STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. OXF-21-412

J.P. MORGAN ACQUISTION CORP.

PLAINTIFF-APPELLANT

v.

CAMILLE J. MOULTON

DEFENDANT-APPELLEE

ON APPEAL FROM SOUTH PARIS DISTRICT COURT
DISTRICT COURT DOCKET NO. SOPDC-RE-19-02

BRIEF OF AMICUS CURIAE USFN — AMERICA'S MORTGAGE BANKING ATTORNEYS®

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INTEREST OF AMICUS CURIAE

Founded in 1988, the USFN — America's Mortgage Banking Attorneys® ("USFN") is a national, not-for-profit association of law firms that specialize in matters of real estate finance. USFN consists of law firms that represent banks, mortgage lenders, mortgage servicing companies and government sponsored enterprises in connection with foreclosure, bankruptcy, loan modifications and other workouts, inventoried properties, and litigation related to these areas of representation. Membership also includes industry-affiliated suppliers of products and services.

USFN was established to promote competent, professional, and ethical representation among its membership and for the mortgage servicing industry, and to represent the collective interests of its membership to the mortgage servicing industry. As part of its mission, USFN also supports the interests of its members and the mortgage servicing industry through education, political and governmental advocacy, and by encouraging the use of industry standard procedures, technologies, and best practices.

USFN has a particular interest in this matter because Maine mortgage foreclosure practice is a core business of its members and their clients. Judicial decisions involving the concepts and holdings at the center of *Moulton, Pushard*

and *Deschaine* greatly affect USFN members, and greatly impact the legal advice provided to the clients those members serve.

ARGUMENT

This Court has invited *amici curie* briefs on two questions, framed in reconsidering its stance on barring second foreclosure actions on the basis of *res judicata* and the interplay between a judgment in favor of borrowers and the enforceability of the underlying mortgage as well as whether the mortgage should be discharged as a result.

The USFN agrees with, and adopts the rationale of the Appellant as set forth in its brief and reply brief. Further, in answering the Court's questions, the USFN respectfully submits the foregoing for this Court's consideration:

I. This Court Should Reconsider Existing Precedent that Failure to Comply with 14 MRSA §6111 Renders the Note and Mortgage Unenforceable.

In support of its position that this honorable Court should reconsider existing precedent that a mortgagee's failure to comply with 14 MRSA §6111 renders the underlying note and mortgage unenforceable as a subsequent foreclosure is currently barred by the principals of res judicata, the USFN respectfully submits the foregoing:

A. A Foreclosing Mortgagee's Failure to Strictly Comply with 14 MRSA §6111 is a Question of Justiciability and Therefore Implicates Subject Matter Jurisdiction in Foreclosure Matters.

A mortgagee is precluded from both *accelerating* the unpaid balance of the mortgage note and *enforcing* the mortgage under 14 MRSA §6111 until the notice and service requirements thereunder have been fulfilled. 14 MRSA §6111 in relevant part, is as follows:

> [*T]he mortgagee may not accelerate* maturity of the unpaid balance of the obligation *or otherwise enforce the mortgage* because of a default consisting of the mortgagor's failure to make any required payment, ... until at least 35 days after the date that written notice pursuant to subsection 1-A is given by the mortgagee to the mortgagor and any cosigner against whom the mortgagee is enforcing the obligation secured by the mortgage at the last known addresses of the mortgagor and any cosigner that the mortgagor has the right to cure the default by full payment of all amounts that are due without acceleration, including reasonable interest and late charges specified in the mortgage or note as well as reasonable attorney's fees. (Emphasis added)

14 MRSA §6111 in its current form was enacted pursuant to PL 2009, c. 402 which was entitled, "An Act to Preserve Home Ownership and Stabilize the Economy by Presenting Unnecessary Foreclosures." The emphasis and intent of the statute was to enact protections and mediation for owner occupied residential properties while, at the same time, mandating that the mortgagors be provided with certain notice and contact information to facilitate foreclosure alternatives that could prevent foreclosure. In furtherance of that goal, the Legislature crafted the language in the statute to prevent mortgagees from being able to invoke the

jurisdiction of the court to adjudicate a foreclosure action unless the notice and service requirements of 14 MRSA §6111 were satisfied prior to taking the steps necessary to file a foreclosure action.

The statute enacts a blanket prohibition on both, 1) the acceleration of the underlying debt and 2) the enforcement of the mortgage, until thirty-five days have elapsed from the giving of proper notice. The giving of proper notice and the expiration of the thirty-five day period are not just conditions precedent to acceleration and enforcement of the mortgage, but operate as a statutory prohibition preventing a mortgagee from invoking the court's jurisdiction to adjudicate the foreclosure.

This Court has addressed this issue[1] previously in *Federal National Mortgage Ass'n v. Deschaine*, 2017 ME 190, ¶ 26, 27, 170 A.3d 230 ("*Deschaine*") which relied upon *Johnson v. Samson Construction Corp.*, 1997 ME 220, 704 A.2d 866.

Johnson reinforced the tenet that a Plaintiff could not bring its claims in a piecemeal fashion and that *res judicata* prevented a litigant from splintering their claims if the litigant had a reasonable opportunity to present those grounds in a prior action. The *Johnson* decision held that the underlying foreclosure action was

[1] It should be noted that 14 MRSA § 6111 places a prohibition on both acceleration of the debt as well as enforcement of a mortgage unless and until the notice requirements and time periods therein have been satisfied. The opinion in *Deschaine* however only addressed the acceleration portion of this statute and did not address the enforcement of the mortgage.

a suit on the accelerated debt and once the acceleration clause was triggered, the entire amount owed became due immediately. It should be noted that *Johnson* was decided prior to 14 MRSA §6111 becoming effective, that the *Johnson* case involved commercial loan documents that contained an automatic acceleration provision.

In deciding *Deschaine,* this Court held that *Johnson* fully disposed of issues present. *Deschaine* held that Fannie Mae had previously exercised its right to accelerate the note pursuant to permissive language contained in the underlying note and mortgage prior to the first foreclosure being dismissed with prejudice. In so holding, the Court adopted the rationale of our sister jurisdiction of Connecticut in *Hartford Federal Savings & Loan Ass'n v. Tucker,* 196 Conn. 172, 491 A.2d 1084 (1985), to further the proposition that the filing of the complaint constitutes a valid exercise of a mortgagee's acceleration right. The USFN respectfully requests that this Court revisit that premise.

In finding *Tucker* instructive, it is important to note that, as of that decision, Connecticut did not have any statutory proscribed notice requirement for acceleration or enforcement of a mortgage. Such a requirement was not enacted until the passage of the Emergency Mortgage Assistance Program notice requirement codified at Conn. Gen. Stat. §8-265ee and even then, such a notice requirement only prevented a foreclosing mortgagee from moving for judgment,

not accelerating the debt or commencing the action. This Court's reliance on *Tucker* to show that the filing of a foreclosure complaint operates as the acceleration of the debt only is applicable in instances where there is no statutory provision that inserts additional requirements. Here, there exists a statutory gatekeeper to acceleration and enforcement of the mortgage in the form of 14 MRSA §6111 that the *Deschaine* opinion did not contemplate.

Deschaine held that, "because acceleration is entirely *the lender's* prerogative and occurs upon the filing of a foreclosure complaint… it does not depend on any judicial imprimatur in the form of a judgment in the lender's favor." (emphasis in original.). Respectfully, acceleration is not entirely the lender's prerogative and is constrained by the limitations contained in 14 MRSA §6111 as aforesaid.

As 14 MRSA §6111 places a strict pre-foreclosure barrier to court adjudication until compliance is had, for those seeking to enforce a mortgage or accelerate a secured debt, a finding of noncompliance with 14 MRSA §6111 cannot confer on the Court the ability to render a judgment in favor of the Defendants. "Standing is a threshold issue and Maine courts are 'only open to those who meet this basic requirement.'" *Ricci v. Superintendent, Bureau of Banking,* 485 A.2d 645, 647 (Me.1984), "The basic premise underlying the doctrine of standing is to 'limit access to the courts to those best suited to assert a

particular claim.'*Halfway House, Inc. v. City of Portland,* 670 A.2d 1377, 1380 (Me.1996).

While an issue of standing is generally one of subject matter jurisdiction, *See Dubois v. Town of Arundel,* 2019 ME 21 ¶ 6, 202 A.3d 524. 527, in foreclosure actions in Maine, standing raises an issue of justiciability. This however, in the case of *Gregor,* amounted to a distinction without a fundamental difference. *Homeward Residential, Inc. v. Gregor*, 2015 ME 108, 122 A.3d 947. In *Gregor,* at issue was foreclosing plaintiff's failure to comply with 14 MRSA §6321. This Court held that since the foreclosing Plaintiff did not comply with a necessary statute, the plaintiff did not have standing. Since plaintiff did not have standing, the Court could not decide the merits of the case and that the matter was properly dismissed without prejudice rather than having a judgment entered in favor of defendants.

Holding likewise that non-compliance with 14 MRSA §6111 should not lead to a judgment in favor of defendants and instead should result in a dismissal without prejudice would logically follow. Not only would such a result be consistent with foreclosure jurisprudence, but it would be consistent with other areas of law as well.

A similar analysis is conducted in the area of medical malpractice. 24 MRSA § 2903 requires that a plaintiff in a medical malpractice action send a

notice of claim ninety days prior to the filing of such an action. The statute states that no such action may be commenced until the plaintiff has served and filed a written notice in compliance with section 2853. According to this Court in *LaCroix v. Caron,* 423 A.2d 247, 250 (Me. 1980), the purpose of 24 MRSA §2903 was intended as a means of implementing the dispute resolution procedures established by the Act." It was intended to keep unnecessary medical malpractices cases out of court where alternatives existed.

This Court also reviewed a similar issue in *Dutil v. Burns,* 1997 ME 1, 687 A.2d 639. In that case, an action was allowed to go forward when the prior action was dismissed for plaintiff's failure to follow the necessary statutory requirements, namely the notice requirement in the Maine Health Security Act. In vacating the judgment for the defendants in the second action, this Court held that Plaintiff's failure to meet the pre-suit requirements did not serve as an adjudication on the merits.

Similarly, 14 MRSA §6111, which was enacted in 2009, after the *Johnson* decision, was intended to keep unnecessary foreclosures out of court – i.e. those where the goal of 14 MRSA §6111 was accomplished, either by curing the arrears or successfully engaging in foreclosure alternatives. Only those loans where due and proper notice was provided without the intended success of avoiding the foreclosure could avail the mortgagee to access to the court to foreclose.

Comparing 14 MRSA §6111 to 24 MRSA §2903 is an analogy this Court had examined and rejected in *Wells Fargo Bank, N.A. v. Girouard,* 2015 ME 116, 123 A.3d 216. This Court found *Dutil* distinguishable because failing to comply with 14 MRSA § 2903 barred Dutil from *maintaining* a medical malpractice action in the first place. This Court did not find that non-compliance with 14 MRSA §6111 amounted to a jurisdictional issue, but instead led to a successful challenge of Wells Fargo's claim on the merits. Respectfully, the distinction is without a difference as the legislature could not have intended that the mortgagee was free to commence a foreclosure when it prohibited the same mortgage from enforcing the mortgage before complying with 14 MRSA §6111. Commencing a foreclosure action is an action to enforce the mortgage. Therefore, since the mortgagee cannot enforce the mortgage without complying with 14 MRSA § 6111 it follows that it would be barred from *maintaining* a foreclosure action.

To demonstrate the legislative intent of 14 MRSA §6111 in that regard, one need only examine 14 MRSA § 6322 where proof of a default compels the court to enter a judgment of foreclosure and sale. "...If the court determines that such a breach exists, a judgment of foreclosure and sale *must* issue..." 14 MRSA § 6322 (Emphasis added). In instances where the court finds that a breach occurred but also finds noncompliance with 14 MRSA § 6111, a different analysis must be utilized as there exists an inherent conflict with the two statutes.

Under current Maine law the trial courts enter judgment in favor of the borrower for plaintiff's failing to prove an essential element of the plaintiff's case. This is because 14 MRSA §6321 requires the plaintiff to prove compliance with 14 MRSA § 6111. 14 MRSA § 6321 states, in relevant part, "The mortgagee shall further certify and provide evidence that all steps mandated by law to provide notice to the mortgagor pursuant to section 6111 were strictly preformed."

It is axiomatic that a court should not read a statute to conflict with another when an alternative, reasonable interpretation yields harmony. *See Pinkham v. Morrill,* 622 A.2d 90, 95 (Me.1993). The only way to read the conflict out of the statutes is to view 14 MRSA § 6111 in such a way that failing to prove compliance with §6111 makes the case non-justiciable. Just as failing to provide evidence that the plaintiff is the owner of the mortgage, and mortgagee of record, as well as the entity entitled to enforce the note which provides prudential standing under the Greenleaf[2] analysis makes the case non-justiciable, so too should failing to provide evidence of compliance with 14 MRSA §6111. Note that under 14 MRSA §6321 and *Chase Home Finance LLC v. Higgins,* 2009 ME 136, 985 A.2d 508, this Court

[2] Note that in *Greenleaf* this Court found that the assignment from MERS in the Bank of America was not sufficient to transfer ownership of the mortgage yet found that it was sufficient to comply with the evidentiary burden sent forth under both 14 MRSA § 6321 and *Chase v. Higgins*. However, both *Chase* and § 6321 require not just evidence of a duly recorded mortgage but also evidence that the mortgage has been properly assigned to the plaintiff. This *amicus* struggles with the dicta contained in *Greenleaf* at ¶17 and believes that that element of proof would not have been sufficient since this Court held that the MERS assignment did not convey legal title to the purported mortgagee.

has held that the foreclosing plaintiff must prove that it is the mortgagee of record by "providing proof of ownership of the mortgage note and mortgage, including all *assignments* and endorsements of the note and mortgage." (Emphasis added) as an essential element of its claim, yet failing to do so results in a dismissal without prejudice and not a judgment for the borrower. *See Bank of America, N.A. v. Greenleaf,* 2014 ME 89, ¶22, 96 A.3d 700.

As non-compliance with 24 MRSA §2903 prevents a plaintiff from being able to invoke the jurisdiction of the court to hear and decide such a case, so too should a finding of non-compliance with 14 MRSA §6111. This Court previously held that the statutory requirements contained the third paragraph of 14 MRSA §6321 were procedural in nature when it stated that the paragraph "addresses procedural prerequisites that an entity with standing must satisfy to maintain an action." *Bank of America, N.A. v. Cloutier,* 2013 ME 17, ¶15, 61 A.3d 1242, 1245.

Unfortunately this Court's holding in *Greenleaf* then held that the requirements of said paragraph in 14 MRSA § 6321 became part of the plaintiff's case on the merits even though that statute is entitled "Commencement of foreclosure by civil action". What was not considered though is the effect of 14 MRSA §6322, entitled "Hearing and judgment" which remained unchanged by the 2009 amendments to the other foreclosure statutes. That statute mandates the trial court to enter a foreclosure judgment for the plaintiff if there is a breach. As stated

previously, if this Court's reading of 14 MRSA §6321 raises the potential for conflict with 14 MRSA §6322 then this Court should find a way to read them harmoniously. It is also noteworthy to review *Johnson v. McNeil,* 2002 ME 99, 800 A.2d 702, which was decided before the 2009 amendments. Under *Johnson,* all that was needed to establish a claim of foreclosure was "(1) a breach of condition in the plaintiff's mortgage; (2) the amount due on the mortgage, including reasonable attorney's fees and court costs; and (3) the order of priority an those amounts, if any that may be due other parties of interest." *Id* at ¶17.

These evidentiary requirements necessary to prove the claim of foreclosure were taken from 14 MRSA §6322 to which *Johnson* cites. These are directly in line with the typical breach of contract claim[3] It is respectfully submitted that all the 2009 amendments did was place other procedural mechanisms in place to provide protections to the mortgagors, the non-compliance of which prevent a court of competent jurisdiction from reaching the merits of a foreclosure action, but do prevent such a court from entering a foreclosure judgment as the case becomes non-justiciable. To hold otherwise would lead to unnecessary conflicts between 14 MRSA §§6322, 6321 and 6111.

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[3] To demonstrate that the parties had a legally binding contract, the plaintiff must establish that there was a meeting of the minds between the parties—or "mutual[ ] assent to be bound by all [the] material terms" of the contract...In order to obtain relief for a breach of that contract, the plaintiff must also demonstrate that the defendant breached a material term of the contract, and that the breach caused the plaintiff to suffer damages. *See Sullivan v. Porter,* 2004 ME 134, ¶ 13, 861 A.2d 625

Accordingly, the USFN respectfully suggests that upon a finding of non-compliance with 14 MRSA §6111, that it is proper for the matter to be dismissed with such dismissal not operating as an adjudication on the merits of the case. Accordingly, Plaintiff in a foreclosure action would be able to send a new notice, which addresses the court's findings of non-compliance which would result in a proper acceleration of the debt and enforcement of the mortgage. In such instances the borrowers would be able to avail themselves of 14 MRSA § 6101 for reimbursement of reasonable costs and attorney's fees.

B. The Court Should Consider a "De Minimus" exception regarding §6111 Notices.

In the alternative, and notwithstanding the provisions of 14 MRSA §6321, in order to avoid similar situations in the future, the USFN respectfully requests that this honorable Court adopt a "de minimus" exception in cases where there is a typographical, or other error may exist in the notice to cure, especially without evidence of reliance, or mistake on the part of the reader.

Taking a step in the opposite direction of *Greenleaf,* 2014 ME 89, 96 A.3d 700, it would be proper for this Court to find no error in the admission of a notice that contained a "de minimus" error. Reviewing the impetus for strict compliance of a foreclosure statute brings us back to 1862 and the case of *Freeman v. Atwood,* 50 ME 473 (1862). The strict compliance with statute in *Freeman* refers only to this requirement:

The mortgagee may enter peaceably and openly, in the presence of two witnesses, and take possession of the premises; in which case, a certificate of the fact and time of such entry shall be made and signed and sworn to by such witnesses before any justice of the peace; and such certificate shall be recorded in each registry of deeds in which the mortgage is recorded; and no such entry shall be effectual, unless such certificate shall be recorded within thirty days next after such entry is made.

This Court continued: "[t]he process of foreclosure is one of the modes of divesting a person of his interest in the property, to which he is not a party."

The basis for strict compliance with foreclosure statues in Maine stems from one case where the mortgagee failed to include the dates and times whereupon he made entry into the property, in a proceeding which is non-judicial in nature and not subject to the protections of court oversight, and to which the mortgagor was not a party, and where the requirements were non-technical at best.

Contrast that with foreclosure proceedings today where there are multiple protective statutes, including a new obligation of "good faith" even during litigation giving rise to a private cause of action against servicers for a breach. Each contains numerous, extremely technical requirements, all subject to oversight and scrutiny by a court of competent jurisdiction that is sitting as a court of equity. It inures to the benefit of all, and especially to the

principals of equity for this Court to allow the concept of "de minimus" exceptions within the text of an otherwise completely compliant notice as part of its proof to the satisfaction of the judicial authority

C. When Res Judicata should continue to apply.

Subpart A to the Court's first question poses the question, if question one is answered in the affirmative, when should res judicata continue to apply. The Court poses a corollary as well, in, should it make a difference if the second foreclosure is based on a new default.

II. The Application of Res Judicata.

To summarize the position of the USFN, as to the event of default that led to the initial failed foreclosure, res judicata should remain to preclude a plaintiff's proceeding on that particular default, if the trial court rendered a decision on the *merits* of the case, or if the court entered a dismissal with prejudice which acts as if the case was decided on the merits. If the trial court only made a finding of non-compliance with 14 MRSA § 6111, made another finding that was a precondition to the institution of suit or determined that a procedural requirement that was not fulfilled, preventing it from rendering a judgment on the merits then res judicata should not operate as a bar on a subsequent foreclosure action. As this Court did in *Deschaine,* it is helpful to examine how other judicial jurisdictions decided similar matters.

This Court has examined how Vermont has decided to approach the issue when it reviewed *Cenlar FSB v. Malenfant*, 2016 VT 93, 203 Vt. 23, 151 A.3d 778 (2016). In that case, as well as in the vast majority of judicial jurisdictions, res judicata in mortgage foreclosure cases operates as claim preclusion rather than issue preclusion. In Vermont, as established by *Malenfant,* when a foreclosing plaintiff fails in a foreclosure action, the Vermont Supreme Court held that amounts to an adjudication in favor of the borrower that there was no default and all amounts that had accrued before the alleged default are no longer owed. *Malenfant*, ¶33. Should the plaintiff wish to continue to enforce the debt, it must send a thirty day notice to the defendant informing them that the debt has been "de-accelerated" and that their obligation to make payments of a specified amount will be commencing on a date certain not sooner than 30 days after the notice is sent. *Id.* at ¶36. Then, if the Defendant defaults on the cured obligation, then the Plaintiff is free to commence foreclosure while waiving all interest and fees, but not advances, that accrued from the prior acceleration of the debt until the defendant was invited to resume payments.

That is contrasted with Connecticut where the foreclosing Plaintiff is subject to pay the Defendant's attorney's fees for the failed action only upon defendant's motion and after a finding that defendant 'successfully defended' the prior

foreclosure action. *See Bank of America, N.A. v. Aubut,* 167 Conn. App. 347, 143 A.3d 638 (2016).

It would be the position of the USFN that, with the exception of jurisdictional cases outlined above, res judicata would still apply in foreclosures; however it would apply to the particular missed payment that resulted in the default which led to the failed foreclosure. In the alternative, as aforesaid, the USFN suggests that if trial courts do not reach the merits of the case, i.e. the alleged default, then res judicata does not apply.

III. This Court Should Reconsider The Language In *Deschaine*, And *Pushard v. Bank Of. Am., N.A.*, Ordering That A Failed Foreclosure Action Bars A Second Foreclosure Action On A New Default Under Res Judicata Principles

While the USFN does agree that holdings in *Deschaine* and *Pushard v. Bank of America, N.A.*, 2017 ME 230, 175 A.3d 103 should be reexamined, we believe that repudiation is perhaps too strong of a concept to apply to the language in those two cases as those cases were not decided in a vacuum and were decided in an appropriate manner based on the record before the Court at the time. With that in mind, the USFN would respectfully submit the following on the issues of res judicata and refining the holdings

in those two cases so as to be in line with the nature and intent of the proceedings.

A. Neither Claim Preclusion nor Issue Preclusion Bar a Subsequent Foreclosure Upon a New Default.

"The doctrine of res judicata is a court-made collection of rules to ensure that the same matter will not be litigated more than once." *Machias Sav. Bank v. Ramsdell* 1997 ME 20, ¶ 11, 689 A.2d 642, 643-44. Comprising res judicata are the theories of claim preclusion and issue preclusion (or collateral estoppel). *Beegan v. Schmidt*, 451 A.2d 642, 643-44 (Me. 1982). Upon the entry of a final judgment, claim preclusion bars the relitigation of the same cause of action on the merits between the same parties. *Id.* at 644. Issue preclusion "prevents the reopening in a second action of an issue of fact actually litigated and decided in an earlier case." *Id.* at 644.

B. Claim Preclusion

Claim preclusion itself has several components. "It bars relitigation only if (1) the same parties or their privies are involved on both actions; (2) a valid final judgment on the merits was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been, litigated in

the first action." *Wilmington Trust Company v. Sullivan-Thorne*, 2013 ME 94, ¶7, 81 A.3d 371, 374-75.

Typically, a second foreclosure will involve the same parties or their privies,[4] thus satisfying the first prong of claim preclusion. It is the second and third prongs, however, where the argument ensues.

The second prong, the entry of a final judgment, whether or not a mortgagee is able to prove the elements of its claims in the foreclosure complaint or whether there was a final disposition, has been addressed above. When the decision is not one of jurisdiction, or where the trial court proceeds to adjudicate the merits of the case, or where there is a disposition via sanction or evidentiary ruling which prohibited plaintiff from presenting required evidence to establish its case, the second prong is satisfied.

The third prong of claim preclusion requires that the matters to be decided in the second action were litigated or could have been litigated. *Id.* This is where claim preclusion based on a subsequent default in a second foreclosure fails. Assuming, *arguendo*, that a mortgagor successfully rebuts the existence of a default in the performance of his mortgage and is granted judgment after a trial in a foreclosure case, a subsequent default of a payment that had not yet come due until

[4] Occasionally, a new mortgagee is involved due to the negotiation and transfer of the note and assignment of the mortgage, but the principle of the same parties and their privies applies.

after the prior trial ended could not have been litigated at the trial. Claim preclusion rightly prevents the mortgagee's relitigation and recovery of any amounts that would have come due during the foreclosure trial but for the acceleration of the debt, but cannot and should not possibly prevent enforcement of a future scheduled payment that the mortgagor fails to make once acceleration of the debt has been revoked.

Further, if the debt was found to have been accelerated and a decision on the merits had been reached in favor of the borrower, then absent an affirmative act to revoke the acceleration of the debt, or to cause de-acceleration of the debt and have the normal monthly installment payments be due and owing once again, then claim preclusion would apply to bar the claim. However, if the acceleration of the debt was undone, and the mortgagor's obligation to make monthly installments resumes, then the plaintiffs claim for foreclosure on a separate instance of default would remain viable. This method would not result in the plaintiff splintering its claims as only the installments due after de-acceleration could ripen into a new claim that would not have existed when the plaintiff filed its first action.

For this reason, it is respectfully submitted that this Court should refine the holdings set forth in *Deschaine* and *Pushard*, and rule that a second foreclosure is permissible *per se* provided there is a new default and that the foreclosure of a mortgage based upon a future event of default should be tenable.

C. Issue Preclusion

Collateral estoppel, the issue preclusion component of res judicata, "prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and ... the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding." *Penkul v. Matarazzo*, 2009 ME 113, ¶7, 983 A.2d 375, 377.

Most of the defaults in a mortgage foreclosure action involve the alleged nonpayment of a specific monthly installment payment (or sequence of installment payments).[5]14 M.R.S.A. § 6322 imposes upon a foreclosing mortgagee the burden of proving, *inter alia*, that there has been a breach of condition of the mortgage and the amount due. As discussed above, one element of Mortgagee's proof is compliance with 14 M.R.S.A. § 6111, the notice of a mortgagor's right to cure. *See Greenleaf,* 2014 ME 89, 96 A.3d 700. Specifically, a mortgagee must include in the written notice "an itemization of all past due amounts causing the loan to be in default and the total amount due to cure the default." 14 M.R.S.A. 6111(1)(B). It is not enough to generally allege a default, but the notice must detail the specific default, and the amount to cure. *Id.*

[5] Other defaults outside of a contractual installment payment involve an unauthorized transfer of ownership of the subject property or non-payment of taxes and/or insurance.

Again, assuming that a mortgagee was unable to meet its burden a breach of a condition of the mortgage collateral estoppel prevents the factual issue of the specified payments allegedly in default from being relitigated in a second foreclosure. However, in order for a borrower to prevail at trial on the merits of a foreclosure case, pursuant to 14 MRSA §6322, the court must find that there was no breach. Further, if the mortgagees acceleration remedy is not completed until judgment enters due to the borrower's continuing right to reinstate the mortgage by paying the arrears at any time before judgment, then for a payment that had not yet come due at the time of trial, such a factual issue could not have been proven by any evidence, nor could have been determined by a finder of fact. By their nature, foreclosures, like FED actions[6] present obstacles to the traditional applications of claim and issue preclusion and accordingly, a future default should be enforceable.

Many states in which foreclosures are conducted through a judicial action have reached the same conclusion. Res judicata does not bar subsequent foreclosure: *Singleton v. Greymar Assoc.*, 882 So.2d 1004 (Fla. 2004); U.*S. Bank, N.A. v. Amaya*, 254 So.3d 579 (Fla. 2018); U.*S. Bank, N.A., as Trustee v. Davis*, 232 A.3d 952 (Penn. 2020); *Afolabi v. Atlantic Mortgage & Investment Corp.*, 849 N.E.2d 1170 (Ind. 2006); *Fed. Nat'l Mortg. Assn. v. Thompson*, 912 N.W.2d 364

[6] *See 20 Thames Street, LLC v Ocean State Job Lot of Maine 2017, LLC,* 2021 ME 33, 252 A.3d 516 where this Court held that claim preclusion does not necessarily apply to successive FED actions as they "will always address the same property and the same lease and seek eviction for defaults..." Id at ¶ 21.

(Wisc. 2018); *U.S. Bank Trust, N.A., as Trustee v. Watson*, 2020 WL 3409891 (Ohio 2020). Lack of standing does not trigger res judicata barring subsequent foreclosures: *State of NY Mortgage Agency v. Massarelli*, 167 A.D.3d 1296 (N.Y. 2018); *U.S. Bank Trust, N.A. v. Loring*, 193 A.D.3d 1101; *Selene Finance, L.P. v. Coleman*, 187 A.D.3d 1082 (N.Y. 2020).

Revisiting this Court's opinions in *Deschaine* and *Pushard* is an opportunity to align Maine's treatment of res judicata principles in foreclosure actions with, not only the majority of states, but also with one that seeks to do equity to all litigants.

D. De-acceleration or Revocation of Acceleration of the Note Preserves a Mortgagee's Right to a Future Foreclosure Upon a New Default.

An acceleration clause is a provision in loan documents that requires the obligor to pay in full the outstanding balance sooner than the scheduled maturity date. *Acceleration Clause*, Black's Law Dictionary (11th ed. 2019). Most standard form promissory notes do not require notice of acceleration after a notice of default has been given and the appropriate time has elapsed (even assuming a notice of default is required). Such was evident in paragraph 9 of the promissory note in this matter; notice of acceleration was waived.

In *Deschaine*, the Court relied on *Johnson v. Samson Const. Corp.*, 1997 ME 220, 704 A.2d 886, 869 in ruling that the acceleration triggered by the mortgagee's foreclosure complaint indivisibly merged the installment payments into one obligation for the entire debt. *Johnson* at 869. However, neither Court

adequately considered what effect a dismissal or judgment for the mortgagor had on the debt owed, the possibility of a future default and enforcement, or the implications of failing to comply with 14 MRSA §6111 as outlined above.

To the extent that a note must be de-accelerated in order to preserve the mortgagee's right to a future foreclosure (in a future default), that occurs upon the dismissal of a foreclosure action. *Bartram v. U.S. Bank, N.A.*, 211 So.3d 1009 (Fla. 2016). In *Bartram,* The Florida Supreme Court held that the acceleration of the debt was deemed conditional for as long as the borrower has a right to reinstate the loan. Until a judgment of foreclosure enters, in a judicial state, the loan is not accelerated. If a case is disposed of prior to a judgment of foreclosure entering, the indebtedness is not accelerated.

Even in the absence of a dismissal, where a mortgagor prevails at trial, unless the mortgagee affirmatively proves that there is no breach or that there is no debt owed, the loan is nonetheless de-accelerated. If a mortgagee is unable to prove its prima facie case in accordance with 14 MRSA §6322, it is not entitled to judgment and therefore, a court dismissal on the merits of that claim will be as if the breach did not occur, meaning that the borrowers would be adjudicated as being current on their mortgage installment payment obligation. Likewise, if the trial court has no evidence that the entire mortgage obligation has been *paid* in full

a judgment should not enter in favor of the mortgagor pursuant to 14 MRSA§ 6206 as doing so would be contrary to the patent intent of that statute.

Like the Court in *Bartram,* this Court should find that the acceleration is not deemed complete until such time as the borrower's right to reinstate has terminated. Such a right is found in paragraph nineteen of the mortgage at issue which is a standard paragraph used in a majority of the mortgages in Maine (Revised Appendix at Pg. 60[7].) The Mortgage document allows for the revocation of the acceleration at the borrower's option if the borrower remits to the lender the amount that would have been due had the debt not been accelerated. The documents also give a firm expiration of that right, which, in a judicial foreclosure state like Maine, is the time a judgment of foreclosure enters.

If the foreclosure case is dismissed, or if a judgment enters in favor of the borrower, then the acceleration of the loan, under the terms of the loan documents themselves, the debt is not accelerated. As such, no further action would need to be accomplished to revoke the acceleration or de-accelerate the debt.

In criticizing the current approach to the treatment of acceleration and claim preclusion, the Vermont Supreme Court in *Malenfant*, noted: "there are at least two

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[7] Such paragraph states, in relevant part, "Even if Lender has required immediate payment in full, I may have the right to have enforcement of this Security Instrument discontinued. I will have this right at any time before the earliest of: (a) Five days before sale of the Property under any power of sale granted by this Security Instrument…or c) before a judgment has been entered enforcing this Security Instrument if I meet the following conditions: 1) I pay to Lender the full amount that then would be due under this Security Instrument and the Note as if immediate payment in full had never been required.

significant downsides to this approach: one logical and one practical." *Id.* at ¶ 25. The Court explained that the logical downside is the Law Court's reliance on "the fact that lender accelerated the entire debt." *Id.* at ¶ 26. This reliance on acceleration in *Deschaine* and its line of reasoning is flawed, because:

If the lender brings an action alleging default by the borrower, and the court determines that the borrower is not, in fact, in default— whether after actual adjudication on the merits or by dismissal with prejudice—then the acceleration is invalid. In other words, the adjudication against lender with prejudice, or "on the merits," requires us to treat the first judgment as essentially determining that lender did not establish a default on the note by borrowers. *Id.*

Accordingly, without default, there can be no remedy of acceleration, as default is a prerequisite to acceleration. The logic of *Deschaine* and *Pushard* should be refined and this Court, like Vermont and several other states referenced *supra*, should strike a more equitable balance between the parties with respect to the effects of either a prior judgment against the mortgagee or especially a dismissal of the action.

The practical downside to This Court's approach stems from the inequities that result from rulings such as *Deschaine* and *Pushard*. The *Malenfant* Court was concerned regarding the logical and practical problems of claim preclusion barring subsequent foreclosure actions for new defaults and correctly noted that

acceleration is rendered invalid upon a finding that the lender could not prove default. As discussed below, equity and public policy require, absent a finding of such egregious conduct warranting the extreme option of the loss of the future enforceability of the note and mortgage, a less severe outcome as the norm. This is not to suggest that a mortgagee loses nothing. In *Malenfant*, the mortgagee lost all amounts monthly installment amounts that were due as part of the alleged default, including penalties, attorney's fees and interest that accrued during that action of the date of final disposition, less escrow monies advanced for taxes and insurance. This Court should rule likewise whenever res judicata applies to a mortgage foreclosure.

IV. RECONSIDERATION OF *DESCHAINE* AND *PUSHARD* IS NECESSARY TO APPLY EQUITABLE JUDICIAL REMEDIES UPON A NEW DEFAULT WHEN A PRIOR FORECLOSURE IS ADJUDICATED AGAINST THE MORTGAGEE.

A. Reconsideration of *Deschaine* and *Pushard* Comports with *Stare Decisis* Principles.

Upon invitation of this Court to review and reconsider the implications imposed by both *Deschaine* and *Pushard*, the USFN respectfully notes the presence of a presumptive right contained within the collateral loan documents that allows for a mortgagee to commence a new foreclosure action, supported by decisional law, which reflects a more equitable balance between the parties and their competing interests.

Important in the Court's consideration is the implementation of its equitable powers to balance and harmonize those competing interests by weighing practical, but conflicting thoughts of judicial relief. In undertaking a revisionist approach, this Court neither undermines prior jurisprudence nor does it cast aside the doctrine of *stare decisis* to find equity. Quite frankly, to do so is consistent with this Court's recent willingness to pause and reflect over the appropriate legal analysis for issues borne out of a disproportionate judicial ruling.

Furthermore, the Supreme Court of the United States has recently said, "stare decisis is not an inexorable command." It is no small consequence that some of the Court's most important constitutional decisions have overruled prior precedents. *See, e.g., Brown v. Board of Education*, 347 U. S. 483, 491 (overruling the infamous decision in *Plessy v. Ferguson*, 163 U. S. 537, and its progeny). *Dobbs V. Jackson Women's Health Organization,* 597 U.S. ____ (2022).

The *Dobbs* Court has identified five factors that weigh in favor of overruling a precedent:

1. The nature of the Court's error: As set forth in this brief, the logical and practical errors in *Deschaine,* and its line of cases that follow, fail in equity and in law.

2. The quality of the reasoning: As shown by other states such as Vermont and Florida, the reasoning behind *Deschaine* is based largely on a prior case that was inapplicable to it and all similarly situated residential foreclosures.
3. Workability: The *Deschaine* decision is not one of equity and places an undue burden on lenders, where a failed foreclosure results in a discharged mortgage even in circumstances where the borrowers freely admit they were in breach.
4. Effect on other areas of law: The *Deschaine* decision, insofar as it alters parties' contractual rights, risks expanding into other collection or breach-of-contract cases)
5. Reliance interests: There is no compelling reason to allow litigants the continued comfort to forever be able to rely on the ruling in *Deschaine* as it may constitute incentive for borrowers to avoid paying their loans and does not lead to an equitable result.

Moreover, this Court has demonstrated that certain previous decisions are ripe to be viewed through a more pragmatic prism in light of circumstances and current times. In *Bank of New York Mellon v. Shone*, 2020 ME 122, 239 A.3d 671, this Court states that "[e]ven when we have a certain unease with the analysis of a prior decision, we do not overrule the decision without a compelling and sound justification" and that settled point of law will remain undisturbed "unless the

prevailing precedent lacks vitality and the capacity to serve the interests of justice." *Id.* at 690, ¶¶ 54-55, and that such relevant considerations do include whether "the passage of time and changes in conditions" call for a reassessment of existing case law to the point of "reaching a different result." *Id.* at ¶56, quoting *Est. of Galipeau v. State Farm Mut. Auto Ins. Co.*, 2016 ME 28, ¶ 15, 132 A.3d 1190). In other words, tradition alone should not overwrite what the law ought to do.

It should be noted that when this Court examined the principals of res judicata in the context of foreclosures in *Johnson*, *supra*, it relied upon *Stadler v. Cherry Hill Developers, Inc.* 150 So.2d 468, 472 (Fla.Dist.Ct.App. 1963) to hold the acceleration of the mortgage indebtedness prevented a subsequent foreclosure due to claim preclusion. However, *Stadler* was subsequently overruled by the Supreme Court of Florida in *Singleton v. Greymar Associates*, 882 So.2d 1004 (2004) holding that res judicata should not be applied so rigidly to foreclosure cases to prevent a subsequent foreclosure on a subsequent default. The Florida Court went on to say:

> This seeming variance from the traditional law of res judicata rests upon a recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship. For example, we can envision many instances in which the application of the Stadler decision would result in unjust enrichment or other inequitable results. If res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default

> would essentially insulate her from future foreclosure actions on the note—merely because she prevailed in the first action.
> Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.

Id at 1011-12.

Now before this Court is the opportunity to reevaluate the current case law, its resulting inequitable constraints on foreclosures, and embrace a more principled implementation of balanced, fair, and even-handed justice to this issue of a second foreclosure action following an adverse ruling against the mortgagee.

B. Public Policy Requires a Fair, Equitable, and Even Administration of Justice.

The consequences that flow from both the *Deschaine* and *Pushard* decisions do not provide for a balanced and equitable application of justice to the parties. Public policy would suggest and invite a flexible legal construct that accepts and acknowledges the respective weight and obligations of a foreclosure between Plaintiff and Defendant to be most fair and predictable as well as an undertaking that should be encouraged and not discouraged. The resulting remedy sought should strike a balance between providing relief to individual mortgagors while recognizing the contractual relationship that still exists between the parties until either the equitable right to redeem has been terminated or the mortgage has been paid in full.

As guidance to this Court, other judicial districts[8] likewise have grappled with balancing the appropriate public policy interests created in a second foreclosure action when facing a claim preclusion defense. The Vermont Supreme Court ruled in *Malenfant* that a dismissal of a first foreclosure complaint does not preclude a second foreclosure action. *Malenfant* at ¶ 10. In weighing the preclusive consequence of prohibiting any subsequent foreclosure the *Malenfant* Court struck an equitable balance in allowing a subsequent foreclosure action, but barred the Plaintiff from recovering all arrears that had accrued from the first default which had formed the basis for the foreclosure action, accrued interest, attorneys' fees and other expenses covering a specified period of time. *Malenfant* at ¶ 10.

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[8] The Florida Courts have also weighed in on the issue of note acceleration and claim preclusion. The Florida approach is well-reasoned based on contract theory:

> A mortgagor may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the mortgagee had waived reliance on the defaults. In those instances, the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence, an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven. ... Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because [the mortgagee] failed to prove the earlier alleged default.

Singleton v. Greymar Assocs., 882 So.2d 1004, 1007 (Fla. 2004).

In examining the available remedies due the parties, the Court stated: "all foreclosure actions are fundamentally equitable in nature, and thus the court has some discretion in adjusting the parties' respective rights and liabilities. . . to achieve a result that is fair and just." Id. To buttress such policy, the Court found that such a finding would "still allow[] [lender] to recover amounts where it is. . . out-of-pocket and has a more cognizable financial interest and a more compelling equitable claim." *Id.*

To accept and follow that premise and reasoning, it is encouraged that this Court strike an equitable, sensible balance between the parties with respect to the effects of a prior judgment or dismissal against the lender. Furthermore, *Malenfant* reasoning should mean the inequities resulting from *Deschaine* and *Pushard* provides an unstated acceptance that:

> By insulating the borrowers from any legally enforceable obligation to make future payments to lender, this approach imposes on lender a cost for its procedural default that may be wholly disproportionate to the lender's infraction. In fact, the consequences of such a rule might be to discourage lenders from engaging in the kind of forbearance and negotiation that preceded the trial court's dismissal of the first foreclosure action in this case.
> *Id.* at ¶27.

The Law Court, like the *Malenfant* Court, should be concerned regarding the balance of equity. It is time for a new approach.

C. Public Policy Requires the Fair Application of Equitable Remedies.

This Court has previously stated that one who seeks equity must do equity. See *Hamm v. Hamm*, 584 A.2d 59, 61 (Me. 1990). Foreclosure courts sit as courts of equity. *See Farm Credit of Aroostook v.* Sandstrom, 634 A.2d 691 (ME 1993.) Likewise, the *Malenfant* Court, in its application to apply coherent, tenable, and deserving equitable results, was mindful of both the mortgagee's and the mortgagor's strengths and weaknesses in its application of remedies. Considering what was a fair representation to both, the Court provided an instructive framework that acknowledged a mortgagee's prior deficiencies, but appropriately weighed this against the framework of what was proportionate to each party, and therefore constructed a deserving penalty but also a deserving remedy.

The Court first found that from the prior action, no subsequent claim by the mortgagee can incorporate claimed arrearages of any sort that were due from the borrowers resulting from a date of default upon which the prior action was based.

Second, during the pendency of the mortgagee's prior action, no arrearage with respect to principal or interest, or fees or penalties for nonpayment of borrowers' monthly obligation, could have accrued.

Third, during the pendency of the mortgagee's prior action, there cannot be a claim that any interest on the outstanding principal balance accrued.

Fourth, in the prior action, the mortgagor's underlying obligation is not extinguished by an adverse decision, ruling or the judgment with prejudice.

Fifth, the aforementioned mortgagee preclusions do not preclude the mortgagee's recovery for real estate taxes paid to preserve its security interest in the property.

See Malenfant at ¶¶ 33-37.

This is in line with the basic premise of mortgage and foreclosure law. Since Maine is a title theory of mortgages state the granting of a mortgage conveys conditional legal title to the mortgagee and the equitable right to redeem legal title by paying the mortgage is reserved by the mortgagor. *Mortgage Electronic Registration Systems Inc. v. Saunders,* (2010 ME 79, ¶9), referencing *Johnson v. McNeil, (*2002 ME 99, ¶10.) If the mortgage is paid in full, the mortgagee is compelled to release the mortgage thereby restoring legal title to the mortgagor which then results in fee title. *See* 33 MRSA §551. When the mortgagors breach their obligation to pay the mortgage and the mortgagor seeks to terminate the mortgagor's right of

redemption vis-à-vis a foreclosure, an unsuccessful foreclosure attempt should mean that the mortgagee failed in its attempt to terminate the mortgagors' right of redemption. However, absent a showing of satisfaction of the condition of the mortgage – i.e. payment in full – the legal title should not be at risk even if the mortgagee fails to prove a breach or compliance with a statutory requirement.

V. CONCLUSION

Based upon the foregoing, as well as in reliance upon the rationale contained in the Appellee's brief and reply brief, the USFN respectfully requests that this Honorable Court reevaluate the current status of Maine foreclosure law. Specifically, the USFN requests that this Court hold that 14 MRSA § 6111 is a precondition to acceleration and enforcement of note and mortgage and when a lender is found to not comply with said statute, that be deemed as a jurisdictional defect. As a result, the underlying foreclosure is properly dismissed with Plaintiff free to correct the defect and restart the foreclosure.

In instances where the trial court proceeds to the merits of the action and finds that Plaintiff was unable to prove its foreclosure case, the USFN suggests that the Court adopt the rational of *Malenfont* where the loan is

treated as being reinstated and the mortgagee is free to re-foreclose on a new default should one exist.

To do so would be in keeping with the continued application and vitality of s*tare decisis* through the lens of equity. Second, the public policy arguments that mandate a clear, effective, and even administration of justice proportionate to the party's foreclosure burdens. Third, the equitable remedies available and offered to this Court do not constitute a collateral attack on a prior judgment but are an appropriate judicial exercise of its equitable authority to administer justice evenly.

This Court should likewise find that equity now demands a fair application of justice and a reconsideration of *Deschaine's* meaning to a more centered application of equity.

Respectfully submitted,

USFN

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CERTIFICATE OF SERVICE

I, _____, certify that on the date indicated below, I have sent two copies of this Brief of Amicus Curiae to each of the parties listed below by the United States Mail, first-class, postage prepared addressed as listed below:

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