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IN THE SUPREME COURT OF OHIO

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SHARON WILBORN, *et al.*,

*Plaintiff-Appellants,*

v.

BANK ONE CORPORATION, *et al.*,

*Defendant-Appellees.*

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On Appeal from the Seventh District Court of Appeals, Mahoning Co., Ohio,  
Case No. 04-MA-182

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**MEMORANDUM OF DEFENDANTS-APPELLEES OPPOSING  
PLAINTIFFS-APPELLANTS' MOTION FOR RECONSIDERATION**

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Michael S. Miller (0009398)†  
Daniel R. Volkema (0012250)  
**VOLKEMA THOMAS LPA**  
140 East Town Street, Suite 1100  
Columbus, OH 43215  
Telephone: (614) 221-4400  
Facsimile: (614) 221-6010

*Counsel for Plaintiff-Appellants*

Stuart T. Rossman\*  
**NATIONAL CONSUMER  
LAW CENTER**  
77 Summer Street, 10th Floor  
Boston, MA 02110  
Telephone: (617) 542-8010  
Facsimile: (617) 542-8028

*Counsel for Plaintiff-Appellants*

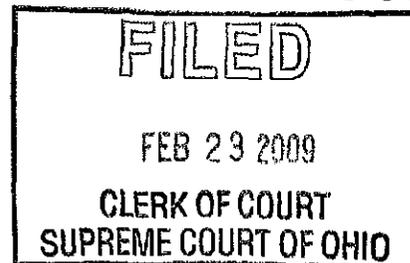
James C. Martin†\*  
Perry A. Napolitano\*  
Joseph E. Culleiton\*  
David J. Bird\*  
**REED SMITH LLP**  
435 Sixth Avenue  
Pittsburgh, PA 15219  
Telephone: (412) 288-7230  
Facsimile: (412) 288-3063

*Counsel for Defendant-Appellees Bank One, N.A.  
(Ohio), Ameriquest Mortgage Co., Wells Fargo  
Home Mortgage, Inc, Washtenaw Mortgage Co.,  
Mortgage Electronic Registration Systems, Inc.,  
and Chase Manhattan Mortgage Corp.*

† Counsel of Record

\* Admitted *pro hac vice*

*(List of counsel continued on next page)*



Seth R. Lesser\*\*

**LOCKS LAW FIRM PLLC**

110 East 55th Street, 12th Floor

New York, NY 10022

Telephone: (212) 838-3333

Facsimile: (212) 838-3735

*Counsel for Plaintiff-Appellants*

Benson A. Wolman (0040123)†

Rachel K. Robinson (0067518)

Paul B. Bellamy (0005314)

Judith B Goldstein (0069655)

**EQUAL JUSTICE FOUNDATION**

88 East Broad Street, Suite 1590

Columbus, OH 43215-3506

Telephone: (614) 221-9800

Facsimile: (614) 221-9810

*Counsel for Amici Curiae the Equal Justice Foundation, the Ohio State Legal Services Association, Southeastern Ohio Legal Services, Northeast Ohio Legal Services, Legal Aid of Western Ohio, Advocates for Basic Legal Equality, the Legal Aid Society of Columbus, the Legal Aid Society of Cleveland, and the Coalition on Homelessness and Housing in Ohio*

Nancy H. Rogers

*Attorney General of Ohio*

Benjamin C. Mizer†

*Solicitor General of Ohio*

Todd A. Nist (0079436)

*Assistant Solicitors*

30 East Broad Street, 17th Floor

Columbus, OH 43215

Telephone: (614) 466-8980

Facsimile: (614) 466-5087

*Counsel for amicus curiae the State of Ohio*

Bobbie L. Flynt (0066909)

**COMSTOCK, SPRINGER**

**& WILSON CO. LPA**

100 Federal Plaza East, Suite 926

Youngstown, OH 44503

Telephone: (330) 746-5643

Facsimile: (330) 746-4925

*Counsel for Defendant-Appellees*

*Bank One, N.A. (Ohio), et al.*

Stephen T. Bolton (0010994)

**MANCHESTER, BENNETT,**

**POWERS & ULLMAN**

201 E. Commerce Street, Atrium Level 2

Youngstown, OH 4503-1641

Telephone: (330) 743-1171

Facsimile: (212) 743-1190

*Counsel for Defendant-Appellees Bank One, N.A. (Ohio), et al.*

Lucia Nale†

Diana Swisher Andsager

**MAYER BROWN LLP**

71 South Wacker Drive

Chicago, IL 60606

Telephone: (312) 701-7074

Facsimile: (312) 706-8663

*Counsel for Defendant-Appellee Principal Residential Mortgage, Inc.*

Earle C. Horton (0010255)†

Brett E. Horton (0064180)

**HORTON & HORTON CO., LPA**

Tower at Erieview, Suite 1410

Cleveland, OH 44114

Telephone: (216) 696-2022

Facsimile: (216) 696-1995

*Counsel for FDIC as Receiver of Defendant-Appellee Washington Mutual Bank, FA (successor to Defendant Homeside Lending, Inc.)*

† Counsel of Record

\* Admitted *pro hac vice*

*(List of counsel continued on next page)*

Rick D. DeBlasis (0012992)†  
**LERNER, SAMPSON & ROTHFUSS**  
120 E. 4th Street, Suite 800  
Cincinnati, OH 45202  
Telephone: (513) 412-6614  
Facsimile: (513) 354-6765  
*Counsel for Defendant-Appellee Lerner,  
Sampson & Rothfuss*

† Counsel of Record

\*\* Admitted *pro hac vice*

**MEMORANDUM OF DEFENDANTS-APPELLEES OPPOSING  
PLAINTIFFS-APPELLANTS' MOTION FOR RECONSIDERATION**

In this case, the Court unanimously held that Ohio common law and public policy do not proscribe a provision in a residential mortgage contract requiring a defaulting borrower to pay a lender's reasonable attorney fees as a condition of terminating a foreclosure proceeding and reinstating a defaulted loan. 2009-Ohio-306, ¶ 1. Plaintiffs now attack the Court's decision, arguing that its opinion: (1) erroneously relies on federal law, not state law, to support its holding; (2) fails to accept Plaintiffs' pleaded facts as true; and (3) allows lenders to charge attorney fees under circumstances where borrowers do not have realistic options and are not adequately protected from over-reaching. Motion at 2-5. None of these arguments withstands reasoned analysis on the record before this Court. Because Plaintiffs' motion fails to show that the Court's decision is predicated upon an obvious error or a failure to consider fully an issue that was properly raised by the movant, the motion should be denied.

To begin with, Plaintiffs err badly when they contend that this Court's opinion is "based" on "provisions" of federal law authorizing the recovery of attorney fees as a condition of a mortgage reinstatement. Motion at 2-5. This is simply not an accurate or fair description of what this Court found or held. In its opinion, the Court did not purport to rely on any provision of federal law authorizing the recovery of attorney fees as a condition of a mortgage reinstatement or workout of a default. On the contrary, the Court based its decision squarely on Ohio common law and public policy, as set forth in cases such as *Leavans v. Ohio National Bank* (1893), 50 Ohio St. 591, *Miller v. Kyle* (1911), 85 Ohio St. 186, *Worth v. Aetna Casualty and Surety Co.* (1987), 32 Ohio St. 3d 238, and *Nottingdale Homeowners' Association, Inc. v. Darby* (1987), 33 Ohio St. 3d 32. After carefully reviewing these and other Ohio precedents respecting the enforcement of contractual agreements to pay attorney fees, the Court drew a clear and reasonable distinction between, on the one hand, a provision in a residential mortgage contract

requiring the payment of reasonable attorney fees as a condition of terminating a foreclosure and reinstating a defaulted loan and, on the other hand, the type of one-sided, mandatory fee-shifting provisions declared invalid in *Miller* and other cases. In the Court's words,

a mortgage reinstatement provision in a residential mortgage agreement creates no obligation on a defaulting borrower to pay a lender's attorney fees until the borrower exercises his or her choice to reinstate. Thus, the borrower's obligation to pay such fees does not arise solely as a consequence of the lender-initiated foreclosure action. Instead, the obligation arises only upon the defaulting borrower's voluntary exercise of the contractual right to reinstate the mortgage loan, a right gained in exchange for the lender's surrender of the present right to foreclosure. Thus, reinstatement is not the enforcement of a debt obligation, and the public-policy concerns expressed in *Miller* and *Leavans* regarding the imposition of a penalty against a debtor upon default have no relevance.

2009-Ohio-306, ¶ 19 (footnote omitted); *see also id.*, ¶ 18. ("The defaulting borrower's agreement to pay the lender's attorney fees incurred in connection with the foreclosure proceedings is a reasonable exchange for the right to require the lender to reinstate the defaulted mortgage loan and to forbear the lender's legal rights to foreclose, be presently paid in full, and sever the relationship with the defaulted borrower."). This distinction plainly did not depend on any federal statute or policy but rather was a straightforward recognition of the options that a defaulting borrower has under Ohio law and the benefits that a borrower receives when he or she voluntarily elects to exercise a reinstatement right or work out a default by means outside of foreclosure litigation.

The Court further considered and rejected Plaintiffs' arguments that their contractual agreements to pay attorney fees in connection with reinstatements and alternate workouts were contrary to Ohio common law and public policy because they were part of unconscionable contracts of adhesion that involved no "realistic choice" as to terms that unreasonably favored one party. 2009-Ohio-306, ¶¶ 20-36. Contrary to Plaintiffs' motion at 3-4, the Court's analysis of this issue likewise did not turn on any provision of federal law authorizing the recovery of

attorney fees in connection with mortgage reinstatements or workout; nor did the Court's opinion disregard Plaintiffs' pleaded facts. Indeed, as the Defendants noted in their briefs and oral arguments to the Court, Plaintiffs' complaint is devoid of allegations suggesting that Plaintiffs lacked bargaining power in dealing with their lenders over reinstatements and workouts and were compelled by their lenders to accept terms that were unreasonable. Notwithstanding these omissions, this Court addressed their "unconscionability" contention.

Moreover, in addressing the unconscionability issue, the Court took Plaintiffs' arguments at face value and examined whether attorney fee provision in their mortgage loan documents reflected the kind of one-sided bargain that Ohio law might condemn. As the Court's analysis reveals, however, no "unconscionability" conclusion is possible on this record given the express terms of the fee provision and how the provision came to be included in the Plaintiffs' contracts.

Here, Plaintiffs' own mortgage loan documents demonstrate that this is not a case where an attorney fee provision has been "incorporated into an ordinary contract, lease, note or other debt instrument ... by the creditor or a similar party ... in the sole interest of such party." *Compare* 2009-Ohio-306, ¶¶ 20-36 *with* *Worth*, 32 Ohio St. 3d at 242-43. The record shows that the language of the attorney fee provision is based on Uniform Instruments promulgated by the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac"). *See* 2009-Ohio-306, ¶¶ 3, 20-22, 35, 37 & nn.1, 4. While the history of these Uniform Instruments and Fannie Mae and Freddie Mac certainly was relevant to this Court's "unconscionability" holding, federal law did not, in any respect, provide the basis for the legal conclusion the Court reached. Rather, since the Uniform Instruments' drafting process involved numerous sophisticated parties with competing interests and significant bargaining power, the attorney fee provision was not the kind of one-sided, unbargained for provision that Ohio common law and public policy might otherwise condemn. 2009-Ohio-306,

¶ 38 (recognizing that Ohio public policy “strongly favors the use of these uniform mortgage forms” and that declaring some part of them unenforceable would harm Ohio borrowers).

Finally, Plaintiffs miss the mark when they contend that this Court’s decision will allow lenders to charge attorney fees under circumstances where borrowers do not have realistic options and are not adequately protected from over-reaching. Motion at 4-5. As with Plaintiffs’ other reconsideration arguments, this assertion erroneously assumes that the Court’s opinion hinges on some federal statute authorizing the recovery of attorney fees. Further, this Court’s holding is a narrow one, relating only to certain loan reinstatements, and the Court was careful to note that only reasonable attorney fees are recoverable if the provision is enforced. The Court’s opinion thus provides the protections that prospective borrowers might need.

In reality, then, the Court’s opinion fairly and accurately reflects the record, Ohio common law precedents, and established public policies; it relies on relevant judicial opinions and other legal authorities which are routinely considered in the context of a motion to dismiss; and it responds fully and completely to arguments raised and addressed in the briefs of the parties and their *amici*. For these reasons, Defendants-Appellees respectfully urge the Court to deny the motion for reconsideration. *See* S.Ct. Prac. R. XI(2) (a motion for reconsideration “shall not constitute a reargument of the case”); *State ex rel. Shemo v. Mayfield Hts.* (2002), 96 Ohio St.3d 379, 380 (motion denied to extent movant simply argued with logic of opinion and sought to re-litigate issues previously briefed); *see also S & P Lebos, Inc. v. Ohio Liquor Control Comm.* (Ohio App. 10th Dist. 2005), 163 Ohio App. 3d 827, 829 (reconsideration standard is “obvious error” or failure to consider fully issue that was raised previously).

Date: February 20, 2009

Respectfully submitted,



James C. Martin\*  
Perry A. Napolitano\*  
Joseph E. Culleiton\*  
David J. Bird\*  
**REED SMITH LLP**  
435 Sixth Avenue  
Pittsburgh, PA 15219  
Telephone: (412) 288-7230  
Facsimile: (412) 288-3063

\* admitted *pro hac vice*

Bobbie L. Flynt (0066909)  
**COMSTOCK, SPRINGER & WILSON CO. LPA**  
100 Federal Plaza East, Suite 926  
Youngstown, OH 44503  
Telephone: (330) 746-5643  
Facsimile: (330) 746-4925

Stephen T. Bolton (0010994)  
**MANCHESTER, BENNETT, POWERS & ULLMAN**  
201 E. Commerce Street, Atrium Level  
Youngstown, OH 44503-1641  
Telephone: (330) 743-1171

*Counsel for Defendant-Appellees Bank One, N.A. (Ohio), Ameriquest Mortgage Co., Wells Fargo Home Mortgage, Inc, Washtenaw Mortgage Co., Mortgage Electronic Registration Systems, Inc., and Chase Manhattan Mortgage Corp.*



Lucia Nale\*  
Diana Swisher Andsager\*  
**MAYER BROWN LLP**  
71 South Wacker Drive  
Chicago, IL 60606  
Telephone: (312) 701-7074  
Facsimile: (312) 706-8663

*Counsel for Defendant-Appellee Principal Residential Mortgage, Inc.*

*Rick D. DeBlasis / sgs w/ permission*

Rick D. DeBlasis (0012992)

**LERNER, SAMPSON & ROTHFUSS**

120 E. 4th Street, Suite 800

Cincinnati, OH 45202

Telephone: (513) 412-6614

Facsimile: (513) 354-6765

*Counsel for Defendant-Appellee Lerner, Sampson &  
Rothfuss*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 20, 2009, a true and correct copy of the foregoing document was served on the following counsel of record via third party carrier for overnight delivery:

Michael S. Miller, Esq.  
Daniel R. Volkema, Esq.  
**Volkema, Thomas, LPA**  
140 E. Town Street, Suite 1100  
Columbus, OH 43215

*Counsel for Plaintiffs-Appellants*

Stuart Rossman, Esq.  
**National Consumer Law Center**  
77 Summer Street, 10<sup>th</sup> Floor  
Boston, MA 02110

*Counsel for Plaintiffs-Appellants*

Seth R. Lesser, Esq.  
**Locks Law Firm, PLLC**  
110 East 55<sup>th</sup> Street, 12<sup>th</sup> Floor  
New York, NY 10022

*Counsel for Plaintiffs-Appellants*

Rachel K. Robinson  
Paul B. Bellamy  
Judith B Goldstein  
**Equal Justice Foundation**  
88 East Broad Street, Suite 1590  
Columbus, OH 43215-3506

*Counsel for Amici Curiae The Equal Justice Foundation, et al.*

Nancy Hardin Rogers,  
*Attorney General of Ohio*  
Benjamin C. Mizer, *State Solicitor*  
Todd A. Nist, *Assistant Solicitor*  
30 East Broad Street, 17th Floor  
Columbus, OH 43215

*Counsel for Amicus Curiae the State of Ohio*



David J. Byrd  
*An Attorney for Defendants-Appellees  
Bank One, N.A., et al.*