 – Pa34); and (B) the Affidavit of Plaintiff's counsel Adam J. Beedenbender (hereinafter "Beedenbender Affidavit") (Pa174 – Pa175) with one exhibit: a letter dated September 24, 2019 from the law firm Drew Eckl Farnham to Thomas Maher (hereinafter "the dunning letter") (Pa176 – Pa177).

The May 11, 2006 Note between Countrywide Bank (hereinafter Countrywide) as lender and Thomas Maher as borrower was denominated a "Home Equity Credit Line" (hereinafter "HELOC") with a $1,000,000.00 credit limit (Pa5 – Pa16 [hereinafter the "Note"]).[6] The ledger indicates that on May 17, 2006, Mr. Maher drew down the full available balance of the loan -- $991,888.00 (Pa27 "Initial Draw"). The remaining $8,112.00 was retained by the lender as an origination fee ($1,650.00), a closing cost fee ($6,212.00)

[6] The terms of the loan are onerous, including a monthly adjustable interest rate capped at 18%. It is curious that the loan was cast as a line of credit instead of a standard loan given that the borrower drew down the maximum amount available at the loan's inception, which could indicate a notorious practice known as "spurious open-ended lending."

and "other charges" ($250.00). Id. Mr. Maher made no further draws against the credit line. Id. According to the plaintiff's ledger, in the eight years between June 2006 and July 2014, Mr. Maher made payments totaling $669,715.30.

Maturity Date: Under the terms of the Note, the borrower could draw down against the credit line during an "initial draw period" of sixty months, which would automatically renew for an additional sixty months unless the lender sent written notice to Mr. Maher of its election not to renew. (Pa5, Para. 1). If automatically extended, the draw period would have expired approximately May 2016.[7] After the conclusion of the draw period, the note was to enter into a "repayment period" of 180 months. Stated another way, the loan fully matured 180 months after the inception of the repayment period. Although an exact maturity date is not specified in the Note, application of the terms of the note indicate that the loan would have fully matured and the last payment would have been due in June, 2031.

[7] There is no evidence in the record that the lender elected not to renew the draw period. Default and acceleration occurred before the end of the extended draw period.

Evidence of Breach:

Events of Breach: The Note specified eleven separate "events or conditions" that would permit the lender to exercise its choice of any combination of six separate remedies (Pa12 – P12, Para. 12):

(1) I fail to meet the repayment terms of this Agreement, such as my failure to make any Minimum Payment Due to you on or before the Payment Due Date;

(2) I engage at any time in fraud or material misrepresentation in connection with my Account, whether in any application, in this Agreement or in the Mortgage;

(3) I sell or transfer title to the Real Property without first obtaining your written permission;

(4) I fail to maintain insurance on the Real Property as required under this Agreement or the Mortgage;

(5) I act or fail to act and as a result a lien senior to the lien of the Mortgage is filed against the Real Property;

(6) I die and I am not survived by another person obligated as a Borrower under this Agreement;

(7) All or part of the Real Property is taken through eminent domain, condemnation or similar government taking;

(8) A prior lienholder on the Real Property begins foreclosure under its security document;

(9) The Real Property is used for an illegal purpose which could subject the Real Property to seizure;

(10) I fail to pay taxes on the Real Property; or

LOAN #: [redacted]1530

(11) My action or inaction adversely affects the Real Property or your rights in the Real Property. Such action or inaction could include, for example, the following:

(a) A judgment is filed against me;

(b) I commit waste or otherwise destructively use or fail to maintain the Real Property;

(c) I die and I am survived by another person obligated as a Borrower under this Agreement; or

(d) I move out of the Real Property.

Evidence of Date of Breach: Plaintiff's Complaint (Pa40 – Pa43, Para. 7) indicates that the defendant breached the agreement by failing to "abide by the Contract's minimum monthly payment requirements." Similarly,

Paragraph 11 of the Bank of America Affidavit states "Defendant(s) Thomas Maher failed to make payments as agreed under the Secondary Mortgage Loan and Mortgage" (emphasis omitted). Neither the complaint nor the affidavit specifies the date of breach. The ledger demonstrates that Mr. Maher made payments on the loan in various amounts (all denominated on the ledger as "regular payments") from June 2006 until December 19, 2011.[8] After that, the ledger reflects a lengthy gap in payments until March 27, 2013. The ledger shows several payments between March 27, 2013 and July 25, 2014 in various amounts but payments were applied to arrears and the loan was never brought current after December 2011.

Lender's Remedies/Evidence of Acceleration:

Remedies: Upon any of the specified events or conditions of breach, the lender could elect any combination of the following remedies:

B. If an event described in paragraph 12.A above occurs, subject to any notice or other limitation of applicable law, you may do any combination of the following things:

(1) you may terminate any of my rights under my Account;

(2) you may temporarily or permanently refuse to make any additional loans;

(3) you may declare all sums owing under this Agreement and any other agreement I have made with you to be immediately due and payable;

(4) you may foreclose the Mortgage;

(5) you may reduce my Credit Limit; and

(6) you may take any other action permitted by this Agreement, by law or in equity.

[8] The foreclosure complaint in Bank of America v. Maher, SWC-F-001166-14 indicates a breach date of December 25, 2011.

Evidence of Acceleration: As evidence of acceleration, Plaintiff's Statement of Material Facts in support of its November 7, 2022 Motion for Summary Judgment states:

> 7. Bank of America charged-off and accelerated the debt owed under the Contract on March 23, 2015. See ¶ 4 to the Affidavit and exhibit 4 thereto.

The Bank of America Affidavit makes no mention of acceleration or whether Bank of America ever declared all sums due and owing under the agreement immediately due and payable. Paragraph 4 of the Affidavit reads as follows:

> The following information is kept within Bank of America's mortgage account records:

Customer Name:	**Thomas Maher**
Current Balance:	**$785,259.21**
Contract Date	**05/11/2006**
Charge-Off Date:	**03/23/2015**

Similarly, Exhibit 4 is the ledger, which also does not mention acceleration or indicate that Bank of America "declared" that "all sums due under the agreement are immediately due and payable." It simply indicates a "principal adjustment" of -$725,259.21 on March 23, 2015.

Although not referenced in its statement of material facts, in its argument Plaintiff's November 7, 2022 Motion for Summary Judgment also

relies upon the Beedenbender Affidavit and the September 24, 2019 dunning letter from his firm as evidence of acceleration. That letter stated:

> We have been retained by Bank of America to assist them with regard to funds due to them pursuant to their loan to you. This loan is a home equity line of credit. According to Bank of America records, this note is currently in default and there is a balance due of $785,259.21. We understand the current financial landscape and would like to work with you to resolve the debt owed and achieve a positive result for both you and Bank of America. It is important to understand that you have options concerning this debt, and that we are willing to work with you to explore those options. Please contact us so that we can discuss your potential options and help you achieve a beneficial result.
>
> Unless you notify this office within thirty days after receiving this notice that you dispute the validity of this debt, or any portion thereof, this law firm will assume the debt is valid. If you believe that this debt, or any portion thereof, is not valid you have thirty days from receipt of this letter to dispute the validity of this debt in writing. If you notify this law firm in writing within thirty days after receiving this notice that you dispute the validity of this debt, or any portion thereof, this law firm will obtain verification of the debt or obtain a copy of the judgment and mail you a copy of such verification or judgment. Additionally, while Bank of America is the current creditor, upon written request within thirty days from receipt of this letter, this firm will provide you with the name and address of the original creditor, if different from Bank of America.
>
> At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. I truly appreciate your time and cooperation in this matter and ask that you contact Tess Powell directly at 470-428-8004, or at our toll-free number, 1-877-219-5222 ext. 5103 between the hours of 8:30 AM and 5:30 PM EST to discuss your potential remedies or options you might have to satisfy this debt.
>
> **Finally, please be advised that this communication is from a debt collector. This is an attempt to collect a debt any information obtained will be used for that purpose.**

The dunning letter does not unequivocally declare all sums due under the agreement immediately due and payable. Instead, although it states that a balance of $785,259.21 is due, it also states that "it is important to understand that you have options concerning this debt, and that we are willing to work with you to explore those options." For his part, the defendant denies receiving the September 24, 2019 letter (which is addressed to the foreclosed property even though it is dated well after foreclosure and execution of the writ of possession).

Neither party referred to Bank of America's January 10, 2014 acceleration in its foreclosure complaint.

Trial Court Opinion

On January 6, 2023, the trial court granted Bank of America's second motion for summary judgment in the amount of $785.259.21[9] and denied Mr. Maher's cross-motion to dismiss the complaint. (Pa380 – Pa398). The trial court did not decide whether the applicable statute of limitations was N.J.S.A. 12A:3-118 (applicable to negotiable instruments) or N.J.S.A. 2A:14-1 (applicable to other contracts) but held that the statute of limitations ran from the date of acceleration and as such the complaint was timely filed. In so holding, the trial court relied on the Law Division opinion in the case of FDIC v. Valencia Pork Store, 212 N.J. Super. 335 (Law Div. 1986), reversed on other grounds, 225 N.J. Super. 110 (App. Div. 1988) (applicable to divisible contracts) and decisions of other states. Without acknowledging any dispute and without explanation, the trial court ruled that the loan was accelerated on March 23, 2015 (the charge-off date).

[9] Summary judgment in the amount of $785.259.21 is not supported by evidence in the record. The Note indicates that the amount due was a function of the "average daily balance" of the loan multiplied by an interest rate that adjusted monthly based on a variable "index" plus a margin of 1.250%, and the monthly minimum payment depended upon whether the loan was in the "draw" period or the "repayment" period. The plaintiff did not supply any of this information to the court in its motion for summary judgment. It simply produced a ledger listing the defendant's payments.

Appellate Division Opinion

The Appellate Division affirmed the trial court's order on April 12, 2024. With regard to the applicable statute of limitations, the Appellate Division did not analyze whether the note was a negotiable instrument, but held that the applicable statute of limitations was N.J.S.A. 2A:14-1, illogically reasoning that N.J.S.A. 12A:3-118 (applicable to negotiable instruments, not to sales of goods) was inapplicable because the HELOC did not involve the sale of goods. The Appellate Division held that the statute of limitations began to run on acceleration, relying on this Court's decision in the case of Metromedia v. Hartz Mountain, 129 N.J. 532, 535-36 (1995), quoting FDIC v. Valencia Pork Store, 212 N.J. Super. at 338. With regard to the date of acceleration, the Appellate Division did not acknowledge the Defendant's argument that the loan was never accelerated and held "the acceleration clause was activated on March 23, 2015."

This court granted the defendant's application for certification on October 15, 2024. In December, 2024, this Court granted the motion of Legal Services of New Jersey to appear as amicus curiae and for an extension of time to file a brief. The defendant has remained unrepresented throughout this litigation.

STANDARD OF REVIEW

This Court reviews both summary judgment and motions to dismiss de novo, applying the same standard as the trial court. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021); Baskin v. P.C. Richard & Son., 246 N.J. 157, 171 (2021). Similarly, construction of a contract is a question of law, which this Court must review "with fresh eyes," paying no special deference to the trial court's interpretation. Kieffer v. Best Buy, 205 N.J. 213, 223 (2011).

LEGAL ARGUMENT

I. THE COURT SHOULD REVERSE BECAUSE A COLLECTION ACTION FOR THE ENTIRE AMOUNT DUE ACCRUES UPON DEFAULT UNLESS THE CONTRACT IS DIVISIBLE

This Court has long recognized that the "most important" purpose of statutes of limitations is that they offer litigants repose that "creates desirable security and stability in human affairs." Galligan v. Westfield Centre Service, 82 N.J. 188, 191-192 (1980). They also "compel the exercise of a right of action within a specific, reasonable period of time." Id. (citations omitted). Moreover, "[b]y penalizing unreasonable delay, such statutes induce litigants to pursue their claims diligently so that answering parties will have a fair opportunity to defend." Id. (citations omitted).

The United States Supreme Court has held that, by design, statutes of limitations provide a reasonable period of time for an aggrieved party to

pursue a claim while at the same time promoting justice for defendants. United States v. Kubrick, 444 U.S. 111, 117 (1979). Statutes of limitations are:

> designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. The theory is that **even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and the at the right to be free of stale claims in time comes to prevail over the right to prosecute them.**

Order of R.R. Tels. v. Ry. Express Agency, 321 U.S. 342, 348-349 (1944) (emphasis added).

A. NEW JERSEY LAW IS CLEAR THAT A CAUSE OF ACTION FOR BREACH OF CONTRACT ACCRUES WHEN CONTRACT IS BREACHED

It is axiomatic that in order to prevail on a claim of breach of contract, a plaintiff must prove (1) the parties entered into a contract with certain terms; (2) the plaintiff did what the contract required the plaintiff to do; (3) the defendant did not do what the contract required the defendant to do, defined as a breach of contract; and (4) the defendant's breach of the contract or failure to do what the contract required caused a loss to the plaintiff. Goldfarb v. Solimine, 245 N.J. 326, 338-339 (2021), citing Globe Motor v. Igdalev, 225

N.J. 469, 482 (2016) (alterations omitted) (quoting Model Jury Charges (Civil), 4.10A "The Contract Claim -- Generally" (approved May 1998)).

As a general rule, statutes of limitation begin to run upon the accrual of a cause of action. Ali v. Rutgers, 166 N.J. 280, 286 (2000). This Court has recognized that "the Legislature has not specified when a cause of action is deemed to have accrued," and has left the determination to judicial interpretation. Rosenau v. City of New Brunswick and Gamon Meter, 51 N.J. 130, 137 (1968). In the negligence context, this Court has held that a cause of action accrues "on the date on which the right to institute and maintain a suit first arose." Id. In other contexts, this Court has held that a cause of action accrues **upon the occurrence of an act resulting in injury for which the law provides a remedy**. Beauchamp v. Amedio, 164 N.J. 111, 116 (2000) (emphasis added) ("[o]rdinarily, a cause of action accrues when any wrongful act or omission resulting in any injury, however slight, for which the law provides a remedy, occurs" quoting Tortorello v. Reinfeld, 6 N.J. 58, 65 (1950)).

The right to institute and maintain a suit for breach of contract accrues either when the breach occurs or when the plaintiff, with the exercise of due diligence, should have discovered the breach. Sodora v. Sodora, 338 N.J. Super. 308, 313 (Ch. Div. 2000); see also Lopez v. Swyer, 62 N.J. 267, 272-73

(1973); cf. 31 Williston on Contracts § 79:14 (4th ed. 2004) ("[O]rdinarily, in an action based on a contract, accrual occurs as soon as there is a breach of contract...."). "That a 'right to institute and maintain a suit' would first arise in a breach of contract claim when the contract is breached is consistent with the elements of the action itself." Peck v. Donovan, 565 Fed. Appx. 66 (3d Cir. 2012).

Importantly, in the context of notes secured by mortgages, in the case of Security Nat. Partners v. Mahler, 336 N.J. Super. 101 (App. Div. 2000), cert. denied, 169 N.J. 607 (2001), superseded by statute N.J.S.A. 2A:50-56.1, the Appellate Division recognized that the law with regard to the statute of limitations for enforcement *of the note* was well-settled – six years from the date of default:

> . . . a foreclosure proceeding is different and distinct from a suit on the underlying note. Plaintiff acknowledges, as it must, that suit on the note is governed by a six-year limitation period which ran from the date of defendants' default, March 22, 1989, and thus expired before the present suit was instituted by the second complaint against defendants on June 28, 1996.

Id. at 105 (citations omitted).

Notably, in Mahler, the Appellate Division resolved a surprising issue: that New Jersey lacked established law on the applicable statute of limitations for foreclosure actions. By analogy to adverse possession, the Appellate

Division in Mahler created a twenty year statute of limitations for foreclosure. That twenty year statute of limitations was codified in 2009, and then reduced to six years by statutory amendment in 2019. N.J.S.A. 2A:50-56.1. It is worth noting that in codifying a foreclosure statute of limitations in 2009 and in amending that statute of limitations in 2019, the New Jersey legislature focused on the date of default – not the date of acceleration. N.J.S.A. 2A:50-56.1 provides:

> An action to foreclose a residential mortgage shall not be commenced following **the earliest of**:
>
> a. Six years from the date fixed for the making of the last payment or the maturity date set forth in the mortgage or the note, bond, or other obligation secured by the mortgage, whether the date is itself set forth or may be calculated from information contained in the mortgage or note, bond, or other obligation, except that if the date fixed for the making of the last payment or the maturity date has been extended by a written instrument, the action to foreclose shall not be commenced after six years from the extended date under the terms of the written instrument;
>
> b. Thirty-six years from the date of recording of the mortgage, or, if the mortgage is not recorded, 36 years from the date of execution, so long as the mortgage itself does not provide for a period of repayment in excess of 30 years; or
>
> c. Six years from the date on which the debtor defaulted, which default has not been cured, as to any of the obligations or covenants contained in the mortgage or in the note, bond, or other obligation secured by the mortgage, except that if the date to perform any of the obligations or covenants has been extended by a written instrument or payment on account has been made, the action to foreclose

> shall not be commenced after six years from the date on which the default or payment on account thereof occurred under the terms of the written instrument.

Id. (L.2009, c. 105, § 1, eff. Aug. 6, 2009. Amended by L.2019, c. 67, § 1, eff. April 29, 2019) (emphasis added). See also Deutsche Bank Trust Co. Americas as Trustee v. Weiner, 456 N.J. Super. 546 (App. Div. 2018) (statute of limitations for foreclosure accrues on default not acceleration); Deutsche Bank National Trust Co. v. Hochmeyer, 2018 WL 2999030 (App. Div. 2018) (same); Deutsche Bank National Trust Co. as Trustee v. Blando, 2019 WL 1300514 at *2 (App. Div. 2019) (acceleration is not a pre-requisite to foreclosure but may affect the amount due).

In the contract at issue, acceleration is at most an option for the lender following breach, which may affect issues such as computation of interest, and not a pre-condition for filing suit. Even when a plaintiff's right of action depends on a preliminary act to be performed by the plaintiff, New Jersey law is clear a plaintiff cannot suspend indefinitely the running of the statute of limitations by delaying performance of the act. Desiderio v. D'Ambrosio, 190 N.J. Super. 424 (Ch. 1983). The plaintiff must perform the preliminary act within the statute of limitations. Id.

Other than the courts below in this matter, amicus has been unable to locate any decision holding that belated acceleration of a promissory note

extends the statute of limitations on the entire debt, either in New Jersey or in any other state. Nor can amicus locate any New Jersey decision holding that each payment of a debt payable in installments has its own independent due date, cause of action and statute of limitations absent acceleration nor any New Jersey cases that hold that acceleration is a pre-requisite to maintenance of a collection action on a debt.

The evidence before the court shows that the original breach of contract occurred when the defendant missed his monthly payment in December 2011. Although the defendant made a few subsequent payments that may have been attempts to cure the default, the ledger does not demonstrate that the 2011 default was ever actually cured. (See Pa26 – Pa34, column "PMT/MO"). Even if the subsequent payments did cure the default, the contract was breached again in or soon after July 2014, and no further payments made beyond that date. The complaint was not filed until January 2021 – more than six years after either of these dates. Thus, Plaintiff's claim is time-barred.

Re-affirming that a cause of action for breach of contract accrues on breach maintains an easily discernable and consistent trigger for the statute of limitations, simplifying the analysis so that creditors, debtors and courts can easily determine where matters stand. In contrast, a holding by the Court that the statute of limitations for collection of a debt begins to run on acceleration

provides far less certainty than a holding that the statute of limitations accrues on breach, and will engender litigation on as yet undetermined issues that vex states adopting that rule, such as what actions constitute acceleration, what actions constitute revocation of acceleration and the consequences of a lender's failure to accelerate or de-accelerate.

B. RELIANCE ON METROMEDIA IS MISPLACED BECAUSE A HOME EQUITY LINE OF CREDIT IS NOT A DIVISIBLE CONTRACT

New Jersey law is clear that when a contract is divisible each breach creates a separate cause of action, and therefore each has its own unique statute of limitations that runs from the date of that individual breach. New Jersey case law is consistent that a contract is divisible when a portion of the price to be paid by one party is set off against a portion of the performance by another party. "Under New Jersey law, 'a contract is said to be divisible when performance is divided in two or more parts with a definite apportionment of the total consideration to each part.'" In re Nickels Midway Pier, LLC, 255 F. App'x 633, 636 (3d Cir. 2007) (quoting Integrity Flooring v. Zandon Corp., 32 A.2d 507, 509 (N.J. 1943)). The contract at issue is not divisible insofar as the borrower's monthly payments do not correspond to any on-going lender obligations under the contract.

Because the HELOC at issue is not a divisible contract, the Appellate Division's reliance on the case of Metromedia v. Hartz Mountain, 139 N.J. 532 (1995) is misplaced. In Metromedia, a commercial landlord and tenant agreed that the tenant would hire its own cleaning service and the landlord would reimburse the cost on a monthly basis upon the tenant's presentation of the cleaning bills. The tenant failed to submit bills for reimbursement for seven years whereupon the landlord refused payment. This Court held that in "the unusual circumstances" of the case, where the payment procedure was "unclear," it was "possible to view the case of action as not arising until the rejection of the claims presented by [the tenant] to [the landlord]." Instead, this Court held that the tenant's "enforceable right" to sue "arose immediately upon completion of the cleaning services" and therefore the tenant's "claims for a monthly credit accrued on a monthly basis. . . ." As a result, the tenant's claim to reimbursement for some of the cleaning bills was time-barred while later claims survived.

In Metromedia, this Court relied on the Texas case of F.D. Stella Prods. v. Scott, 875 S.W.2d 462, 464-65 (Tex. Ct. App. 1994), a case involving a 60-month lease of restaurant equipment. The Texas Court explained:

> The essential feature of a divisible contract is that a portion of the price is set off against a portion of the performance; therefore, when a part of the performance has been rendered, a debt for that part immediately arises. . .

> An installment contract under which the monthly payment is for a portion of the goods received is a classic divisible contract. So too is a lease, in which a month's use of the lessor's property is set off by a month's worth of rent. Under such a lease, for each month's use there is a new debt apportioned as monthly rent.

Id. (citations omitted).

In Metromedia, this Court also relied upon the Law Division opinion in FDIC v. Valencia Pork Store, 212 N.J. Super. 335 (1986), reversed on other grounds, 225 N.J. Super. 110 (App. Div. 1988) as did the trial court in this matter below. However, here, the trial court's reliance on FDIC v. Valencia Pork Store was misplaced: like the divisible contract at issue in Metromedia, the contracts at issue in FDIC v. Valencia Pork Store were a series of three commercial lease agreements between the parties – not a single promissory note as in the case at hand. The "somewhat novel" issue before the Law Division in FDIC v. Valencia Pork Store was "when a cause of action accrues on a default in lease payments where an acceleration provision is present." Id. at 338. In that case, where three separate lease agreements were at issue and where the lessor failed to exercise an optional acceleration clause, the Law Division held that the statute of limitations barred collection on one of the leases but not two others. The Appellate Division reversed because federal law applied to the contract at issue and "the question decided by [the trial

court] as to the statute of limitations on an installment obligation has not been definitively determined as a matter of federal law." Fed. Deposit Ins. Corp. v. Valencia Pork Store, Inc., 225 N.J. Super. 110, 113 (App. Div. 1988) (citations omitted).

All other New Jersey cases holding, as in Metromedia, that a contract payable in installments gives rise to multiple causes of action with different limitations periods – reported and unreported -- do so only where a portion of the price paid is set off against a portion of the performance. County of Hudson v. State, Department of Corrections, 208 N.J. 1, 13-14 (2011) (in contract entered into pursuant to County Correctional Policy Act to house State prisoners in exchange for periodic payments based on services provided during each period, county's causes of action accrued on each date the State allegedly failed to make a full payment for services during that period); County of Morris v. Fauver, 153 N.J. 80 (1998) (in on-going contract for housing State prisoners, county's cause of action on each voucher accrued when submitted to the State for payment); In Re Estate of Balk, 445 N.J. Super. 395 (App. Div. 2016) (settlement agreement resolving estate dispute gave rise to independent causes of action when a single missed payment was not a total breach giving rise to an action for breach of the entire agreement); Ballantyne House Assocs. v. City of Newark, 269 N.J. Super. 322, 331-32

(App. Div. 1993) (agreement to provide municipal garbage collection services in exchange for tax abatements); Deluxe Sales and Service v. Hyundai, 254 N.J. Super. 370 (App. Div. 1992) (separate claims with separate limitations periods arose for each invoice under a long-term contract for sales of goods); Masonic Temple Ass'n of Elizabeth v. Kistner, 11 N.J. Misc. 761 (1933) (statute of limitations barred collection of recurring temple subscription fees due more than six years before the action was brought but not those due subsequently); R.C. Beeson v. The Coca-Cola Co., 2008 WL 4447106 (D. N.J. 2008) (consultant's claim to licensing fees earned on a per-project basis). Cf. Bil-Jim Construction v. Wyncrest Commons, 2023 WL 7276637 (App. Div. 2023) (statute of limitations did not apply separately to each progress payment due under a construction contract where periodic payments represented partial payments due under a single contract, not separate divisible transactions).

Similarly, this Court has held that separate statutes of limitations apply to separate breaches only where a party is seeking a remedy as to certain individual breaches and not upon total breach or repudiation of the contract. In Re Estate of Balk, 445 N.J. Super. 395, 401 (App. Div. 2016) (settlement agreement resolving estate dispute gave rise to independent causes of action when a single missed payment was not a total breach rise to an action for breach of the entire agreement); R.C. Beeson v. Coca-Cola Co., 2008 WL

4447106 (D. N.J. 2008) ("[T]he installment contract theory does not apply in the instance of a repudiation or a total breach. When there is an installment or continuous contract, repudiation or total breach will do two things: first, it will create a claim and trigger the statute of limitations, and second, it will prevent a subsequent breach from giving rise to a new cause of action." Id. *citing* Nat'l Util. Serv. Inc. v. Cambridge-Lee Industs., 199 Fed. Appx. 139, 142-43 (3d Cir. 2006)).

II. IF THE COURT HOLDS THAT ACCELERATION GIVES RISE TO ACCRUAL, THEN REVERSAL IS STILL APPROPRIATE BECAUSE THE LENDER ACCELERATED WHEN IT FILED ITS FORECLOSURE MORE THAN SIX YEARS BEFORE IT FILED THIS ACTION

If this Court affirms the holding that a cause of action on breach of a promissory note accrues upon acceleration, then this Court must also hold that Respondent's suit is time-barred because Bank of America accelerated the debt on January 10, 2014 when it filed a foreclosure action proclaiming that all sums due under the note and mortgage were then due, and never explicitly de-accelerated.

This would be the result in New York, for example, where the long-standing rule is that a mortgage payable in installments is subject to a six-year statute of limitations for each missed payment individually unless the mortgage is accelerated. See, e.g., Wells Fargo Bank v. Welch, 223 A.D.3d

993 (N.Y. App. Div. 2024). Acceleration requires clear and unambiguous communication to the defendant. Nationstar Mortgage v. Weisblum, 143 A.D.3d 866 (N.Y. App. Div. 2d Dept. 2016). A uncommunicated charge-off[10] alone would not operate as an acceleration. Walsh v. Henel, 226 A.D. 198 (N.Y. App. Div. 4th Dep't. 1929). If accelerated, the entire debt becomes due and the statute of limitations begins to run on the entire balance. EMC Mortgage v. Patella, 279 A.D.2d 604 (N.Y. App. Div. 2d Dep't. 2019). Filing a foreclosure action operates as an acceleration. MSMJ Realty v. DLJ Mortgage Capital, 157 A.D.3d 885 (N.Y. App. Div. 2d Dep't. 2018). A lender may revoke acceleration before the statute of limitation elapses on the entire debt. EMC Mortgage v. Patella, 279 A.D.2d 604 (N.Y. App. Div. 2d Dep't. 2019). Revocation must be in a form that is clearly and unambiguously communicated to the defendant. Deutsche Bank National Trust v. Adrian, 157 A.D.3d 934 (N.Y. App. Div. 2d Dep't. 2018). Voluntary discontinuance of a foreclosure action does not revoke acceleration. See CPLR 3217(e) (amended in 2022 expressly to nullify a decision to the contrary in Freedom Mortgage v. Engel, 169 N.E.3d 912 (N.Y. Court of Appeals 2021)).

[10] New York courts have noted that a charge-off may confer tax benefits on a creditor that may render it inequitable to allow belated enforcement of that debt. Discover Bank v. Shimer, 36 Misc.3d 1214 (Nassau Cty. Dist Ct. 1st Dist. 2012).

III. IF THE COURT AFFIRMS IT SHOULD MAKE CLEAR THAT ITS HOLDING DOES NOT APPLY TO CREDIT CARD ACCOUNTS BECAUSE THE HOLDING REGARDING ACCELERATION ONLY APPLIES WHERE THE UNDERLYING CONTRACT HAS A MATURITY DATE

Critically important to New Jersey consumers, if this Court affirms summary judgment in this matter (which *amicus* argues, above, it should not), this Court should expressly limit this holding to closed end debt **with a maturity date** (i. e., where the lender advances a specified amount of money and the borrower agrees to repay the principal and interest in substantially equal installments over a stated period of time) and expressly decline to apply this analysis to open-end debt such as credit card debt. To hold otherwise would have the effect of eliminating any statute of limitations on open-ended debt.

In Midland Funding v. Thiel, 446 N.J. Super. 537 (App. Div. 2016), the Appellate Division held (1) the right to institute and maintain a debt collection lawsuit arises in the date on which the debtor fails to make a minimum payment (citing Deluxe Sales & Serv. v. Hyundai Eng'g & Constr., 254 N.J. Super. 370, 375 (App. Div. 1992)); and (2) a partial payment – i.e., a payment less that the minimum amount required by the credit card agreement – does not change the date of default and therefore does not toll the statute of limitations. The Court should expressly preserve this ruling for credit card debt.

Several states that hold that the statute of limitations on closed end debt runs from the date of acceleration expressly exclude open-ended credit card debt from that rule. For example, in Arizona, the general rule is that the statute of limitations on un-matured debt runs from the time that each separate payment becomes due. Navy Federal Credit Union v. Jones, 930 P.2d 1007 (Arizona Court of Appeals, Division 2 1996). However, the Arizona Supreme Court expressly repudiated the Navy Federal rule for credit cards in the case of Mertola v. Santos, 422 P.3d 1028 (Ariz. Sup. Ct. 2018). In Mertola the Arizona Supreme Court held that a cause of action on a credit card contract accrues on upon default -- "that is, when the debtor first fails to make a full, agreed-to minimum monthly payment" -- even when the credit card contract contains an optional acceleration clause. Id. at 1032.

The Mertola court emphasized that unlike closed end promissory notes, "[u]nder credit-card contracts . . . the date when the entire debt will become due is uncertain and may not occur until far in the future. To hold that a cause of action on the debt does not accrue until the creditor exercises his right to accelerate would vest the creditor with unilateral power to extend the statutory limitation period and permit interest to continue to accrue, long after it is clear that no further payments will be made, subject only to a standard of reasonableness and other equitable doctrines. This would functionally

eliminate the protection provided to defendants by the statute of limitations. We decline to extend such power to the creditor." Mertola, 422 P3d at 1032.

CONCLUSION

This Court should reverse the decision of the Appellate Division below and hold that the statute of limitations for a breach of contract cause of action begins to run upon breach, in this case, a failure to pay that resulted in default.

If however, the Court holds that the statute of limitations accrues on acceleration then the Court should still reverse because the lender accelerated the debt on January 10, 2014, did not produce evidence of de-acceleration, and failed to institute the collection suit within the statute of limitations. In addition, the Court should explicitly limit any holding that a statute of limitations in a collection action begins to run on acceleration to closed end debt with a maturity date, and make clear that the holding does not apply to open-end debt such as credit card debt.

Respectfully submitted,

LEGAL SERVICES OF NEW JERSEY
Amicus Curiae

Dated: 1/23/2025

By: _____
Dawn K. Miller

s/Rebecca Schore
Rebecca Schore

s/David McMillin
David McMillin

s/Dhairya Bhatia
Dhairya Bhatia

s/Maryann Flanigan Sutherland
Maryann Flanigan Sutherland

s/Robert Casagrand
Robert Casagrand