IN THE ARIZONA SUPREME COURT

LAVELLE BRIDGES, Plaintiff/Appellee, v. NATIONSTAR MORTGAGE LLC, a Delaware corporation, Defendant/Appellant.	Arizona Supreme Court No. CV-21-0024-PR Court of Appeals, Division One No. 1 CA-CV 19-0556 Maricopa County Superior Court No. CV2016-000605

SUPPLEMENTAL BRIEF

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INTRODUCTION

"Litigation is not a game," we are told.[1] This Court certainly administers Arizona's legal system as if it is not, with its signal innovations of mandatory pretrial disclosure of relevant materials in 1993 and the abolition of peremptory challenges in 2022. This appeal is about whether the law of home foreclosure should be treated like a game. This Court should not adopt Mr. Bridges' positions, which would turn Arizona's foreclosure practice into a game in which defaulting homeowners can claim that a notice of foreclosure sale accelerates their debt – but that enough years of loan assistance measures designed to aid consumers, combined with enough bankruptcy filings, can stifle foreclosure and run out the clock on the bank's rights.

Mr. Bridges' Deed of Trust has a clause permitting acceleration at the election of the bank, which never stated any such election. Basic principles of statutory and contract law compel the conclusion that his debt was not accelerated and that the statute of limitations has not run on the bank's claims against him. Yet even if Mr. Bridges' debt were accelerated, bankruptcy law and principles of equitable tolling stand foursquare against his abusive argument that the bank's rights expired before it could exercise them. The rule he proposes is extraordinarily inequitable, and would injure Arizona's consumers and businesses alike. This Court should affirm.

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[1] *Haeger v. Goodyear Tire and Rubber Co.*, 906 F. Supp. 2d 938 (D. Ariz. 2012), *aff'd*, 793 F.3d 1122 (9th Cir. 2015), *rev'd*, 137 S. Ct. 1178 (2017), *sanction vacated on remand*, — F.3d — (9th Cir. 2017).

FACTS RELEVANT TO THE DETERMINATION OF THE APPEAL

A. Mr. Bridges Borrows $500,000 in March 2007, Secured by His Home in Litchfield Park, and Nationstar Becomes the Servicer on His Loan.

Mr. Bridges obtained a $500,000 loan from Pacific Coast Mortgage, Inc. on March 13, 2007. (I.R. 51, Ex. B.) He secured the loan with a deed of trust recorded against his property at 13304 West Palo Verde Drive, Litchfield Park, Arizona 85340 on March 19, 2007. (*Id.*) There were a number of assignments of the Deed of Trust not relevant here. (*Id.*; I.R. 1, Ex. C; I.R. 28, p. 2; I.R. 108, p. 16-17.) The final assignment was to The Bank of New York Mellon, a nonparty here, for whom Nationstar services Mr. Bridges' mortgage loan. (I.R. 108, p. 16-17.) Mr. Bridges' Deed of Trust allowed, but did not require, a foreclosing servicer to accelerate the debt. (Nationstar App. 20) ("Lender shall give notice to Borrower prior to acceleration following Borrower's breach…[and that] failure to cure the default on or before the date specified in the notice ***may result in acceleration*** of the sums secured by this Security Instrument and sale of the Property.") (emphasis added).

B. Mr. Bridges Defaults, After Which Mr. Bridges' Requests for Loss Mitigation Assistance and Bankruptcies From January 2011 to June 2016 Stop Nationstar From Foreclosing.

1. Mr. Bridges Defaults and Nationstar Notices a Trustee's Sale But Does Not State That It Is Accelerating His Debt.

Mr. Bridges defaulted on the loan in 2008. (I.R. 148, p. 3, ¶ 14.) Notices of a trustee's sale were recorded January 30, 2009 and May 6, 2009. (I.R. 108, p. 3,

¶¶ 7-8.) But Mr. Bridges relied exclusively on the recorded notices of sale to argue the lender exercised its acceleration option. (Op. Br. 14; Ans. Br.; Bridges App. 3-8.) He provided no other acceleration evidence. (*Id.*) The notices do not state the lender accelerated Mr. Bridges' entire principal loan balance. (Nationstar App. 31-34.). They do not even reference the note or deed of trust's acceleration clauses or list the full debt amount. (*Id.*) After initially noticing these sales, Nationstar sought to work with Mr. Bridges by considering his requests for loan modifications and for permission to short-sell his home. (*See*, *e.g.*, I.R. 131, Ex. A; I.R. 148, 6-8.)

2. Seven Loss Mitigation Efforts Lasting Almost Four Years.

Seven times Mr. Bridges forestalled foreclosure process by using measures that are in place to cause banks to work with consumers, so they can get back up to date on payments, or sell their house on terms of their choosing. Five of these seven times Mr. Bridges applied for loan modifications. During each of the five periods these applications were pending[2], loss mitigation review necessarily prevented Nationstar from foreclosing. (I.R. 148, p. 7.) Mr. Bridges also twice applied for approval to conduct a short sale of his home – that is, for permission to sell the house for less than the total amount then due on the loan. (*Id.*, p. 8.) Foreclosure processes

[2] These requests were pending from January 23, 2012-January 21, 2014 (a period of 730 days), April 7, 2014-July 30, 2014 (115 days), August 20, 2014-September 15, 2014 (26 days), October 15, 2015-December 9, 2015 (55 days), and January 29, 2016-June 28, 2016 (152 days). (I.R. 148, p. 7.)

were likewise paused while those requests were pending, even though Nationstar denied these requests because Mr. Bridges' application did not contain all required materials.[3] (*Id*.) These measures kept Mr. Bridges loan in loss mitigation review for ***1,454 days*** (a week shy of four years) spread across the period January 2012 through June 2016, which prevented Nationstar from making efforts at foreclosure during these windows. (*Id.*, p. 7-8.)

3. Two Bankruptcies Triggering 545 Days of the Bankruptcy Code's Automatic Stay, Spread Across a Three-Year Period.

Mr. Bridges also forestalled foreclosure by filing two bankruptcies that were frequently dismissed and reinstated, creating ***nine different intervals*** in 2011, 2012, and 2014 during which he was protected from foreclosure by the automatic stay. His first Chapter 7 bankruptcy filing, on January 14, 2011, created six different discontinuous intervals during which the automatic stay protected him for a total of 432 days, as his case was repeatedly dismissed and reinstated until it was finally closed on December 10, 2012.[4] (*Id.* at p. 10, ¶ 60; I.R. 155.) Mr. Bridges' second bankruptcy, filed on March 2, 2014, was more of the same. In it, Mr. Bridges created

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[3] These requests were pending from November 22, 2014-September 1, 2015 (283 days), and October 2, 2015-January 6, 2016 (96 days). (*Id.*)

[4] These periods during which the automatic stay was in effect were: January 14, 2011-March 16, 2011 (61 days of bankruptcy stay), April 22, 2011-July 5, 2011 (74 days of bankruptcy stay), July 18, 2011-October 3, 2011 (77 days of bankruptcy stay), October 12, 2011-December 22, 2011 (71 days of bankruptcy stay), January 12, 2012-March 2, 2012 (50 days of bankruptcy stay), May 17, 2012-August 24, 2012 (99 days of bankruptcy stay). (I.R. 155; Op. Br. 5-6.)

three more discontinuous intervals during which the automatic stay protected him for foreclosure for a total of 113 days.[5] (I.R. 155, p. 2.)

4. From January 14, 2011 to June 28, 2016, Mr. Bridges' Use of Loss Mitigation Tools and Bankruptcies Left Nationstar Only 221 Days – Chopped Up Into Ten Intervals – During Which It Could Attempt to Restart Foreclosure.

After January 14, 2011, less than two years after the first notice of trustee's sale was recorded in January 2009, Nationstar was prevented from foreclosing up to and through June 28, 2016. (I.R. 148, p. 8, I.R. 155, pp. 2-4.) The loss mitigation review Nationstar conducted, overlaid with concurrent or strategically sequential bankruptcies, divided this five and one-half year period so that it contained only 221 days during which Nationstar could seek to restart foreclosure. That 221 day period, in turn, was chopped up into 10 periods ranging in length from 8 to 39 days.[6] The loss mitigation reviews and bankruptcies thus did not afford Nationstar a 90-day window in which it could possibly have noticed and conducted a trustee's sale.

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[5] These intervals were: March 2, 2014-March 20, 2014 (18 days), May 2, 2014-June 9, 2014 (38 days), and October 6, 2014-December 2, 2014 (57 days).

[6] These intervals were: March 17, 2011-April 21, 2011 (34 days), July 6, 2011-July 17, 2011 (12 days), October 4, 2011-October 11, 2011 (8 days), December 21, 2011-January 11, 2012 (20 days), January 22, 2014-March 1, 2014 (39 days), March 21, 2014-April 6, 2014 (16 days), July 31, 2014-August 19, 2014 (20 days), September 16, 2014-October 5, 2014 (20 days), September 2, 2015-October 2, 2015 (30 days), January 7, 2016-January 28, 2016 (22 days). (I.R. 148, p. 8, I.R. 155, pp. 2-4, Op. Br. 5-6.)

A.R.S. § 33-808(C)(1) ("The date shall be no sooner than the ninety-first day after the date that the notice of sale was recorded.")

ISSUES PRESENTED

1. Does recording a notice of trustee sale to foreclose under a note while opting not to invoke a debt instrument's option to accelerate the debt, and never conducting the sale, accelerate the entire indebtedness as a matter of law, as Mr. Bridges contends it must?

2. If Nationstar accelerated Mr. Bridges' debt, was the limitations period tolled by bankruptcy law or equitable doctrines?

ARGUMENT

I. Where a Loan Servicer Records a Notice of Trustee's Sale Without Referencing the Optional Acceleration Clause, and Then Never Conducts the Trustee's Sale, the Debt is Not Accelerated.

Mr. Bridges' arguments that the debt was accelerated here – despite the lack of any notice of acceleration to him from Nationstar – are that simply noticing the sale is an "affirmative act" that must be credited as an acceleration, and that this Court essentially said so in *Mertola, LLC v. Santos*, 244 Ariz. 488 (2018). Neither proposition withstands scrutiny. Along the way, Mr. Bridges also misconstrues this Court's own decision in *Schaeffer v. Chapman*, 176 Ariz. 326 (1993), and also overstates and misunderstands two decisions from the Court of Appeals – *Baseline Fin. Servs. v. Madison*, 229 Ariz. 543 (App. 2012) and *Navy Fed. Credit Union v.*

Jones, 187 Ariz. 493 (App. 1996) – that this Court in *Mertola* expressly declined to adopt as controlling. 244 Ariz. at 492 ¶ 21. Reviewing the record and Arizona law, it is clear that the recordation of a notice of a trustee's sale that is never conducted – while likewise never invoking an optional acceleration clause – does not accelerate the debt under a closed-ended financial instrument such as Mr. Bridges' note. This Court should affirm.

A. The Language of the Parties' Contract – Read Against This Court's Discussion of Optional Acceleration Clauses in *Mertola* – Makes Clear That Nationstar Did Not Accelerate Mr. Bridges' Debt.

The record on its face defeats Mr. Bridges' claim that the Note and Deed of Trust are automatically accelerated by noticing a trustee's sale.

First, there is no question that the acceleration clause in Mr. Bridges' Deed of Trust is optional, and that Nationstar did not invoke it. The Deed of Trust makes acceleration after a default optional and requires Nationstar to send a notice with specified characteristics before it can accelerate:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach… The notice shall specify (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice ***may result in acceleration*** of the sums secured by this Security Instrument and sale of the Property.

(Nationstar App. at 20) (emphasis added; text in original is uniformly bolded). Additionally, the Deed of Trust has a separate provision in Paragraph 18 for

acceleration if the borrower sells the mortgaged property without the consent of the Noteholder. There too, acceleration requires the sending of a notice to be effective: "If Lender exercises this option, Lender shall give Borrower notice of acceleration." (Nationstar App. 20.) The recorded Notices of Trustee Sale that Bridges claims accelerated his debt make no such statement. (Nationstar App. 31-34.) And Mr. Bridges admits that there was no other notice provided to him stating that failure to cure might result in acceleration. (*See, e.g.*, Pet. For Review, at 4 ("The Statement of Breach did not invoke or refer to the acceleration clause in the Deed of Trust.").)

Second, it matters a lot that Nationstar did not invoke its optional acceleration clause, because this Court teaches that acceleration clauses are "[g]enerally… viewed as protective devices for the security of the lender." *Mertola*, 244 Ariz. at 490 ¶ 11(quoting *Browne v. Nowlin*, 117 Ariz. 73, 75 (1977)). In *Mertola*, this Court also recognized that acceleration clauses are sometimes "optional," as they were in both *Browne* and *Mertola* itself, so that a creditor is not required to invoke them. *Id.*

Mr. Bridges' proposed rule – that merely noticing a trustee's sale that is never held accelerates a homeowners' debt as a matter of law – would turn all of this upside down. While *Mertola* promised that, subject to accrual rules, "[p]arties remain free to contractually define default and otherwise negotiate repayment of debt," 244 Ariz. at 493 ¶ 22, in Mr. Bridges' regime, not so much. Nationstar's optional acceleration clause simply isn't optional anymore, and the contract's plain language will no

longer be given effect. *Cf. Hadley v. Sw. Props., Inc.*, 116 Ariz. 503, 506 (1977) ("Where the language of the contract is clear and unambiguous, it must be given effect as it is written."). Mr. Bridges' rule would hurt individual Arizona homeowners far more than banks, replacing the give and take of negotiations to work on troubled mortgages with an imperative to foreclose or sue quickly, to secure what is owed. *See Navy Fed. Credit Union*, 187 Ariz. at 495 ("[T]he rule on future installments subject to acceleration gives the parties flexibility to continue to work toward amicable and fair resolutions between themselves rather than immediately drawing litigation swords and marching off to a courthouse." (internal quotation marks omitted)).

B. Mr. Bridges Badly Misreads *Mertola,* and Offers This Court No Reason Grounded in it to Adopt the Dangerous Rule He Proposes.

Mr. Bridges' argument that *Mertola* established or suggested a rule that recording a notice of sale is an affirmative act exercising an option to accelerate lacks all merit, and warps the text of *Mertola* beyond recognition. (Pet. For Review at 7 (quoting *Mertola*, 244 Ariz. at 492 ¶ 19 ("[P]roceeding against collateral is effective notice of acceleration.")).)

First, this Court wisely explained in *Mertola* that "closed-account or closed-end installment contracts, such as promissory notes, are unlike and materially distinguishable from credit-card contracts." 244 Ariz. at 491 ¶ 16. *Mertola* did not

establish any rule that merely noticing a sale that never happens is "effective notice of acceleration." *See id.* at 492 ¶ 19.

Second, in the same passage of his Petition for Review invoking *Mertola*, Mr. Bridges references as fellow travelers in support of his theory *Baseline Fin. Servs. v. Madison*, 229 Ariz. 543 (App. 2012) and *Navy Federal*, 187 Ariz. 493. (*See* Pet. For Review, at 6-7.) Yet he omits to note that this Court not only rejected the application of *Baseline* and *Navy Federal* to credit card indebtedness in *Mertola*, but importantly, also expressly declined to "adopt the *Navy Federal/Baseline* holding for other types of debt," *e.g.*, closed-ended instruments like Mr. Bridges' mortgage. *Mertola*, 244 Ariz. at 492 ¶ 21. This Court was thus at pains not to endorse the Court of Appeals decisions that he mistakenly believes aid him here.

Third, when this Court wrote the sentence Mr. Bridges acontextually lifts from *Mertola* – that "proceeding against collateral is effective notice of acceleration" – it was in a paragraph that merely explained the different incentives facing credit-card debtholders from mortgage banks. *Mertola*, 244 Ariz. at 491 ¶ 19. Put another way, this Court was merely explaining how *Mertola* ***was not governed*** by cases governing mortgage-like debt. But Mr. Bridges' presentation of *Mertola* is most incorrect because he fails to acknowledge the "proceeding against collateral" to which this Court referred was ***the completed physical repossession of a debtor's automobile in Baseline***. *Mertola*, 244 Ariz. at 492 ¶ 19 (citing *Baseline*,

229 Ariz. at 544). Serving a notice of a sale that never happened upon Mr. Bridges is not what this Court was talking about in *Mertola* when it wrote the sentence on which Mr. Bridges hangs so much.

C. Mr. Bridges Is Wrong to Suggest That the Court of Appeals' Holding that Nationstar Never Invoked its Option to Accelerate Is Somehow in Conflict With *Schaeffer v. Chapman*.

Mr. Bridges tries without success to suggest that honoring Nationstar's choice not to exercise its option to accelerate here – as the Court of Appeals did – would conflict with *Schaeffer v. Chapman*, 176 Ariz. 326 (1993). (Pet. For Review, at 7-9.) He is wrong for several reasons.

First, Mr. Bridges is wrong to say that the Court of Appeals "held that acceleration could not have occurred in this case because the lender failed to comply with the 30-day notice provision in Bridges' Deed of Trust." (Pet. for Review, at 7.) The Opinion now on review doesn't say that. (Bridges App. 4-8.) It says that Nationstar neither invoked its optional acceleration rights, nor included acceleration language in the notice of trustee's sale. (Bridges App. 4 ¶ 10.) The Memorandum Decision doesn't say that either. It acknowledges that acceleration requires prior notice of the intent later to accelerate (which didn't occur there) – but it also says Nationstar's default notice doesn't by its terms accelerate the debt. (Bridges App. 11-12 ¶ 10.)

Second, Mr. Bridges misses the bigger point that *Schaeffer* is a case in which

a debtor faced a rush to a premature sale in violation of her loan contract's terms, and this Court properly noted the creditors' failure to comply with the 30-day notice requirement before noticing its too-hasty trustee's sale. 176 Ariz. at 329. These notice requirements are contractual requirements. They are also shields so a debtor has a chance to work out his or her issues with the creditor, or to know in advance what sale might occur. They are not claim-destroying swords, as Mr. Bridges has repurposed them here. His failed attempt to make this a case about honoring a 30-day notice requirement common to the instruments in *Schaeffer* and in this case cannot bootstrap into this record a notice of acceleration that is absent from it.

D. The Court of Appeals Decisions Upon Which Mr. Bridges Relies Do Not Suggest That Noticing a Trustee's Sale Automatically Accelerates a Debt, and Thus Provide No Reasoned Basis To Announce Such a Rule.

Mr. Bridges' arguments generally rest on a number of Court of Appeals decisions that do not control this Court's resolution of this matter, but which, equally importantly, also do not support the rule he proposes – that every recorded notice of a trustee's sale is an "affirmative act" that must be taken as acceleration. The genesis of the "affirmative act" idea in this area of Arizona law seems to be *Barnett v. Hitching Post Lodge, Inc.*, 101 Ariz. 488, 492 (1966), in which this Court said that filing an actual claim for a debt in an estate proceeding was a "sufficient affirmative action to activate the acceleration clause." *Id.* Since then, the Court of Appeals has gradually balanced upon that small and unremarkable statement an increasingly

weighty rule that lenders must undertake "affirmative acts" sufficient to accelerate. (Pet. For Review, at 6 (citing cases).)

As an initial matter, *Andra R Miller Designs LLC v. US Bank NA*, 244 Ariz. 265 (App. 2018), supports Nationstar. First, completely unlike this matter, it is a case in which the creditor invoked its acceleration clause both when it noticed its sale and later, when decelerating and canceling that sale. *Id.* at 267 ¶ 3, 268 ¶ 5. Far from suggesting that noticing a trustee's sale automatically accelerates, *Miller Designs* suggests the reverse – that acceleration occurs when the creditor invokes the acceleration clause. Second, while *Miller Designs* says in dicta that commencing foreclosure is an "affirmative act of acceleration," *id*. at 270 ¶ 16, it cites that statement to *Prevo v. McGinnis*, 142 Ariz. 298 (App. 1984) – a judicial foreclosure case outside the non-judicial foreclosure deed of trust scheme at issue here, which is fully "a creature of statutes." *BT Capital, LLC v. TD Serv. Co. of Ariz.*, 229 Ariz. 299, 300 ¶ 9 (2012) (A party's "rights related to the trustee's sale, and thus any claims it may have against the trustee [] or the beneficiary [], are defined by the statutes governing deeds of trust."). Additionally, the note in *Prevo* did not contain an optional acceleration clause. *See* 142 Ariz. at 302. *Miller Designs* does not make it true that recording a notice of trustee's sale without referencing an option to accelerate in fact accelerates. At most, it begs the question before this Court.

More to the point, none of the Court of Appeals cases on "affirmative act"

offer a sound rule this Court should adopt. This Court got it right in *Mertola* when it wrote of whether physical repossession of a car was "effective notice of acceleration." 244 Ariz. at 492 ¶ 19. Mr. Bridges' Deed of Trust is a contract requiring notice. The Court of Appeals' detour into the parlance of "affirmative act" is an expedition into fashioning unnecessary judicial gloss where the simpler and better question is whether the creditor has given notice under the parties' contracts – which seems to be this Court's formulation in *Mertola*. Nothing in *Baseline* – which Mr. Bridges said coined the "affirmative act rule" – remotely suggests otherwise, as it was merely a case stating that by the time you seize a car, you have accelerated. *Mertola*, 244 Ariz. at 492 ¶ 19 (citing *Baseline*, 229 Ariz. at 544).

E. The Express Language of A.R.S. § 33-813(A) Reinforces That This Court Should Not Treat the Mere Recording of a Notice of Trustee's Sale as Automatically Accelerating the Debt.

The language of A.R.S. § 33-813(A) refutes Mr. Bridges' argument that the mere recording of a notice of trustee's sale automatically accelerates a debt. Under A.R.S. § 33-813(A), borrowers like Mr. Bridges have the right to reinstate their loan by paying only the past due portion – and not the entire loan balance – as late as the day before a trustee's sale. *See id.* It thus follows that when a trustee's sale is merely noticed, the entire debt was not accelerated in the first place. *See id.* The Montana Supreme Court reached the same conclusion while analyzing Montana's parallel statute. *Puryer v. HSBC Bank USA, Nat'l Ass'n For the Holders of Ace Sec. Corp.*

Home Equity Loan Tr., Asset Backed Pass-Through Certificates, Series 2006-CW1, 419 P.3d 105, 110-11 ¶ 16 (Mont. 2018). The Court of Appeals saw this as an issue of impermissibly reading the phrase "or a portion of a principal sum" out of A.R.S. § 33-813(A). (Bridges App. 6 ¶ 11.) Either way, Nationstar – which neither elected to accelerate, nor ever held a trustee's sale here – didn't accelerate Mr. Bridges' entire indebtedness.

II. Even if the Debt Were Accelerated, the Statute of Limitations to Foreclose Was Tolled By the Bankruptcy Code and Equitable Principles.

A. Federal Bankruptcy Law Imposed a Stay That Tolled the Period for Foreclosure Against Mr. Bridges By 545 Days, Extending the Deadline to Until at Least June 28, 2016.

Federal bankruptcy law mandates the day-for-day tolling of the six-year statute of limitations during the 545 day period during which Nationstar could not effect a trustee's sale. (*See* Facts, Section B.3., *supra* (detailing bankruptcies)). Section 108 of the Bankruptcy Code requires that, "if applicable nonbankruptcy law . . . fixes a period for commencing . . . a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition," then the period does not expire until either "(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case," or "(2) 30 days after notice of the termination or expiration of the stay." 11 U.S.C. § 108(c).

This Court's precedent recognizes crediting the 545 days that Mr. Bridges'

bankruptcy applications were pending. *In re Smith* acknowledged that, "[u]nder bankruptcy laws, a petition for bankruptcy operates to stay any action to 'create, perfect, or enforce' liens or judgments." 209 Ariz. 343, 345 ¶ 11 (2004) (quoting 11 U.S.C. § 362(a) (1998)). And this Court stated that the BAP "concluded as a matter of federal law that the effectiveness of a judgment is extended by the number of days that [the applicable Arizona statute] would have been suspected by a stay preventing enforcement of a judgment." *Id.* at 346 ¶ 16. The timeframe the debtor remained in bankruptcy also extended the applicable time period for acting – in *In re Smith*, filing a renewal affidavit. *Id*. ¶ 17. It is notable that tolling in *In re Smith* extended even to filing a renewal affidavit, which is hardly synonymous with the requirement of "commencing . . . a civil action." 11 U.S.C. § 108(c)(1).

Federal courts in analogous – if not identical – situations have interpreted Section 108(c)(1) consistently with applying to the extension of the statute of limitations for filing a Notice of Trustee's Sale under A.R.S. § 33-813. *See In re Va Bene Trist, LLC*, No. 2:17-BK-00993-DPC, 2018 WL 770357, at *2 (Bankr. D. Ariz. Feb. 7, 2018) (deciding, while citing 11 U.S.C. §§ 108, 362, that "[e]nforcement of the Bank's rights under the Deed of Trust was stayed for years by the First Bankruptcy"); *Mlynarczyk v. Wilmington Sav. Fund Soc'y FSB*, No. CV-15-08235-PCT-SPL, 2016 WL 3524329, at *4 (D. Ariz. Apr. 29, 2016) (relying on 11 U.S.C. §§108 and 362 in concluding that a notice of trustee's sale was timely filed under

Arizona law in tolling "the period from the filing of Plaintiffs' bankruptcy action until the stay was lifted"); *see also, e.g.*, *Barrow v. NewRez LLC*, No. CV-20-08064-PCT-SMB, 2021 WL 927659, at *3 (D. Ariz. Mar. 11, 2021) (determining that, under 11 U.S.C. § 362(c)(1), the "filing of a Notice of Trustee Sale is an act against the property of the estate," meaning that "the bankruptcy stay remained in place, and the statute of limitations remained tolled, until the bankruptcy court lifted the stay as to the Property," even without analyzing 11 U.S.C. § 108).

The Supremacy Clause mandates this outcome. "Congress is empowered by the United States Constitution to establish bankruptcy laws. The bankruptcy provisions enacted by Congress by virtue of the supremacy clause of the Constitution bind state courts in this area." *Great Sw. Fire Ins. Co. v. Triple "I" Ins. Servs., Inc.*, 151 Ariz. 283, 285 (1986) (citing U.S. Const. art. I, § 8, U.S. Const. art. VI, cl. 2). Indeed, the "effect of the automatic stay is that all legal actions being taken or to be taken against the debtor are halted." *Id*. (internal quotation marks and citation omitted). "The section is inclusive. Every proceeding of a judicial or quasi-judicial nature is affected." *Id*. (internal quotation marks and citation omitted). To hold otherwise would undermine the automatic stay, which exists to "protect the debtor, giving him a 'breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove

him into bankruptcy.'" *Id*. (quoting H.R.Rep. No. 595, 95th Cong., 2d Sess. 340 (1977), reprinted in 1978 U.S. Code Cong. & Admin.News, 5787, 6296–97).

B. Nationstar's Time To Foreclose Is Equitably Extended Either by the Doctrine of Estoppel by Inducement, or Equitable Tolling.

Under either of two equitable theories, Nationstar's time to foreclose should be extended past the time this suit was filed, and thus, to the present.

First, Arizona law will equitably bar defendants from asserting the statute of limitations where they: (1) engage in affirmative conduct meant to cause forbearance; (2) actually prevent the other party from taking timely action; (3) by conduct that reasonably could be expected to induce forbearance; and (4) plaintiff later brought action within a reasonable time. *See, e.g., Nolde v. Frankie*, 192 Ariz. 276, 279 ¶ 13 (1998) ("Arizona courts have recognized equitable exceptions to the application of the statute when necessary to prevent injustice."). All of that happened here. As to (1), Mr. Bridges submitted five applications for loan modifications and two for short sales. (I.R. 148, pp. 7-8.) As to (2), Nationstar did forbear from foreclosing because of its procedures for loss mitigation, which require it to forbear, and because of 12 C.F.R. § 1024.41(g), which prohibits servicers like Nationstar from moving for orders of sale if it receives a loss mitigation application more than 37 days before the scheduled sale. As to (3), Mr. Bridges expected forbearance; it was the obvious goal of his procession of requests, as he continually obtained forbearance. (I.R. 148, 149.) As to (4), Nationstar still cannot foreclose –

and the statute is further tolled – during this suit to determine whether Nationstar may foreclose. *See City of Phoenix v. Sittenfeld*, 88 P.2d 83, 87 (Ariz. 1939).

Second, equitable tolling applies here, for similar reasons. *See Hosogai v. Kadota*, 145 Ariz. 227, 231 (1985) ("A court has a legitimate interest in the procedural rules that govern lawsuits, especially to prevent such rules from becoming a shield for serious inequity."), *superseded on other grounds by statute*. Here, Mr. Bridges applied for loan modifications five times, obtaining a loss mitigation freeze of foreclosure activities of nearly four years (1,454 days), and filed two bankruptcies that were repeatedly dismissed and reinstated, buying a stay of 545 days. All of this stopped Nationstar from foreclosing during loss mitigation review. *See* 12 C.F.R. § 1024.41. Adding to the case for equitable tolling here, the law deplores as abusive tactical bankruptcies filed "to forestall foreclosure from exercising foreclosure rights" without the intention to comply with the requisites of bankruptcy. *See In re Hughes*, 360 B.R. 202, 203–04 (Bankr. N.D. Tex. 2007). As explained in painful detail in the fact section of this Supplemental Brief, after January 14, 2011, Nationstar only had 221 days, diced into ten uselessly small pieces, in which it could even try to foreclose.

Equity requires tolling the statute of limitations in this case, if ever it does.

CONCLUSION

For the foregoing reasons, this Court should: (1) determine that Nationstar did not accelerate its debt by serving a notice of trustee's sale; or (2) if the Court concludes that Nationstar accelerated the debt, hold that federal bankruptcy law, equitable principles, or both, require tolling the statute of limitations from the filing of this suit up to and through its eventual termination; and (3) remand the matter for proceedings consistent with such an opinion.

RESPECTFULLY SUBMITTED this 15th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns:

A supplemental brief and is submitted under Rule 23(k)(3).

2. The undersigned certifies that the supplemental brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 5,100 words.

3. The document to which this Certificate is attached does not exceed the 20-page limit that was set by Arizona Supreme Court order on August 24, 2021.

October 15, 2021

/s/ Andrew M. Jacobs
Andrew M. Jacobs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of October, 2021, the foregoing **SUPPLEMENTAL BRIEF** was electronically filed with the Arizona Court of Appeals Division One and served through AZTurboCourt to the following:

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