No. 22-0910

IN THE SUPREME COURT OF TEXAS

Deysi R. Santos,

Petitioner,

v.

Yellowfin Loan Servicing Corp.,
as Successor in Interest to First Franklin,

Respondent.

On Appeal from the Fourteenth Court of Appeals
in Houston, Texas
Case No. 14-21-00151-CV

PETITIONER DEYSI R. SANTOS'S REPLY BRIEF ON THE MERITS

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The two-year statute of limitations in Section 51.003(a) of the Texas Property Code bars Yellowfin from pursuing Ms. Santos's unpaid debt more than twelve years after foreclosure of her home. Section 51.003(a)'s text plainly covers deficiency actions brought by non-foreclosing junior lenders, and to hold otherwise, as Yellowfin urges, would require this Court to add words to the statute that the Legislature did not include.

Even if Section 51.003(a) doesn't apply, Yellowfin's suit remains untimely under any other statute of limitations. That is because Yellowfin's cause of action accrued at foreclosure—when the loan was accelerated. No relevant limitations period permits a lender to wait for twelve years to recover a debt remaining after a foreclosure sale, as Yellowfin seeks to do here.

Finally, even if Yellowfin's suit is not barred by any statute of limitations, it has waived its right to collect Santos's debt.

I. Yellowfin's suit to recover unpaid debt more than twelve years after foreclosure is time-barred.

A. Section 51.003(a) bars this action.

Section 51.003(a)'s plain language covers actions brought by a junior creditor to recover post-foreclosure debt. Although Yellowfin accuses Santos of "seeking to rewrite the statute," Resp. Br. 14, it never even discusses Section 51.003(a)'s text. The reason for Yellowfin's failure to do business with

the statute's words is clear: Section 51.003(a) unquestionably encompasses suits brought by the junior creditor after the senior creditor's foreclosure.

Recall that Section 51.003(a) applies to "*any* action brought to recover the deficiency" after a foreclosure sale. Tex. Prop. Code § 51.003(a) (emphasis added). It does not say "any action brought by the senior lienholder," or "any action brought by the foreclosing party," or "indebtedness remaining on the note on which the lender foreclosed." It says "any action," period.

And Section 51.003(a) defines "deficiency" as the difference between "the price at which real property is sold at a foreclosure sale" and "the indebtedness secured by the real property." As our opening brief explains (at 13-16), Yellowfin's suit falls squarely within that definition. Yellowfin seeks to recover the indebtedness that was secured by Deysi Santos's home before it was sold at a foreclosure sale. Yellowfin's suit is thus for "the amount remaining on a debt after applying the proceeds realized at a foreclosure sale," which is "one of the very definitions of 'deficiency.'" *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 4 (Tex. 2014) (citing Black's Law Dictionary 514 (10th ed. 2014)). Courts have also referred to a junior lender's post-foreclosure debt in particular as "a deficiency" and its suit to recover that debt as seeking a "deficiency judgment." *See Roseleaf Corp. v. Chierighino*, 378 P.2d 97, 99, 102 (Cal. 1963).

It is not the "court's function to question the wisdom of these statutes or to seek to rewrite them based upon [its] view of public policy." *Sowell v. Int'l*

Ints., L.P., 416 S.W.3d 593, 600 (Tex. App.—Houston [14th Dist.] 2013, pet. denied 2013). If the Legislature had intended to limit Section 51.003(a) to only actions brought to recover the foreclosing lender's debt, it could have done so. Other legislatures have. For instance, California's anti-deficiency statute prevents recovery of deficiencies remaining only on a note "under [whose] power of sale" the foreclosure took place. Cal. Civ. Proc. Code § 580d(a). The California Supreme Court has accordingly held that the statute, by its text, applies only to post-foreclosure debts remaining on "the instrument securing the note sued upon." *Roseleaf*, 378 P.2d at 101. Here, no similar limiting language appears. And "changing the meaning of the statute by adding words to it … is a legislative function, not a judicial function." *City of Rockwall v. Hughes*, 246 S.W.3d 621, 631 (Tex. 2008).

In sum, Yellowfin's brief does not (because it cannot) dispute that Section 51.003(a)'s plain text covers this suit. That's all this Court needs to say to reverse.

2. Santos's plain-language understanding of Section 51.003(a) does not conflict with standard mortgage-law principles. Yellowfin next contends that Santos's understanding of Section 51.003(a) "discard[s]" standard mortgage-law concepts. Resp. Br. 8. But Santos's argument dovetails with all those concepts.

First, Yellowfin emphasizes that "[w]here there is a debt secured by a note, which is in turn, secured by a lien, the note and the lien constitute

separate obligations." Resp. Br. 8 (quoting *Aguero v. Ramirez*, 70 S.W.3d 372, 374 (Tex. App.—Corpus Christi 2002, pet. denied)). We do not disagree, but that is beside the point. The note and the lien *do* constitute separate obligations. So, we acknowledge that the junior lienholder may seek to recover the remaining debt on a note even after foreclosure extinguishes its lien. Santos simply argues that the lender must bring that action within the limitations period. *See* Opening Br. 25-26. Similarly, we do not contest that a lender may sue to recover a debt on a note without first foreclosing. *See* Resp. Br. 18 (citing *Carter v. Gray*, 81 S.W.2d 647, 648 (Tex. 1935)). Our point is only that when a foreclosure *does* occur, the foreclosure triggers the limitations period because at foreclosure, the full amount of the debt becomes due. *See* Opening Br. 28-29.

Yellowfin also suggests that Santos's interpretation of Section 51.003 conflicts with *Holy Cross Church of God in Christ v. Wolf*, which held that "[i]f a note or deed of trust secured by real property contains an optional acceleration clause," "the action accrues only when the holder actually exercises its option to accelerate." 44 S.W.3d 562, 566 (Tex. 2001). But as our opening brief explained (at 30-31), Santos's interpretation of Section 51.003(a) does not conflict with *Holy Cross* because the rule espoused there applies only to notes "secured by real property," 44 S.W.3d at 566. After foreclosure on Santos's home, the junior lien on the property was extinguished and the note was no longer secured by real property. *Wesley v.*

Amerigo, Inc., No. 10-05-00041-CV, 2006 WL 22213, at *2 (Tex. App.—Waco Jan. 4, 2006, no pet.) (mem. op.). Yellowfin has acknowledged as much. 1CR216 ("Yellowfin's Note is not 'secured by' anything and has not been since the November 6, 2007 foreclosure sale.").

Yellowfin also emphasizes *Holy Cross*'s reasoning that no "affirmative action towards foreclosure" is required to accelerate "a note secured by real property" because that would "mean the foreclosure posting or sale would be the triggering event bringing about the right to hold a foreclosure sale." 44 S.W.3d at 570; *see* Resp. Br. 9. Once again, though, that reasoning does not apply *post*-foreclosure. Before foreclosure, no affirmative steps toward foreclosure are required beyond "(1) notice of intent to accelerate, and (2) notice of acceleration" to accelerate the loan. *Holy Cross*, 44 S.W.3d at 566. *Holy Cross*'s point was that the loan had been accelerated *prior* to foreclosure once those two requirements were met. *Id.* at 570. That observation says nothing about what happens to the loan *after* foreclosure, which is the relevant question here. As explained earlier, *see* Opening Br. 26-27, foreclosure in fact accelerated the junior loan.

Yellowfin complains that applying this statute of limitations to all lienholders would require it to monitor actions on the property securing its interests and prove the fairness of a foreclosure it did not conduct. Resp. Br. 7, 14. But Yellowfin's extratextual concerns cannot override Section 51.003's plain text. In any case, this "carefully crafted deficiency judgment statute

with its two-year limitations period and other protections for borrowers and creditors" "adds balance to the mortgagor-mortgagee relationship regarding deficiency judgments … by circumscribing mortgagees' rights to seek deficiency judgments and specifying rights that borrowers have regarding alleged deficiencies." *PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 554-55 (Tex. 2015). Section 51.003 thus "is intended to protect borrowers and guarantors," *Moayedi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 4-5 (Tex. 2014); *see* Opening Br. 15-16, not debt buyers like Yellowfin.

Yellowfin also overstates the supposed burdens on non-foreclosing lienholders. For instance, the burden to prove the offset under Section 51.003 rests on the borrower, not the lender (so that "burden" is no more on a non-foreclosing lender than on the foreclosing lender). *Brewer v. Compass Bank*, No. 05-20-00624-CV, 2022 WL 883908, at *6 (Tex. App.—Dallas Mar. 25, 2022, pet. denied). And parties not involved in the foreclosure sale—like guarantors, who do not even receive notice of the sale—can take advantage of Section 51.003's offset provision, regardless of the supposed difficulties of proof raised by Yellowfin. *Long v. NCNB-Texas Nat. Bank*, 882 S.W.2d 861, 865-66 (Tex. App.—Corpus Christi-Edinburg 1994, no pet.) ("The legislature clearly envisioned the prospect of guarantors defending suits for deficiency after they received no notice of the foreclosure sale.").

3. Stare decisis is irrelevant here. Yellowfin next asserts that because some Courts of Appeals have rejected Santos's argument, stare decisis

requires affirmance. Resp. Br. 10. That argument is badly misplaced. For starters, Yellowfin misunderstands stare decisis. It cites *Court of Appeals'* decisions while invoking the stare decisis effect of decisions issued by *this* Court. "Generally, the doctrine of stare decisis dictates that once *the Supreme Court* announces a proposition of law, the decision is considered binding precedent." *Sw. Bell Tel. Co., L.P. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008) (emphasis added). Decisions of the Courts of Appeals obviously don't bind this Court, *Dallas Area Rapid Transit v. Amalgamated Transit Union Loc. No. 1338*, 273 S.W.3d 659, 666 (Tex. 2008), as it is this Court's role to review the wisdom of those decisions, *see* Tex. R. App. P. 53.1; *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 386 (Tex. 1989) ("This court need not defend its opinions from criticism from courts of appeals; rather they must follow this court's pronouncements.").

In any case, the Court of Appeals' decisions cited by Yellowfin do not warrant any respect as to the issues here. One case cited by Yellowfin does not address the statute of limitations issue at all. *See Washington v. Yellowfin Loan Servicing Corp.*, 2022 WL 16646409, at *9 (Tex. App.—Fort Worth Nov. 3, 2022, no pet.) (mem. op.). The other two decisions, *Smith v. Yellowfin Loan Servicing Corp.*, 2023 WL 2596070 (Tex. App.—Dallas Mar. 22, 2023, no pet. h.) (mem. op.), and *Thompson v. Yellowfin Loan Servicing Corp.*, 2023 WL 17492 (Tex. App.—Houston [1st Dist.] Jan. 3, 2023, no pet. h.) (mem. op.), rely

largely on *Santos*—the decision under review—which says nothing about whether that decision is correct.

4. Santos's plain-text understanding of Section 51.003(a) is harmonious with other Texas statutes. The subject of Section 51.003 is deficiency judgments on foreclosed property. *House Research Organization*, Bill Analysis, Tex. H.B. 169 72d Leg., R.S. (1991). In addition to protecting borrowers against large deficiency judgments resulting from below-market prices paid at foreclosure sales, Section 51.003 guarantees that "*[a]ny action* by a lender to recover a deficiency would have to be brought within two years of the foreclosure sale." *Id.* (emphasis added). Section 51.003 sets forth a limitations period on a subject different from that of the "other law regarding limitations" with which Yellowfin claims Section 51.003 should be harmonized. *See* Resp. Br. 15-16. Texas Civil Practice & Remedies Code Section 16.004 establishes a limitations period for suits demanding specific performance on a contract for the conveyance of real property. And Texas Business & Commercial Code Section 3.118 establishes a limitations period for suits to recover on negotiable instruments generally. Harmonization with those statutes is therefore not relevant to Section 51.003's meaning.

And to the extent Section 51.003 cannot be harmonized with broader limitations periods for negotiable and non-negotiable instruments, Section 51.003(a)'s "more specific time period controls." *See Valdez v. Hollenbeck*, 465 S.W.3d 217, 227 (Tex. 2015); Opening Br. 23-24. This Court's decision in

Sowell confirms the point because there the court gave effect to Section 51.003, "the special provision," over Section 16.004, "the general provision." 416 S.W.3d at 599-600.

Nor does the 1997 amendment to Section 16.035, the statute of limitations for a suit for foreclosure or for the recovery of real property under a real-property lien, require a different result. That amendment just reworded "lien debt" as "real property lien" to clarify that all liens were governed by the more specific statute of limitations for liens, Section 16.035, rather than the more general statute of limitations to enforce a negotiable instrument, Section 3.118. *See* Texas Legis. Council, Summary of Enactments 75th Legislature 38 (1997). As the State Bar Committee comments on Section 3.118 observe, "because of their particular nature, the statute of limitations provisions of section 16.035 and 16.036 of the Texas Civil Practice and Remedies Code, relating to actions with respect to debts secured by liens on real property, and section 51.003 of the Texas Property Code, relating to actions to recover deficiencies after nonjudicial foreclosures, should be interpreted to control, in appropriate circumstances, over the provisions of section 3.118." Tex. Bus. & Com. Code § 3.118 cmt. (West Supp. 2021). The Legislature thus made clear that the more specific statute of limitations for real-property liens controlled over the more general statute of limitations for liens, just as Section 51.003(a)'s more specific limitations period for post-foreclosure deficiencies controls here instead of more general limitations

periods. *See* Opening Br. 23-24. And by enacting shorter statutes of limitations in Sections 16.035 and 51.003, the Legislature decided that actions related to foreclosure should be commenced sooner than should general, non-foreclosure-related actions for debt recovery.

5. Section 51.003(a) is a statute of limitations. We agree that "Section 51.003 does not create any new rights," *see* Resp. Br. 14, as it was the Note itself that granted the junior lender a security interest in Santos's home, 1CR8 ¶¶ 4, 9, and the right to "obtain a judgment … for any amounts owing under this Note," 1CR 9 ¶ 11. Section 51.003 just required the junior lender to seek "the unpaid balance of the indebtedness secured by the real property … within two years of the foreclosure sale." Tex. Prop. Code § 51.003(a).

Instead of creating a new basis for liability, Section 51.003(a) set the statute of limitations for an action arising from a person's liability emanating from another source, such as a promissory note or a guaranty agreement. *Sowell v. Int'l Interests, L.P.*, 416 S.W.3d 593, 597 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Section 51.003(a) thus "operate[s] as a statute of limitations," which is "intended to compel a party who possesses a right of action to exercise that right within a reasonable time after it accrues." *Trunkhill Cap., Inc. v. Jansma*, 905 S.W.3d 464, 467-68 (Tex. App.—Waco 1995, writ denied). Section 51.003 is clear that the cause of action accrues at the time of the foreclosure sale. *See* Tex. Prop. Code § 51.003(a); *Sowell*, 416 S.W.3d at 597 ("If the price at which real property is sold at a nonjudicial

foreclosure sale under section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action to recover this deficiency must be brought within two years of the foreclosure sale and is governed by section 51.003.").

6. Yellowfin's out-of-state caselaw does not support its position. Yellowfin cites a number of decisions from other jurisdictions, but not a single one discusses the statute of limitations to enforce a note after a foreclosure. *Collins Asset Grp., L.L.C. v. Alialy*, 139 N.E.3d 712 (Ind. 2020), did not involve foreclosure at all. Yellowfin cites *City Consumer Servs., Inc. v. Peters*, 815 P.2d 234, 237 (Utah 1991), for the unremarkable proposition that a junior creditor can still proceed against a debtor even if its debt becomes unsecured as a result of foreclosure by the senior creditor. Resp. Br. 12. Of course. The junior creditor could have proceeded against Santos, but it had to do so on a timely basis after the triggering event—foreclosure. And Section 51.003 provides the limitations period, which Yellowfin missed by more than ten years.

Yellowfin cites cases for the undisputed principle, *see supra* at 3-4, that actions on notes and foreclosure actions are separate and distinct remedies. Resp. Br. 12. We don't disagree that a mortgagee can file both a suit on the note and a foreclosure action. *See Kepler v. Slade*, 896 P.2d 482, 485-86 (N.M. 1995). And it's irrelevant that the holder of a mortgage had standing to file a foreclosure action on a mortgage securing a note that had been discharged

in bankruptcy. *See Deutsche Bank Nat'l Tr. Co. v. Holden*, 60 N.E.3d 1243, 1245 (Ohio 2016). The question here is not *whether* these actions can be brought, but *when*.

* * *

As just explained, Section 51.003(a) applies to all post-foreclosure debts remaining on junior loans. It should apply here especially. Recall that the junior and senior loans were made by the same lender on the same day. 1CR211-22, 8-18; RR5:14-24, 24:5-7. And under the junior loan's terms, a default on the senior loan was also a default on the junior loan. 1CR9 ¶ 11. The Court thus can resolve this case, if it wishes, without confronting the situation in which "Petitioner had remained current on all of her obligations" under the junior loan. Resp. Br. 18. If Section 51.003(a) is held not to apply in the circumstances here, lenders could circumvent that statute's constraints simply by requiring a borrower to take out two mortgages, *see* Opening Br. 23, contravening the Legislature's post-foreclosure protections for borrowers.

B. Even if Section 51.003(a) does not apply, foreclosure triggered any other applicable limitations period.

Even if Section 51.003(a) does not apply, Yellowfin's suit is untimely under any other applicable statute of limitations. *See* Tex. Civ. Prac. & Rem. Code § 16.004 (four-year limitations period after cause of action accrues on a debt); Tex. Bus. & Com. Code § 3.118 (six-year limitations period after the

note's accelerated due date). That is so because foreclosure accelerated the loan. *See* Opening Br. 28-31.

1. Foreclosure accelerated the Note. Our opening brief explains (at 28) that "acceleration" means nothing more than that the entire loan balance is due earlier than it otherwise would have been. And "when a junior lien is extinguished by foreclosure on a superior lien, the unpaid portion of the loan that was secured by the junior lien merely becomes an unsecured debt for which the lender may obtain a money judgment." *Poston v. Wachovia Mortg. Corp.*, No. 14-11-00485-CV, 2012 WL 1606340, at *2 (Tex. App.—Houston [14th Dist.] May 8, 2012, pet. denied); *see Marhaba Partners Ltd. P'ship v. Kindron Holdings, L.L.C.*, 457 S.W.3d 208, 215 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). At foreclosure, Yellowfin's predecessors-in-interest had the right to seek a money judgment for the *total* "unpaid portion of the loan," *Poston*, 2021 WL 1606340, at *2, not, alternatively, for only the amount of any installment payments missed to that point. That is acceleration, and it occurred at foreclosure. *See* Opening Br. 28.

Yellowfin's reliance on the rule that the limitations period "runs against each installment from the time it becomes due," *Gabriel v. Alhabbal*, 618 S.W.2d 894, 897 (Tex. App.—Houston [1st Dist.] 1981, writ denied), is beside the point, Resp. Br. 18-19. That rule applies before a loan is accelerated, not when, as here, the full balance has already come due—that is, has been accelerated—upon foreclosure. Accelerating the note has the same effect as

the note "matur[ing] under its own terms." *See Wells Fargo Bank, N.A. v. Express Limousines, Inc.*, No. 03-21-00266-CV, 2022 WL 3048235, at *3 (Tex. App.—Austin Aug. 3, 2022, no pet.) (mem. op.). And that is when the limitations period commences. *Id.*

Yellowfin responds that it could have continued to demand installment payments under the Note post-foreclosure. Resp. Br. 16. That's wrong. When there is an "unpaid amount of a debt after the foreclosure sale," "there is no mechanism available for the lender to collect the deficiency through non-judicial means." *Marhaba*, 457 S.W.3d at 215. If no "non-judicial means" are left to collect the deficiency, a lender cannot recover its debt by continuing to demand contractual payments under the Note. True, as Yellowfin points out, Resp. Br. 17, the lender in *Marhaba* had foreclosed, but that does not change the general principle relied on in *Marhaba* that a lender must recover any remaining debt through judicial means after foreclosure.

And that principle makes sense. The Note governs the payment terms of a loan secured by real property. Far from a "conversion" theory, Resp. Br. 18, Santos relies on black-letter law to conclude that after foreclosure, the loan was no longer secured by real property. Foreclosure extinguished the lien and rendered the note "an unsecured debt." *Poston*, 2012 WL 1606340, at *2.

2. Yellowfin's predecessors-in-interest could have sought the excess proceeds from the foreclosure sale. That Yellowfin's predecessors-in-

interest could have sought the excess proceeds from the foreclosure sale confirms that foreclosure accelerated the loan. As we have explained, surplus proceeds remaining after a foreclosure sale are distributed to inferior lienholders. *Conversion Props., L.L.C. v. Kessler*, 994 S.W.2d 810, 813 (Tex. App.—Dallas 1999, pet. denied); *see Haddington Fund, LP v. Kidwell*, 2022 WL 100111, at *9 (Tex. App.—Dallas Jan. 11, 2022, pet. denied) (mem. op.) (noting that a post-foreclosure surplus must be "distributed in accordance with the deed of trust").

That the junior lienholder has a right to surplus proceeds after foreclosure means that the loan has been accelerated. Even if a borrower were up to date on installment payments for the junior loan, the junior lender would still receive surplus proceeds up to the entire amount of its debt after foreclosure. That confirms that the entire balance has come due and foreclosure has accelerated the junior loan.

So, because Yellowfin's predecessor (the original holder of the junior indebtedness) was entitled to seek the full amount remaining on the accelerated junior loan at foreclosure, that is when its cause of action accrued. *See Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990). Recall that Section 16.004(a)(3) provides that a suit on a "debt" must be brought "not later than four years after the day the cause of action accrues." Tex. Civ. Prac. & Rem. Code § 16.004(a)(3). Yellowfin brought suit twelve years after its cause of action accrued at foreclosure, so its suit is

untimely under Section 16.004's four-year limitations period. Alternatively, Section 3.118 provides that a suit on a negotiable instrument must be brought six years after the note's accelerated due date. Tex. Bus. & Com. Code § 3.118. Because the accelerated due date here was at foreclosure, Yellowfin's suit is untimely under that section, too.

II. Yellowfin has waived any collection right that it (or its predecessors) may once have had.

Our opening brief explains (at 32-36) that if even the applicable statute of limitations does not bar Yellowfin's claim, Yellowfin and its predecessors-in-interest waived any acceleration rights by waiting over twelve years to assert those rights. Yellowfin responds by pointing to provisions in the Note that permitted the lender to waive or delay enforcement of its rights under the Note. That argument runs headlong into this Court's precedent, which recognizes that "a party's rights under a nonwaiver provision may indeed be waived expressly or impliedly." *Shields Ltd. v. Boo Nathaniel Bradberry & 40/40 Enters.*, 526 S.W.3d 471, 482-83 (Tex. 2017). A party waives a right notwithstanding a nonwaiver provision when it "intentionally engage[s] in conduct inconsistent with claiming the right to enforce the nonwaiver agreement." *Id.* at 485.

That standard has been met here. Contrary to Yellowfin's assertion, *see* Resp. Br. 19-21, this case involves not a simple delay in enforcement but rather an intentional failure by the holders of the junior indebtedness to

contact Santos or inform her whether any balance was still outstanding after foreclosure.

We appreciate that "engaging in the very conduct disclaimed as a basis for waiver is insufficient as a matter of law to nullify the nonwaiver provision." *Shields*, 526 S.W.3d at 484-85. But in the provision here, Santos waived only "notice of … demand for payment (subject to any right you may have to cure your default), waiver, delay and all other notices or demands in connection with this Note," and acknowledged that the lender "may waive or delay the enforcement of our rights under this Note without waiving or otherwise affecting such rights." 1CR9 ¶ 13. Yellowfin and its predecessors did not simply delay enforcement of their rights or fail to provide notice of waiver or delay; instead, as a string of different creditors acquired the Note, no creditor even attempted to discover Santos's address or inform her where her payments should be made.

The history of this case shows how these actions were inconsistent with enforcement of the Note. After the foreclosure sale forced Santos to move out of her home, no creditor informed her whether there was a balance outstanding on her second loan until a lawsuit was filed over twelve years later. RR23:10-15. The Foreclosure Sale Deed showed that the property was sold at the foreclosure sale for more than the amount that was borrowed on the senior loan. 1CR121. Typically, those surplus proceeds are distributed to inferior lienholders, *Conversion Props., L.L.C. v. Kessler*, 994 S.W.2d 810, 813

(Tex. App.—Dallas 1999, pet. denied), but there are no records of how much of the surplus funds were applied to the junior loan, 1CR121.

Instead of claiming the surplus proceeds to which it was entitled after the foreclosure sale, the junior lienholder intentionally chose eventually to sell its rights under the Note, 1CR53-55, and there are now no records of what happened to the excess proceeds, RR24:9-14. Because the junior lienholder "elected not to enforce any rights arising under" the Note at a time when funds were available, it waived its right to enforce those rights at a later time when records of those proceeds were no long available because of its "intentional conduct inconsistent with claiming that right." *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643-44 (Tex. 1996) (holding that defendants had established waiver where plaintiff "had elected not to enforce any rights arising under" the agreement between the parties).

* * *

At the end of the day, this Court need not confront the equities of this case under the waiver doctrine. Section 51.003 was the Legislature's way of balancing those equities in a post-foreclosure deficiency collection action. In no uncertain terms, it decided that a two-year limitations period was the best way to "protect defendants and the courts" from "the loss of evidence, … fading memories, [and] disappearance of documents." *See Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990). This Court should

vindicate that legislative decision by honoring Section 51.003(a)'s plain terms.

PRAYER FOR RELIEF

This Court should grant the petition for review, reverse the decision below, hold Yellowfin's claim time-barred, and remand the case for any necessary proceedings in the trial court.

Respectfully submitted,

/s/ Natasha R. Khan

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CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief complies with Texas Rule of Appellate Procedure 9.4(i)(2)(C) because it contains 4,463 words, excluding the parts exempted by Rule 9.4(i)(1), in 14-point Palatino Linotype font.

/s/ Natasha R. Khan
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Petition was served electronically on the following counsel of record on December 21, 2023, in compliance with Texas Rule of Appellate Procedure 9.5.

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