

75365-7

75365-7

No. 75365-7-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

DOUGLAS S. TINGVALL and AUGUSTA REGO-BARROS, husband  
and wife,

Plaintiffs/Appellants,

v.

U.S. BANK, NA, successor trustee to Bank of America, NA, successor in  
interest to LaSalle Bank NA, as trustee, on behalf of the holders of the  
WaMu Mortgage Pass-Through Certificates, Series 2006-AR12,

Defendants/Respondents,

NATIONAL CITY BANK, an Ohio corporation; EGP INVESTMENTS,  
LLC, a Washington limited liability company; and THE INTERNAL  
REVENUE SERVICE, a federal government entity,

Defendants/Respondents.

---

**RESPONDENT USB AS TRUSTEE'S APPELLATE RESPONSE  
BRIEF**

---

John E. Glowney, WSBA No. 12652  
Vanessa Soriano Power, WSBA No. 30777  
STOEL RIVES LLP  
600 University Street, Suite 3600  
Seattle, WA 98101  
(206) 624-0900  
Email: john.glowney@stoel.com  
Attorneys for Defendant/Respondent U.S.  
Bank, NA, as Trustee

FILED  
APR 11 2011  
CLERK OF COURT  
SUPERIOR COURT  
CLERK OF COURT

**ORIGINAL**

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
I. SUMMARY OF THE ARGUMENT .....	1
II. RELEVANT FACTS .....	1
A. The Tingvalls Borrow \$978,600 And Default On Payments .....	1
B. Mr. Tingvall Confirmed a Chapter 11 Bankruptcy Plan Promising to Surrender the Collateral Property .....	2
III. ISSUES PRESENTED ON APPEAL.....	3
IV. AUTHORITY AND ARGUMENT .....	4
A. A Confirmed Chapter 11 Plan Is a Final Judgment and a Contract Binding on the Tingvalls. ....	4
B. The Tingvalls’ Chapter 11 Plan Is Enforceable in State Court .....	6
C. Ms. Rego-Barros Is Bound By the Terms of the Plan .....	7
D. The Tingvalls’ Reorganization Plan Discharges the Note Obligation and Substitutes the Plan Obligation. ....	8
E. The Tingvalls’ Chapter 11 Plan Replaced the Tingvalls’ Note Obligation; the Applicable Statute of Limitations Is Based on the Plan and Has Not Expired.....	10
F. The Tingvalls Agreed to Surrender Their Collateral Property in a Chapter 11 Plan, Not a Chapter 7 Proceeding.....	12
G. Even if the Statute of Limitations for a Note Applied, the Statute Was Extended Because Mr. Tingvall Acknowledged the Debt in His Bankruptcy Plan. ....	17
H. USB as Trustee’s Counterclaim Related Back to the Date of Commencement of the Lawsuit. ....	18
I. Acceleration of a Note Under the DTA Is Limited to a Specific Non-Judicial Foreclosure Proceeding; Discontinuance or Abandonment of that Proceeding Returns the Parties to the Status Quo.....	20
J. The Alleged Acceleration Notice Was Not Unequivocal Enough to Constitute Acceleration.....	28
V. CONCLUSION.....	29

## TABLE OF AUTHORITIES

Page(s)

### Cases

<i>Baggett Bros. Farm, Inc. v. Altha Farmers Coop., Inc.</i> , 149 So. 3d 717 (Fla. Dist. Ct. App. 2014) .....	6
<i>Bank of N.H. v. Donahue (In re Donahue)</i> , 183 B.R. 666 (Bankr. D.N.H. 1995) .....	4
<i>Bennett v. Dalton</i> , 120 Wn. App. 74, 84 P.3d 265 (2004) .....	19
<i>Booth Oil Site Admin. Grp. v. Safety-Kleen Corp.</i> , 532 F. Supp.2d 477 (W.D. N.Y. 2007) .....	6
<i>In re Calzadilla</i> , 534 B.R. 216 (Bankr. S.D. Fla. 2015) .....	14
<i>Cannavina v. Poston</i> , 13 Wn.2d 182, 124 P.2d 787 (1942) .....	17, 18
<i>Citizens Bank of Americus v. Kennedy (In re Kennedy)</i> , 79 B.R. 950 (Bankr. M.D. Ga. 1987) .....	4
<i>In re Cluff</i> , No. 09-41244-JDP, 2012 WL 909551 (Bankr. D. Idaho Mar. 15, 2012) .....	7
<i>Cordero v. America’s Wholesale Lender</i> , No. 1:12-cv-00099-CWD, 2012 WL 4895869 (D. Idaho Oct. 15, 2012) .....	15
<i>Crown Zellerbach Corp. v. Dep’t of Labor &amp; Indus. of State of Wash.</i> , 98 Wn.2d 102, 653 P.2d 626 (1982) .....	25
<i>Dale C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange Tree Assocs., Ltd.)</i> , 961 F.2d 1445 (9th Cir. 1992) .....	9
<i>Deutsche Bank Tr. Co. Ams. v. Beauvais</i> , 188 So. 3d 938 (Fla. Dist. Ct. App. 2016) .....	27

<i>Deutsche Bank Tr. Co. Ams. v. Beauvais</i> , No. 3D14-575, 2014 WL 7156961 (Fla. Dist. Ct. App. Dec. 17, 2014), <i>reversed in</i> 188 So. 3d 938 (Fla. Dist. Ct. App. 2016).....	20, 26
<i>DiBerto v. The Meadows at Marbury, Inc. (In re DiBerto)</i> , 171 B.R. 461 (Bankr. D.N.H. 1994) .....	9
<i>Edmundson v. Bank of Am., N.A.</i> , 194 Wn. App. 920, 378 P.3d 272 (2016) .....	20
<i>In re Elowitz</i> , 550 B.R. 603 (Bankr. S.D. Fla. 2016).....	15
<i>In re Failla</i> , 529 B.R. 786 (Bankr. S.D. Fla. 2014), <i>aff'd sub nom.</i> <i>Failla v. Citibank, N.A.</i> , 542 B.R. 606 (S.D. Fla. 2015) .....	15, 16
<i>Failla v. Citibank, N.A. (In re Failla)</i> , No. 15-15626, 2016 WL 5750666 (11th Cir. Oct. 4, 2016) .....	6, 14, 16
<i>FDIC v. Torrefaccion Cafe Cialitos, Inc.</i> , 62 F.3d 439 (1st Cir. 1995).....	8
<i>Glassmaker v. Ricard</i> , 23 Wn. App. 35, 593 P.2d 179 (1979).....	28
<i>Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)</i> , 193 F.3d 1083 (9th Cir. 1999) .....	6
<i>In re Guerra</i> , 544 B.R. 707 (Bankr. M.D. Fla. 2016) .....	15
<i>Hassler v. Account Brokers of Larimer Cty., Inc.</i> , 274 P.3d 547 (Colo. 2012).....	28
<i>Huntsville Golf Dev., Inc. v. Bank</i> , No. 5:13-CV-671-VEH, 2014 WL 1117640 (N.D. Ala. Mar. 19, 2014).....	11, 12
<i>J.J. Re-Bar Corp. v. United States (In re J.J. Re-Bar Corp.)</i> , 420 B.R. 496 (B.A.P. 9th Cir. 2009).....	5

<i>Jewell v. Long</i> , 74 Wn. App. 854, 876 P.2d 473 (1994).....	17, 18
<i>Jongeward v. BNSF Ry.</i> , 174 Wn.2d 586, 278 P.3d 157 (2012).....	25
<i>In re Kasper</i> , 309 B.R. 82 (Bankr. D.D.C. 2004) .....	15
<i>KLXX, Inc. v. Stallion Music, Inc.</i> , 610 P.2d 1385 (Utah 1980).....	28
<i>In re Kourogenis</i> , 539 B.R. 625 (Bankr. S.D. Fla. 2015).....	15
<i>In re Lang</i> , 191 B.R. 268 (Bankr. D. P.R. 1995).....	7, 8
<i>In re Lapeyre</i> , 544 B.R. 719 (Bankr. S.D. Fla. 2016).....	15
<i>Logan v. North–West Insurance Co.</i> , 45 Wn. App. 95, 724 P.2d 1059 (1986).....	19
<i>Matos v. Bank of New York</i> , 2014 WL 3734578 (S.D. Fla. July 28, 2014).....	27
<i>In re Metzler</i> , 530 B.R. 894 (Bankr. M.D. Fla. 2015) .....	14
<i>Meyers Way Development Ltd. Partnership v. University Savings Bank</i> , 80 Wn. App. 655, 910 P.2d 1308 (1996).....	21
<i>Miller v. United States</i> , 363 F.3d 999 (9th Cir. 2004) .....	6
<i>Moss v. McDonald</i> , 772 P.2d 626 (Colo. App. 1988).....	28
<i>Murray v. Mansheim</i> , 779 N.W.2d 379 (S.D. 2010).....	19
<i>Nat’l City Bank v. Troutman Enters., Inc. (In re Troutman Enters., Inc.)</i> , 253 B.R. 8 (B.A.P. 6th Cir. 2000).....	9, 10

<i>In re Nylon Net Co.</i> , 225 B.R. 404 (Bankr. W.D. Tenn. 1998).....	6, 9, 10, 16
<i>Olympia Mortg. Corp. v. Pugh</i> , 774 So. 2d 863 (Fla. Dist. Ct. App. 2000) .....	27
<i>Rivera v. Bank of Am., N.A. ex rel. BAC Home Loans Servicing, L.P.</i> , 190 So. 3d 267 (Fla. Dist. Ct. App. 2016) .....	15
<i>Rivera v. Recontrust Co., N.A.</i> , No. 2:11-CV-01695-KJD-PAL, 2012 WL 2190710 (D. Nev. June 14, 2012) .....	15
<i>Rustad Heating &amp; Plumbing Co. v. Waldt</i> , 91 Wn.2d 372, 588 P.2d 1153 (1979).....	21
<i>Simonetti Dev. Ltd. v. Hillard Dev. Corp. (In re Hillard Dev. Corp.)</i> , 238 B.R. 857 (Bankr. S.D. Fla. 1999).....	5, 10, 12
<i>State Sec. Sav. Co. v. Pelster</i> , 296 N.W.2d 702 (Neb. 1980).....	28
<i>State v. K.L.B.</i> , 180 Wn.2d 735, 328 P.3d 886 (2014).....	25
<i>In re Taylor</i> , 793 F.3d 814 (7th Cir. 2015) .....	10
<i>In re Tragopan Props., LLC</i> , 164 Wn. App. 268, 263 P.3d 613 (2011).....	17, 18
<i>Trulis v. Barton</i> , 107 F.3d 685 (9th Cir. 1995) .....	5
<i>United States v. Feterl</i> , 849 F.2d 354 (8th Cir. 1988) .....	28
<i>Warner v. CitiMortgage, Inc.</i> , No. 11-cv-02657-WYD-KLM, 2012 WL 846714 (D. Colo. Mar. 13, 2012).....	15
<i>In re White</i> , 282 B.R. 418 (Bankr. N.D. Ohio 2002).....	15

<i>Woodley v. Myers Capital Corp.</i> , 67 Wn. App. 328, 835 P.2d 239 (1992).....	5
--	---

<i>In re Xofox Indus., Ltd.</i> , 241 B.R 541 (E.D. Mich. 1999).....	6
---	---

**Statutes**

11 U.S.C. § 342.....	18
----------------------	----

11 U.S.C. § 541(a)(2)(A).....	7
-------------------------------	---

11 U.S.C. § 1141(a).....	4, 10
--------------------------	-------

RCW 4.16.020(2).....	11, 12
----------------------	--------

RCW 4.16.280.....	17
-------------------	----

RCW 26.16.030.....	8
--------------------	---

RCW 61.24.....	21
----------------	----

RCW 61.24.030.....	23
--------------------	----

RCW 61.24.040.....	23
--------------------	----

RCW 61.24.040(1)(f).....	24
--------------------------	----

RCW 61.24.040(2).....	22
-----------------------	----

**Other Authorities**

11 Am. Jur. 2d <i>Bills and Notes</i> § 169.....	28
--	----

46 Am. Jur. 2d <i>Bills and Notes</i> § 170.....	21
--	----

## I. SUMMARY OF THE ARGUMENT

Respondent U.S. Bank N.A., successor trustee to Bank of America, NA, successor in interest to LaSalle Bank NA, as trustee, on behalf of the holders of the WaMu Mortgage Pass-Through Certificates, Series 2006-AR 12 (“USB as trustee”) provides this brief in response to the Opening Brief of Appellants (“Tingvall Brief”).

The Tingvalls<sup>1</sup> confirmed a Chapter 11 bankruptcy plan in 2012 that “surrendered” their legal right to contest foreclosure of their house and gave Mr. Tingvall a discharge of their note obligation. The Tingvalls’ Chapter 11 plan is a federal court judgment and contract that is binding on the Tingvalls and enforceable in Washington State courts. The applicable statute of limitations is the statute of limitations for the Tingvalls’ chapter 11 plan, not the discharged note obligation. That statute of limitations will not expire until 2018 at the earliest. The trial court properly granted summary judgment and the Tingvalls’ appeal should be denied.

## II. RELEVANT FACTS

### A. The Tingvalls Borrow \$978,600 And Default On Payments

In August 2006, the Tingvalls borrowed the principal sum of \$978,600 and gave a note evidencing the loan, and a deed of trust securing the loan to Washington Mutual Bank, FA. CP 417, 418, 422, 429

---

<sup>1</sup> Doug Tingvall filed for bankruptcy; Augusta Rego-Barras did not. Nevertheless, the Tingvalls’ marital community property is subject to the Chapter 11 plan. *See* Section IV.C *infra*. For ease of reference, this brief shall refer to “the Tingvalls.”

(Declaration of Rebecca Adelman in Support of Defendants’ Motion for Summary Judgment (“Adelman Decl.”)). An Assignment of Deed of Trust to USB as trustee was recorded in March 2008. CP 418 (*id.* ¶ 4). USB as trustee is the current holder of the Tingvalls’ note and deed of trust. CP 418 (*id.* ¶¶ 2, 4).

Subsequently, in or around November 2007, the Tingvalls defaulted on their monthly loan payments. CP 419 (*id.* ¶ 5). The Tingvalls then entered into a Loan Modification Agreement on September 26, 2008. CP 419 (*id.*, Ex. 4). The Tingvalls later defaulted under the terms of the Loan Modification Agreement. CP 419 (*id.* ¶ 6). A non-judicial foreclosure proceeding under the Deeds of Trust Act (“DTA”) was commenced in 2010, and then discontinued. Non-judicial foreclosure proceedings were also commenced in 2013 and 2015, both of which were also discontinued. CP 82, 83.

**B. Mr. Tingvall Confirmed a Chapter 11 Bankruptcy Plan Promising to Surrender the Collateral Property**

On February 8, 2011, Mr. Tingvall filed for Chapter 11 bankruptcy in the Western District of Washington. CP 322-323 (Declaration of John Glowney in Support of Defendant’s Motion for Summary Judgment (“Glowney Decl.”)). Mr. Tingvall, as a debtor in possession, filed a Bankruptcy Plan and Disclosure Statement (“Chapter 11 Plan” or the “Plan”) on December 27, 2011. CP 323, 378. Under Section III of his Plan, titled “The Plan of Reorganization and Treatment of Claims and

Equity Interests,” Mr. Tingvall listed the note held by USB as trustee. CP 385. This section of the Plan required Mr. Tingvall to not only list his secured claims, but also the proposed treatment the secured claims would receive under the Plan. CP 384.

Mr. Tingvall’s proposed treatment of USB as trustee’s secured claim was surrender of the real property security:

Debtor [Mr. Tingvall] has applied for a loan modification with Chase. It was declined. Therefore, the debtor shall surrender the home under this Plan. The claim shall be limited to its security and no further claim shall be made in these proceedings.

CP 385.

The Tingvalls’ Chapter 11 Plan was approved by an order of the bankruptcy court on February 4, 2012. CP 323, 414.

### **III. ISSUES PRESENTED ON APPEAL**

1. Is the governing statute of limitations the statute of limitations applicable to Chapter 11 bankruptcy plans rather than the statute of limitations applicable to the discharged note obligation?

2. Does the Tingvalls’ Chapter 11 Plan, which is treated as a final judgment and a binding contract, operate to bar the Tingvalls from opposing the Trust’s foreclosure proceedings?

3. Do the Tingvalls have a contractual duty, enforceable by USB as trustee in state court, to comply with the terms of their Chapter 11 Plan and to not oppose the foreclosure of their home?

4. Does the Tingvalls' Chapter 11 Plan operate as an acknowledgement of the debt for purposes of the Washington State statute of limitations?

5. Does the DTA govern "acceleration" of the Tingvalls' note?

#### **IV. AUTHORITY AND ARGUMENT**

##### **A. A Confirmed Chapter 11 Plan Is a Final Judgment and a Contract Binding on the Tingvalls.**

Under their Chapter 11 Plan, the Tingvalls agreed "to surrender the home under this Plan. The claim shall be limited to its security and no further claim shall be made in these proceedings." The bankruptcy court approved the Tingvalls' proposed Chapter 11 Plan, and the Plan was confirmed. CP 323, 414.

The Tingvalls, having availed themselves of the benefits of a bankruptcy filing to discharge their personal liability on the obligation, are bound by the Chapter 11 Plan. A confirmed bankruptcy plan operates both as a contract and as a final judgment that bind the debtor to its terms. *See* 11 U.S.C. § 1141(a) ("the provisions of a confirmed plan bind the debtor"); *Citizens Bank of Americus v. Kennedy (In re Kennedy)*, 79 B.R. 950, 952 (Bankr. M.D. Ga. 1987) ("Section 1141 of the Bankruptcy Code means what it says and not only are the Creditors bound by the confirmed Plan, but the Debtors are also so bound."); *Bank of N.H. v. Donahue (In re Donahue)*, 183 B.R. 666, 667 (Bankr. D.N.H. 1995) ("Just as the Court

would hold a creditor accountable to the terms of a reorganization plan, it must also hold the debtor accountable to the agreements as well.”).<sup>2</sup>

A Chapter 11 plan is a federal court judgment:

Although a confirmed plan of reorganization is often compared to a contract (a traditional creature of state law), and although some courts describe it as such, this court nevertheless concludes that a chapter 11 plan confirmation order, and obligations arising thereunder, are necessarily federal in character. A confirmed plan of reorganization is a creature of the Bankruptcy Code, a comprehensive federal remedial statute. Although obviously a confirmed plan is often the fruit of negotiations tantamount to contractual bargaining, the contents of a plan (both mandatory and permissive), the requirement of judicial approval, and the manner in which the parties obtain that approval, are all governed by federal law, i.e. the Bankruptcy Code. Moreover, federal law provides for the implementation of the plan, and treats a confirmed plan as a federal judgment entitled to *res judicata* effect. Although many courts construe the terms of a plan in accordance with State contract interpretation principles, reorganization plans, by virtue of the orders confirming them, are regarded as judgments of the federal courts.

*Simonetti Dev. Ltd. v. Hillard Dev. Corp. (In re Hillard Dev. Corp.)*, 238 B.R. 857, 871-72 (Bankr. S.D. Fla. 1999) (footnotes, citations, and emphasis omitted); *see also, J.J. Re-Bar Corp. v. United States (In re J.J. Re-Bar Corp.)*, 420 B.R. 496, 502 (B.A.P. 9th Cir. 2009) (“Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect.”) (quoting *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir.

---

<sup>2</sup> *See also, Woodley v. Myers Capital Corp.*, 67 Wn. App. 328, 835 P.2d 239 (1992).

1995)); *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083, 1086 (9th Cir. 1999); *Booth Oil Site Admin. Grp. v. Safety-Kleen Corp.*, 532 F. Supp.2d 477, 515 (W.D. N.Y. 2007) (“[R]eorganization plans, by virtue of the orders confirming them, are regarded as judgments of the federal courts.”) (citation omitted); *Miller v. United States*, 363 F.3d 999, 1003-04 (9th Cir. 2004).

**B. The Tingvalls’ Chapter 11 Plan Is Enforceable in State Court**

The Tingvalls’ Chapter 11 Plan obligations are enforceable in state court. *Baggett Bros. Farm, Inc. v. Altha Farmers Coop., Inc.*, 149 So. 3d 717, 718 (Fla. Dist. Ct. App. 2014). A state law breach of contract action may be brought for a breach of Chapter 11 plan obligations. *In re Nylon Net Co.*, 225 B.R. 404, 406 (Bankr. W.D. Tenn. 1998). If a reorganized debtor defaults under a plan, creditors have several options, including enforcing the plan terms in any court of competent jurisdiction. *In re Xofox Indus., Ltd.*, 241 B.R 541, 543 (E.D. Mich. 1999).

The Tingvalls surrendered their legal right to contest foreclosure by USB as trustee in the bankruptcy proceeding and they cannot be allowed to claim title to property they agreed to surrender to their secured creditor in 2012. *See Failla v. Citibank, N.A. (In re Failla)*, No. 15-15626, 2016 WL 5750666 (11th Cir. Oct. 4, 2016). Accordingly, the trial court’s dismissal of the Tingvalls’ defenses and its decree of foreclosure in favor of USB as trustee should be affirmed.

**C. Ms. Rego-Barros Is Bound By the Terms of the Plan**

Although Ms. Rego-Barros did not file bankruptcy, she is nonetheless bound by the bankruptcy court's order confirming Mr. Tingvall's Plan. 11 U.S.C. § 541(a)(2)(A) provides:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

....

(2) All interests of the debtor *and the debtor's spouse in community property* as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor[.]

(emphasis added), *see also In re Lang*, 191 B.R. 268, 271 (Bankr. D. P.R. 1995) (citing 11 U.S.C. § 541(a)(2)(A)). The court in *Lang* summarized this provision as follows: “if one spouse files for bankruptcy, the interests in the community property of both the debtor and non-debtor spouse become property of the estate provided that debtor spouse has the sole, equal or joint management and control of the property,” which is determined by state law. *Id.*; *see also In re Cluff*, No. 09-41244-JDP, 2012 WL 909551, at \*3 n.17 (Bankr. D. Idaho Mar. 15, 2012) (“Debtor has an interest in Osborne’s community property earnings, and such earnings enter her bankruptcy estate . . .”).

Under Washington community property law, “[e]ither spouse or either domestic partner, acting alone, may manage and control community

property, with a like power of disposition as the acting spouse or domestic partner has over his or her separate property, except” with respect to certain transactions, including transactions concerning real property. RCW 26.16.030. Such exceptions, including the consent provisions, are preempted by the goals and purposes of federal bankruptcy law. *Lang*, 191 B.R. at 272 (citing *FDIC v. Torrefaccion Cafe Cialitos, Inc.*, 62 F.3d 439, 443 (1st Cir. 1995)).

Against this legal backdrop, the Tingvalls’ home, which is community property, became an asset of the Tingvalls’ Chapter 11 bankruptcy estate and, as such, Ms. Rego-Barros, like the non-debtor spouse in *Lang*, is bound by the Plan’s terms requiring “surrender” of the Tingvalls’ home.

**D. The Tingvalls’ Reorganization Plan Discharges the Note Obligation and Substitutes the Plan Obligation.**

The Tingvalls’ focus on the statute of limitations for the note and deed of trust is entirely misplaced. By confirming the Chapter 11 Plan, the Tingvalls discharged their pre-confirmation debts and substituted the Plan obligations, which now “govern[] their rights and obligations” as a judgment and a contract.

It is well settled that, while confirmation of a plan of reorganization discharges the debtor from pre-confirmation debts, the confirmation substitutes the obligations of the plan for the pre-confirmation debts. The chapter 11 plan becomes a binding contract between the debtor and its creditors, and governs their rights and obligations. Although creditors may not attempt to collect

pre-confirmation obligations, creditors may engage in lawful collection activities to enforce plan obligations.

*Nylon Net*, 225 B.R. at 406 (emphasis added; citations omitted).

Confirmation, then, had the dual effect of discharging the Petitioning Creditors' preconfirmation debt and replacing it with their Plan Claims. The plan is essentially a new and binding contract between the Reorganized Debtor and the Petitioning Creditors.

*Nat'l City Bank v. Troutman Enters., Inc. (In re Troutman Enters., Inc.)*, 253 B.R. 8, 11 (B.A.P. 6th Cir. 2000) (emphasis added; citation omitted);

*Dale C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange Tree Assocs., Ltd.)*, 961 F.2d 1445, 1448 (9th Cir. 1992) (confirmation of

chapter 11 plan substitutes the obligations imposed by the plan for preconfirmation debt); *DiBerto v. The Meadows at Marbury, Inc. (In re*

*DiBerto)*, 171 B.R. 461, 471 (Bankr. D.N.H. 1994) ("Under a confirmed reorganization plan former legal relationships between a debtor and its

creditors are extinguished and replaced by new commitments binding in law."); Charles Jordan Taub, *The Law of Bankruptcy*, 1098 (2d ed. 2009)

("Upon confirmation, all prior claims and interests against the debtor are replaced by the provisions of the plan.").<sup>3</sup>

As a result, the Tingvalls have an obligation to comply with the terms of their Plan as both a judgment and a contract. By operation of

---

<sup>3</sup> As discussed further *infra*, the Tingvalls' Chapter 11 Plan obligation is to surrender the property to USB as trustee, and the Tingvalls' arguments about "surrender" under Chapter 7 are inapplicable under the Tingvalls' Chapter 11 Plan.

bankruptcy law, the Tingvalls' obligation on the note is discharged. *Nylon Net*, 225 B.R. 404; *Troutman*, 253 B.R. 8. Creditors, like USB as trustee, are barred from pursuing pre-confirmation debts.<sup>4</sup> The Tingvalls' obligations are governed by their Chapter 11 Plan, and the applicable statute of limitations is based on the Plan.

**E. The Tingvalls' Chapter 11 Plan Replaced the Tingvalls' Note Obligation; the Applicable Statute of Limitations Is Based on the Plan and Has Not Expired**

The Tingvalls' focus on the statute of limitations applicable to their note obligation is misplaced. USB as trustee is now enforcing its rights under the Tingvalls' "new and binding contract," their Chapter 11 Plan, not the note obligation. 11 U.S.C. § 1141(a) ("the provisions of a confirmed plan bind the debtor").

Confirmation of the Chapter 11 Plan results in a federal judgment that "substitutes the obligations of the plan for the pre-confirmation debts," *Nylon Net*, 225 B.R. at 406, and a "new and binding contract," *Troutman*, 253 B.R. at 11. Because the Chapter 11 Plan is a federal judgment, the federal rule for determining *when* the statute of limitations commences applies. *See Hillard*, 238 B.R. at 875-76.

---

<sup>4</sup> *See In re Taylor*, 793 F.3d 814, 819 (7th Cir. 2015) ("When a debtor confirms a Chapter 11 reorganization plan, the plan 'discharges the debtor from any debt that arose before the date of such confirmation.' Discharge in a bankruptcy case 'operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived.'" (citations omitted; brackets in original)).

As a result, Tingvalls' arguments about acceleration of the discharged note and Washington State's statute of limitations for the discharged note obligation are irrelevant and inapplicable. Instead, the relevant statute of limitations is based upon the Plan, not the discharged note. In this case, the earliest date upon which a statute of limitations could commence would be the date of confirmation of the Tingvalls' Plan, or February 4, 2012.

The Bankruptcy Code, Chapter 11, does not itself provide for a statute of limitations for the enforcement of Chapter 11 plans. In such circumstances, the courts adopt the most appropriate state statute of limitations applicable to the plans. In this case, that would be either the applicable Washington State statute of limitations for federal court judgments or its written contract statute of limitations. *Huntsville Golf Dev., Inc. v. Bank*, No. 5:13-CV-671-VEH, 2014 WL 1117640, at \*12-13 (N.D. Ala. Mar. 19, 2014) (because "there is no federal limitations period for enforcing bankruptcy judgments[,] courts often look to comparable state statutes for guidance" and concluding that "for statute of limitations purposes, the relevant state analogue is to a final judgment rather than a contract")(Emphasis added).

Washington has a 10-year statute of limitations for the enforcement of "an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States." RCW

4.16.020(2). Following *Huntsville*, the Court can and should apply Washington’s 10-year statute of limitations to the Tingvalls’ Chapter 11 Plan, which is a “judgment . . . of [a] court of the United States.” RCW 4.16.020(2). The expiration date for the statute of limitations in that case would be February 2022 at the earliest.

Even if the Court determines that the Plan should be construed as a contract for statute of limitation purposes and applies Washington’s six-year statute for written contracts, *see Hillard*, 238 B.R. at 871, 873-74, the earliest the statute would expire would be February 2018.

Regardless whether a 10-year “judgment” statute of limitations or a six-year “contract” statute of limitations is applied to the Plan, it is clear that neither statutory period has expired. The Tingvalls’ Plan was confirmed on February 4 2012, this action was filed in March 2015, and USB as trustee’s counterclaims was filed in July 2015. CP 1; 299; 414. USB as trustee’s claims under the Plan are timely under either a 10-year statute or a six-year statute. Therefore, the trial court correctly concluded that the claims of USB as trustee are not barred by the applicable statute of limitations.

**F. The Tingvalls Agreed to Surrender Their Collateral Property in a Chapter 11 Plan, Not a Chapter 7 Proceeding.**

Mr. Tingvalls’ Chapter 11 Plan is a federal court judgment and a “new and binding” contract requiring the Tingvalls to surrender their

home under the Plan. This “treatment” was proposed by the Tingvalls themselves and required them to “surrender the home under this Plan.” CP 385. Nevertheless, the Tingvalls argue that, because some courts hold that a Chapter 7 debtor who surrenders property is not required to deliver the collateral to his or her secured creditor, they are free to oppose the USB as trustee’s state court exercise of its remedies—in this case, foreclosure.

But the courts have recognized that a debtor who agrees to surrender his or her home—even in a Chapter 7 setting—has given up his or her legal right to oppose a foreclosure of the home. The Tingvalls suggest that USB as trustee’s bankruptcy argument “begs the question of what does it mean to ‘surrender’ a home?” Tingvall Brief at 19. In one of the most recent pronouncements on the subject, the Eleventh Circuit forcefully rejected the Tingvalls’ unsupported ruminations:

Because “surrender” means “giving up of a right or claim,” debtors who surrender their property can no longer contest a foreclosure action. When the debtors act to preserve their rights to the property “by way of adversarial litigation,” they have not “relinquish[ed] . . . all of their legal rights to the property, including the rights to possess and use it.” The “retention of property that is legally insulated from collection is inconsistent with surrender.” Ordinarily, when debtors surrender property to a creditor, the creditor obtains it immediately and is free to sell it. Granted, a creditor must take some legal action to recover real property—namely, a foreclosure action. Foreclosure proceedings ensure that debtors do not have to determine unilaterally issues of priority if there are multiple creditors or surplus if the value of the property exceeds the liability. Debtors who surrender property must get out of the

creditor's way. "[I]n order for surrender to mean anything in the context of § 521(a)(2), it has to mean that . . . debtor[s] . . . must not contest the efforts of the lienholder to foreclose on the property." Otherwise, debtors could obtain a discharge in bankruptcy based, in part, on their sworn statement to surrender and "enjoy possession of the collateral indefinitely while hindering and prolonging the state court process."

*Failla*, 2016 WL 5750666, at \*4 (emphases added; citations omitted; brackets and ellipses in original). In *Failla*, the court rejected the debtors' attempt to have the benefit of a bankruptcy discharge of personal liability while retaining a valuable home: "In bankruptcy, as in life, a person does not get to have his cake and eat it too." *Id.* at \*5.

Even if the Chapter 7 "surrender" cases were applicable to a Chapter 11 plan, the great weight of the case law recognizes that although a debtor surrendering property in bankruptcy is not required to take steps to deliver the property to the creditor, the debtor cannot oppose the lender's exercise of its state-court remedies. *See, e.g., In re Calzadilla*, 534 B.R. 216, 218 (Bankr. S.D. Fla. 2015) ("surrendering" property "means not taking an overt act to prevent the secured creditor from foreclosing its interest in the secured property.") *In re Metzler*, 530 B.R. 894, 896 (Bankr. M.D. Fla. 2015) ("At a minimum, 'surrender' under Bankruptcy Code §§ 521 and 1535 means a debtor cannot take an overt act that impedes a secured creditor from foreclosing its interest in secured property. . . . By actively opposing the state court foreclosure actions, the debtors in these cases failed to 'surrender' their property."); *In re White*,

282 B.R. 418, 422 (Bankr. N.D. Ohio 2002) (surrender functions as both the debtor’s consent to stay relief and estoppel of the right to defend a foreclosure); *In re Lapeyre*, 544 B.R. 719, 722 (Bankr. S.D. Fla. 2016).<sup>5</sup>

For these reasons, the Chapter 7 “surrender” case upon which the Tingvalls rely is inapplicable to the Tingvalls’ Plan obligations.<sup>6</sup> The purpose of such a foreclosure is not to address the debtor’s defenses—

---

<sup>5</sup> *In re Elowitz*, 550 B.R. 603, 607 (Bankr. S.D. Fla. 2016) (“[A]ctive opposition to foreclosure is irreconcilable with surrender[.]” (citation omitted; second brackets in original)); *In re Kourogenis*, 539 B.R. 625 (Bankr. S.D. Fla. 2015); *Rivera v. Bank of Am., N.A. ex rel. BAC Home Loans Servicing, L.P.*, 190 So. 3d 267 (Fla. Dist. Ct. App. 2016) (dismissing borrower’s appeal of foreclosure judgment after he surrendered the property during the pendency of the appeal); *Rivera v. Recontrust Co., N.A.*, No. 2:11-CV-01695-KJD-PAL, 2012 WL 2190710, at \*2 (D. Nev. June 14, 2012) (applying judicial estoppel where the plaintiff agreed to surrender property in bankruptcy court and subsequently asserted state law claims in an attempt to halt foreclosure); *Warner v. CitiMortgage, Inc.*, No. 11-cv-02657-WYD-KLM, 2012 WL 846714, at \*2 (D. Colo. Mar. 13, 2012) (“[A]t a minimum, the doctrine of *res judicata* prevents Plaintiffs Homer and Betty Warner from contesting Defendant’s right to initiate foreclosure proceedings.”); *In re Guerra*, 544 B.R. 707, 709 (Bankr. M.D. Fla. 2016) (the court explained that where (1) a foreclosure action is already in progress when the debtor agrees to surrender the property; and (2) the debtor actively fights the foreclosure shortly after making that agreement, the debtor’s behavior gives rise to an inference he or she “had no intention of surrendering the[] property—i.e., [the debtor] had misled th[e] [c]ourt”); *Cordero v. America’s Wholesale Lender*, No. 1:12-cv-00099-CWD, 2012 WL 4895869, at \*11 (D. Idaho Oct. 15, 2012) (finding the plaintiff judicially estopped from identifying defendant bank as a secured creditor in her bankruptcy schedules, then fighting foreclosure on the ground defendant was an unsecured creditor).

<sup>6</sup> *In re Kasper*, 309 B.R. 82 (Bankr. D.D.C. 2004), is not applicable to this case. In *Kasper*, the debtor filed a “Statement of Intention” indicating that the debtor would “retain possession” without checking off any of the three options appearing on the form: “exempt”; “rede[mption]”; or “reaffirm[ation].” 309 B.R. at 84. Not only has *Kasper* been criticized and rejected, it involved a Chapter 7 case, not a confirmed Chapter 11 plan. See, e.g., *In re Failla*, 529 B.R. 786, 792-93 (Bankr. S.D. Fla. 2014), *aff’d sub nom. Failla v. Citibank, N.A.*, 542 B.R. 606 (S.D. Fla. 2015). Because Chapter 7 cases do not involve “plans,” the ruling in *Kasper* has no bearing on this case, which involves a confirmed bankruptcy plan in which the debtor affirmatively promised that he would “surrender” the property.

those are addressed and settled by the debtor's Chapter 11 plan—but rather such “[f]oreclosure proceedings ensure that debtors do not have to determine unilaterally issues of priority if there are multiple creditors or surplus if the value of the property exceeds the liability.” *Failla*, 2016 WL 5750666, at \*4.

There is a world of difference between a debtor obtaining Chapter 7 relief and a debtor entering into a Chapter 11 plan of reorganization. The Chapter 11 debtor has entered into a new” contract with his or her creditors that “substitutes the obligations of the plan for the pre-confirmation debts.” *Nylon Net*, 225 B.R. at 406. Moreover, because a reorganization plan operates like a contract, USB as trustee, like other Chapter 11 secured creditors, gave up its other rights in bankruptcy (including seeking relief from the stay or otherwise opposing or changing the Plan) because it relied upon the terms of the Plan that the Tingvalls proposed. The Tingvalls’ Chapter 11 Plan is as binding on the lender as on the debtor. To allow the Tingvalls to go back on their promise to surrender the secured property would perpetrate a fraud on the Court.<sup>7</sup>

---

<sup>7</sup> *Failla*, 529 B.R. at 793 (“The Debtors’ refusal to effectively surrender the Property to CitiBank could be considered not only a fraud on the Court[.]”).

**G. Even if the Statute of Limitations for a Note Applied, the Statute Was Extended Because Mr. Tingvall Acknowledged the Debt in His Bankruptcy Plan.**

The Tingvalls' arguments also fail under applicable Washington law. A statute of limitations is restarted by a written acknowledgement or promise by the debtor to pay the debt. RCW 4.16.280; *Jewell v. Long*, 74 Wn. App. 854, 856, 876 P.2d 473 (1994); *Cannavina v. Poston*, 13 Wn.2d 182, 194, 124 P.2d 787 (1942). Generally, an acknowledgement must be in writing, recognize the existence of the debt, be communicated to the creditor or to another person with the intent that it be communicated to the creditor, and not indicate an intent not to pay. *Jewell*, 74 Wn. App. at 857. In other words, "the acknowledgement of a debt will take an action out of the statute of limitations where it is not coupled with any refusal to pay or circumstances defeating the inference of an intent to pay." *In re Tragopan Props., LLC*, 164 Wn. App. 268, 273, 263 P.3d 613 (2011).

As the Tingvalls themselves concede, their 2008 loan modification acknowledged the debt and restarted the statute of limitations. Tingvall Brief at 7. The Chapter 11 Plan is yet another modification of the note obligation that substitutes the Plan obligations for the note obligation. The Chapter 11 Plan, therefore, meets the criteria for restarting the statute under Washington law.

Although the courts have held that certain actions in bankruptcy court do not operate as an acknowledgment of the debt restarting the

statute of limitations, *see Tragopan*, 164 Wn. App. 268, this case does not fall within that authority. The Tingvalls did not simply list this creditor's claim in their schedules, indicate how it would be treated after a Chapter 7 discharge (no plan involved), or propose a plan that was not adopted.<sup>8</sup> Instead, they confirmed a plan that expressly provided for new obligations. The Tingvalls' personal obligation to pay the note was discharged, but it was replaced by a Chapter 11 obligation to "surrender the home."

Confirming a plan plainly acknowledges the underlying debt and proposes to pay it through the plan provisions.<sup>9</sup> *Cannavina*, 13 Wn.2d at 193, 198-99 (debtor acknowledged intent to pay debt when he offered to repay debt by substituting another piece of property and stated, "we will call it even for which I owe you."); *Jewell*, 74 Wn. App. at 856-57 (debtor acknowledged intent to pay debt when he substituted property underlying deed of trust for different piece of property).

#### **H. USB as Trustee's Counterclaim Related Back to the Date of Commencement of the Lawsuit.**

The Tingvalls also contend that USB as trustee's counterclaim for judicial foreclosure was filed after the statute of limitations had run, and

---

<sup>8</sup> *See Tragopan*, 164 Wn. App. at 273.

<sup>9</sup> Mr. Tingvalls' acknowledgment of the debt in the Bankruptcy Plan satisfies all other requirements to take the note out of the statutory period. The Tingvalls' Plan is in writing, and by statute, creditors are given notice of bankruptcy proceedings. 11 U.S.C. § 342. Therefore, the written acknowledgment was communicated to the Trust and Chase, the prior servicer, by way of the Chapter 11 Plan. The Tingvalls' Plan also acknowledges an intent to satisfy the debt owed under the note by surrendering the property.

that such a counterclaim does not relate back to the commencement of the action. Because the applicable statute of limitations does not expire until 2018 at the earliest, as explained above, the Tingvalls' various arguments regarding "relation back" of counterclaims are irrelevant.

Moreover, the Tingvalls misconstrue the law in Washington. While it is true that there are considerable differences between a number of jurisdictions over the rules applicable to counterclaims and the statute of limitations,<sup>10</sup> Washington courts have held that a counterclaim that arises out of the same transaction is not barred by the statute of limitations even if the statute expires during the pendency of the action.

The Court also relied on the common law rule that if a counterclaim that arises out of the same transaction or occurrence is not barred by the statute of limitations at the commencement of the action then it is not barred even if the statute expires during the pendency of the action. Two reasons support this result. First, absent such a rule, a plaintiff could wait until just prior to the expiration of the statute of limitations to file a complaint, leaving the defendant insufficient time to file a counterclaim. Second, by joining the defendant and putting his competing right to the same collateral at issue, a plaintiff waives his right to assert the statute of limitations.

*Bennett v. Dalton*, 120 Wn. App. 74, 81, 84 P.3d 265 (2004). The Tingvalls' argument and the out-of-state case law on which they rely, focuses on the law applicable to various defenses (setoff, recoupment, etc.), or cross-claims, but does not address Washington's rule on counterclaims. In contrast, *Logan v. North-West Insurance Co.*, 45 Wn.

---

<sup>10</sup> See cases in *Murray v. Mansheim*, 779 N.W.2d 379, 387 (S.D. 2010).

App. 95, 99, 724 P.2d 1059 (1986), remains good law in Washington. The trial court's decision was correct.

**I. Acceleration of a Note Under the DTA Is Limited to a Specific Non-Judicial Foreclosure Proceeding; Discontinuance or Abandonment of that Proceeding Returns the Parties to the Status Quo.**

The Tingvalls wholly mistake the operation of the acceleration of note obligations in non-judicial foreclosure proceedings under the DTA. The Tingvalls claim that USB as trustee accelerated the note obligation in an April 2009 notice of default and “never revoked” that acceleration. Tingvall Brief at 1-2. The Tingvalls argue that, even though the non-judicial foreclosure commenced in conjunction with the April 2009 notice of default was discontinued or abandoned, the April 2009 “acceleration” remained extant. They based their position primarily on a Florida case (which was recently overruled, as discussed *infra*). Tingvall Brief at 5, *et seq.*<sup>11</sup>

The Tingvalls' note is an installment payment contract for which the statute of limitations runs as to each installment as it comes due, unless the lender gives a notice of acceleration after default.<sup>12</sup> “Acceleration” refers to a lender's right to declare the principal balance of a note immediately due and payable upon the occurrence of an event of default.

---

<sup>11</sup> *Deutsche Bank Tr. Co. Ams. v. Beauvais*, No. 3D14-575, 2014 WL 7156961 (Fla. Dist. Ct. App. Dec. 17, 2014), *reversed in* 188 So. 3d 938, 953 (Fla. Dist. Ct. App. 2016).

<sup>12</sup> *Edmundson v. Bank of Am., N.A.*, 194 Wn. App. 920, 378 P.3d 272 (2016).

But the Washington Legislature, when it created the non-judicial foreclosure proceeding under the DTA, has “taken away” the common law rules governing acceleration of secured notes. *See Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 375, 588 P.2d 1153 (1979) (“An examination of the legislation creating the statutory deed of trust provided for in RCW 61.24 reveals the act created a security instrument allowing for quicker realization of the security interest. In exchange, the remedies available in conventional mortgages allowing acceleration of the entire debt and deficiency judgments were taken away.” (emphasis added)).<sup>13</sup>

Patently, “acceleration” under the DTA is not “acceleration” as it operates in the common law outside the DTA. At common law, waiver of a notice of acceleration is left to the lender’s discretion. 46 Am. Jur. 2d *Bills and Notes* § 170, Westlaw (database updated Sept. 2016) (“The exercise of an option to accelerate is not irrevocable, and the holder of a note who has exercised the option of considering the whole amount due, may subsequently waive this right and permit the obligation to continue in force under its original terms for all purposes.”). At common law, a

---

<sup>13</sup> *Meyers Way Development Ltd. Partnership v. University Savings Bank*, 80 Wn. App. 655, 669-70, 910 P.2d 1308 (1996), does not assist the Tingvalls’ argument. *Meyers* recognized that the DTA does not eliminate the right of the creditor to declare acceleration, but it does not support the Tingvalls’ argument that an acceleration declared for the purposes of a non-judicial foreclosure continues forever. *Meyers* did not address the structure of non-judicial foreclosure proceedings or the borrower’s right of reinstatement.

defaulted borrower could not require or force a lender to reinstate an accelerated loan.

The DTA, in contrast, removes the lender's common law discretion to waive or not waive acceleration, and guarantees the borrower's right to reinstate at any time prior to 11 days from the scheduled sale date.<sup>14</sup> Moreover, these "acceleration/reinstatement" rules apply to each non-judicial foreclosure proceeding. The DTA expressly provides for reinstatement in each separate non-judicial foreclosure proceeding.<sup>15</sup> The DTA is clear that the process starts over if a prior non-judicial proceeding is discontinued or abandoned. A new non-judicial foreclosure proceeding provides the borrower and lender with the same rights, regardless of what occurred in any prior discontinued proceeding.

In short, in place of the common law concept of acceleration, the DTA mandates that a borrower's right to reinstate a loan exists with each non-judicial foreclosure proceeding commenced by a lender. As such, a lender's notice of "acceleration" under the DTA can likewise only apply to a specific non-judicial foreclosure proceeding, and does not carry over to the next. The DTA statutory reinstatement right does not disappear

---

<sup>14</sup> Even if the common law of acceleration applied, the discontinuance or abandonment of a DTA non-judicial foreclosure proceeding would operate as a waiver of a prior acceleration notice.

<sup>15</sup> RCW 61.24.040(2): "You may reinstate your Deed of Trust and the obligation secured thereby at any time up to and including the . . . day of . . . [11 days before the sale date], by paying the amount set forth or estimated above and by curing any other defaults described above." (Brackets and ellipses in original.)

simply because acceleration was declared in an earlier uncompleted proceeding.

This feature of non-judicial foreclosure proceedings compels the conclusion that when a non-judicial foreclosure proceeding is discontinued or abandoned, the lender and borrower return to the status quo. The lender can again start another non-judicial foreclosure proceeding and give a new notice of acceleration, and the borrower again has a statutory right to reinstate (until 11 days before the sale date).

This interpretation of the DTA necessarily follows from the structure of non-judicial foreclosure proceedings established by the DTA. Under the DTA, a “notice of sale” must be sent to the borrower each time a lender commences the non-judicial foreclosure process. RCW 61.24.040.<sup>16</sup> RCW 61.24.040 prescribes that the borrower be served with a notice of trustee’s sale “substantially in the following form” that expressly provides for reinstatement 11 days before the sale date, and only permits “acceleration” (*i.e.*, a required payment of the entire amount due) after that date.

The above-described real property will be sold to satisfy the expense of sale and the obligation secured by the Deed of Trust as provided by statute. The sale will be made without warranty, express or implied, regarding title, possession, or encumbrances on the . . . day of . . . The default(s) referred to in paragraph III must be cured by the . . . day of . . . (11 days before the sale date), to cause a

---

<sup>16</sup> A notice of default must also be sent, and other pre-conditions must be met, before the notice of trustee’s sale can be sent. *See* RCW 61.24.030.

discontinuance of the sale. The sale will be discontinued and terminated if at any time on or before the . . . day of . . . (11 days before the sale date), the default(s) as set forth in paragraph III is/are cured and the Trustee's fees and costs are paid. The sale may be terminated any time after the . . . day of . . . (11 days before the sale date), and before the sale by the Borrower, Grantor, any Guarantor, or the holder of any recorded junior lien or encumbrance paying the entire principal and interest secured by the Deed of Trust, plus costs, fees, and advances, if any, made pursuant to the terms of the obligation and/or Deed of Trust, and curing all other defaults.

RCW 61.24.040(1)(f) (emphasis added; ellipses in original). This form of DTA reinstatement and acceleration is reflected in the notice upon which the Tingvalls rely, set forth in the Tingvall Brief at pages 1-2.

It is therefore plain that each non-judicial foreclosure proceeding starts anew, and prior acts by the lender or borrower are treated as abandoned. With each new non-judicial foreclosure proceeding, the borrower has the full right of reinstatement until 11 days before a sale, regardless that borrower did not exercise this right in a prior proceeding.

The Tingvalls' argument fails to recognize that the DTA's forms of acceleration and reinstatement imposed by the legislature are controlling. Indeed, adopting the Tingvalls' argument leads to absurd results. Under the Tingvalls' argument, a borrower would find himself in a situation where the loan is simultaneously accelerated (per the initial acceleration

notice in a prior proceeding) yet, as the DTA expressly provides, not accelerated until 11 days before the sale date in a second proceeding.<sup>17</sup>

There is no need for this Court to adopt such an absurd and strained construction of the DTA, which would result in a defaulting borrower being simultaneously subject to a requirement to pay an “accelerated” loan balance and at the same time have the express statutory right to reinstatement by payment of only the delinquent amounts. Washington law rejects such absurd interpretations of statutes. *Crown Zellerbach Corp. v. Dep’t of Labor & Indus. of State of Wash.*, 98 Wn.2d 102, 107, 653 P.2d 626 (1982) (“We have consistently held that statutes should receive a sensible construction to effect the legislative intent and, if possible, to avoid unjust or absurd consequences.”) *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (“[A] court must not interpret a statute in any way that renders any portion meaningless or superfluous.” (quoting *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012))).

The Tingvalls’ argument also ignores the meaning of the words being used. “Acceleration” and “reinstatement” are opposite concepts in the world of defaulted notes. “Reinstatement” means that the borrower

---

<sup>17</sup> Thus, under the Tingvalls’ theory, a lender who gives a borrower a notice of a trustee’s sale that expressly states that payment of the arrearages—which is not payment of the “accelerated” amount—will reinstate the loan, is nevertheless deemed to still have kept the loan in “accelerated” status. That is directly contrary to what the lender has expressly told the borrower (as mandated by the DTA) in the written notice of trustee’s sale.

can reestablish the loan's installment payment terms, as provided in the loan documents, by paying only delinquent payments. "Acceleration" means the opposite: the loan *cannot* be paid in installments and the installment payment maturity date is eliminated; the entire debt is matured and immediately due. Nothing in the DTA suggests or compels the Court to adopt such an inherently self-contradictory interpretation.

The interpretation offered by Respondents is consistent with the statute's language and the structure of the non-judicial foreclosure proceeding, and gives meaning to the borrower's right to reinstate and the legislature's limitation on a lender's right to declare acceleration.

The proposition that the parties return to the status quo when foreclosure proceedings are discontinued or abandoned was recently adopted by the Florida courts with respect to judicial foreclosure proceedings. Although the Tingvalls cite *Deutsche Bank Trust Co. Americas v. Beauvais*, No. 3D14-575, 2014 WL 7156961 (Fla. Dist. Ct. App. Dec. 17, 2014), to support their argument, Tingvall Brief at 7-8, that case was recently reversed in an opinion rejecting the permanent acceleration theory and holding (in a judicial foreclosure case) that the parties returned to the status quo when the lawsuit was dismissed:

There was no obligation on the bank to take any action to "decelerate" this loan following dismissal of the first foreclosure action because the mortgage itself confirms that the installment nature of the loan continues even after acceleration and the filing of a foreclosure action:

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of . . . (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower . . . (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred. . . . Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred.

....

This provision, while addressing only a borrower's right to cure, confirms that after acceleration, the borrower is not obligated to pay the entire accelerated balance due to cure but, until a final judgment is entered, need only bring the loan current to avoid foreclosure. Stated another way, despite acceleration of the balance due and the filing of an action to foreclose, the installment nature of a loan secured by such a mortgage continues until a final judgment of foreclosure is entered and no action is necessary to reinstate it via a notice of "deceleration" or otherwise. As our sister court has confirmed, "[a]fter the dismissal . . . the parties returned to the status quo that existed prior to the filing of the dismissed complaint." No further acts were necessary on the bank's part to "decelerate" this loan.

*Deutsche Bank Tr. Co. Ams. v. Beauvais*, 188 So. 3d 938, 946-47 (Fla. Dist. Ct. App. 2016) (emphases and citations omitted; ellipses and brackets in original); *see also Matos v. Bank of New York*, 2014 WL 3734578 at \*1 (S.D. Fla. July 28, 2014) ("The statute of limitations has not run on this foreclosure action due to the dismissal of the prior foreclosure action, which decelerated the notice of acceleration.");

*Olympia Mortg. Corp. v. Pugh*, 774 So. 2d 863, 866 (Fla. Dist. Ct. App. 2000) (“By voluntarily dismissing the [first foreclosure action], Olympia in effect decided not to accelerate payment on the note and mortgage at that time.”). The return to the status quo if a proceeding is not completed is even more clear under Washington’s DTA, because the DTA expressly requires a creditor to go through all the steps of the non-judicial foreclosure if a prior foreclosure was not completed, and expressly provides the borrower with the same “acceleration/reinstatement” rights for each proceeding.

**J. The Alleged Acceleration Notice Was Not Unequivocal Enough to Constitute Acceleration.**

The Tingvalls’ argument also fails under the applicable common law of acceleration. The common law of Washington, like most states, requires that an acceleration be made in a clear and unequivocal manner. “Under Weinberg, acceleration must be made in a *clear and unequivocal manner* which effectively apprises the maker that the holder has exercised his right to accelerate the payment date.” *Glassmaker v. Ricard*, 23 Wn. App. 35, 38, 593 P.2d 179 (1979) (emphasis added). The creditor must perform some “clear, unequivocal affirmative act evidencing his intention to take advantage of the accelerating provision.” *Hassler v. Account Brokers of Larimer Cty., Inc.*, 274 P.3d 547, 553 (Colo. 2012) (quoting *Moss v. McDonald*, 772 P.2d 626, 628 (Colo. App. 1988)). This principle is consistent with that adopted by a majority of other states. *See, e.g.*, 11

Am. Jur. 2d *Bills and Notes* § 169; *United States v. Feterl*, 849 F.2d 354, 357 (8th Cir. 1988);<sup>18</sup> *KLXX, Inc. v. Stallion Music, Inc.*, 610 P.2d 1385, 1388-89 (Utah 1980); *State Sec. Sav. Co. v. Pelster*, 296 N.W.2d 702, 706 (Neb. 1980).

As the quoted portion of the notice in the Tingvall Brief demonstrates, the notice of acceleration is accompanied by a statement explaining the borrower's right to reinstate. Tingvall Brief at 1-2. In fact, the right to reinstate is guaranteed by the DTA. And when a second non-judicial foreclosure proceeding is started, the same acceleration/reinstatement rules would apply. Even under the common law rules, words of acceleration are not considered in a vacuum. A notice that speaks both of acceleration and reinstatement in the same paragraph is not a clear and unequivocal statement of acceleration.

## V. CONCLUSION

The Tingvalls' Chapter 11 Plan is a federal court judgment and contract that is binding on the Tingvalls and enforceable in Washington State courts. The Tingvalls surrendered their legal rights to oppose foreclosure of their home when the Bankruptcy Plan they proposed was confirmed. The Tingvalls obtained the benefits of a Plan and must comply

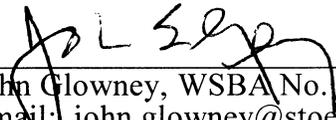
---

<sup>18</sup> *Feterl*, 849 F.2d at 357 (“Because acceleration clauses are generally for the benefit of the creditor, courts tread lightly on the creditor’s freedom to decide whether acceleration is immediately necessary upon the occurrence of a default. Therefore, acceleration is seldom implied, and courts usually require that an acceleration be exercised in a manner so clear and unequivocal that it leaves no doubt as to the lender’s intention and no doubt that the borrower is apprised that the option has been exercised.” (citation omitted)).

with its burdens. The applicable statute of limitations is the statute of limitations for the Tingvalls' Chapter 11 Plan, which will not expire until 2018 at the earliest. For these reasons, the trial court properly granted summary judgment and its decision should be affirmed.

Respectfully submitted this 19<sup>th</sup> day of October 2016.

STOEL RIVES LLP



---

John Glowney, WSBA No. 12652  
Email: john.glowney@stoel.com  
Vanessa Soriano Power, WSBA No. 30777  
600 University Street, Suite 3600  
Seattle, WA 98101  
Tel: 206-624-0900  
Attorneys for Defendant/Respondent USB

**CERTIFICATE OF SERVICE**

I certify that I caused to be served a true and correct copy of the foregoing **RESPONDENT USB AS TRUSTEE'S APPELLATE RESPONSE BRIEF** on the following counsel of record in the manner specified below:

Douglas S. Tingvall  
Attorney at Law  
8310 154th Avenue SE  
Newcastle, WA 98059-9222

Email: Re-law@comcast.net  
*Attorney for Plaintiffs* Douglas S.  
Tingvall and Augusta Rego-Barros

DATED at Seattle, WA: October 19, 2016.

STOEL RIVES, LLP



\_\_\_\_\_  
Teresa Bitseff, Practice Assistant

FILED  
CLERK OF SUPERIOR COURT  
COUNTY OF KING  
OCT 19 11 21 AM '16