IN THE SUPREME COURT OF OHIO

Sharon Wilborn, et al.

Plaintiffs-Appellants,

v.

Bank One Corporation, et al.

Defendants-Appellees.

Case No. 2007-0558

On Appeal From The Seventh Appellate District Court of Appeals, Mahoning County, Ohio, Case No. 04-MA-182

MEMORANDUM OF DEFENDANTS-APPELLEES OPPOSING PLAINTIFFS-APPELLANTS' MOTION TO CONSOLIDATE APPEALS

In response to Plaintiffs-Appellants' motion to consolidate this case with *HomEq v. Schwamberger*, No. 2008-1284, Defendants-Appellees respectfully submit that the sensible course of action would be to decide *Wilborn* first and then decide whether to accept or decline jurisdiction over *HomEq* in light of the *Wilborn* decision. Consolidation of this case and *HomEq* would be inappropriate at the present time because the two cases are at different stages of the appellate process and consolidation could threaten to delay the resolution of *Wilborn* by several months or longer.

Wilborn and *HomEq* involve different parties and lending arrangements, brought years apart in different trial courts by the same group of plaintiffs' attorneys. Although the propositions of law are similar, the jurisdictional memorandum in the *HomEq* case states at the outset that "there are differences between the factual and legal issues in this case and *Wilborn*." *See HomEq*, No. 2008-1284, Plaintiffs-Appellants' Jurisdictional Memorandum at 3.

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SUPREME COURT OF OHIO

Wilborn has been fully briefed, argued, and submitted for disposition on the merits on March 11, 2008 (approximately four months ago); all that remains is for this Court to issue its opinion. In contrast, *HomEq* is a brand new appeal, filed in this Court on July 2, 2008 (just nine days ago). The parties in *HomEq* have only just begun to brief the threshold issue of this Court's discretionary jurisdiction and, in all likelihood, it will take more than a month before the jurisdictional issues are ready to be considered. Plaintiffs-Appellants' motion further assumes the Court inevitably will exercise discretionary jurisdiction over *HomEq* and order full briefing and argument on the merits while *Wilborn* remains pending. While the Court obviously is not under any obligation to accept *HomEq* or order full briefing and argument on the merits, the process contemplated in the motion could delay *Wilborn*'s resolution by another twelve months or more – at a time when borrowers and lenders alike across Ohio await clarification as to mortgage reinstatement provisions.

There is no apparent reason for this Court to delay the resolution of *Wilborn* while it considers *HomEq*. Although Plaintiffs-Appellants' motion contends that *HomEq* involves facts which "dramatically" support their arguments in *Wilborn*, the Fourth District Court of Appeals' *HomEq* opinion simply demonstrates that attorneys' fees provisions included in mortgage reinstatements or forbearance agreements are readily distinguished from one-sided, mandatory, and punitive fee-shifting provisions condemned in cases like *Miller v. Kyle* (1911), 85 Ohio St. 186. The Fourth District's opinion, which carefully follows this Court's precedents and other Ohio decisions, thus confirms that *HomEq* adds nothing new to the legal issues already briefed, argued, and submitted to the Court in *Wilborn*.

For these reasons, Defendants-Appellees respectfully urge the Court to deny the motion to consolidate.

Date: July 11, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 11, 2008, a true and correct copy of the foregoing document was served on the following counsel of record via third party carrier for overnight delivery:

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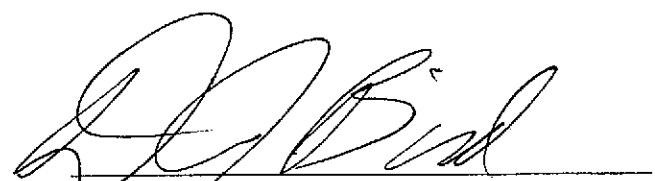

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