

ORIGINAL

IN THE SUPREME COURT OF OHIO

U.S. BANK NATIONAL ASSOCIATION

Plaintiff-Appellant

vs.

WORLEY V. PERRY, ET AL.,

Defendants-Appellees

Supreme Court Case No. 11-0170

On Appeal From Cuyahoga County  
Court of Appeals, Eighth Appellate  
District

Court of Appeals  
Case No. CA-10-094757

MEMORANDUM OF THE LEGAL AID SOCIETY OF CLEVELAND AND SOUTHEASTERN OHIO  
LEGAL SERVICES AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEES WORLEY V.  
PERRY AND DOROTHY PERRY

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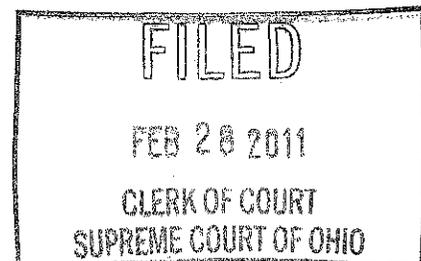
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## STATEMENT OF INTEREST OF THE AMICI CURIAE

The Legal Aid Society of Cleveland, founded in 1905, is the law firm for low-income families in Northeast Ohio. Legal Aid's mission is to secure justice and resolve fundamental problems for those who are low income and vulnerable by providing high quality legal services and working for systemic solutions that empower those we serve. The attorneys of The Legal Aid Society of Cleveland represent clients in civil law cases and primarily address issues of consumer law, housing law, domestic relations, immigration, community development, health, education, work and income. Defending consumers in foreclosure litigation has been and continues to be a significant part of Legal Aid's practice, and a great many of these cases are in Cuyahoga County's Court of Common Pleas.

Southeastern Ohio Legal Services (SEOLS) is an LSC-funded legal services program whose mission is to act as general counsel to our rural client community throughout 30 rural counties in SE Ohio and as such, to provide the highest quality legal services to our clients toward the objective of enabling poor people to assert their rights and interest. Helping distressed homeowners defend against foreclosure by representing them in litigation and mediation settings is currently a main focus within SEOLS as a priority issue as well. As such, SEOLS joins The Legal Aid Society of Cleveland on this *amicus curiae* brief and its assertion that the issues presented by the lender are not issues of public or great general interest.

**I. STATEMENT OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

**A. Appellant's case is not of public or great general interest because *Perry* does not harm prudent lenders or trustees who do not wait three years before recording the assignment of the mortgage.**

The main "issue for determination" before this Court is whether the appeal by U.S. Bank, N.A. as Trustee for Credit Suisse First Boston, CSFB 2005-12 ("U.S. Bank") "presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties."<sup>1</sup> U.S. Bank's claims of this case rocking the foundation of 89,000 foreclosures and being the most important issue in a century is beyond hyperbole: it is the legal equivalent of a person shouting the end of the world is near. But the end of foreclosure is not near. The prudent plaintiff has nothing to fear.

First, *Perry* does not bar parties from filing foreclosures in the future. *Perry* and its predecessors simply require a plaintiff to simply determine that it has standing to pursue a claim before filing a lawsuit. This requirement imposes no new or unexpected burden because a lender or the trustee for a securitized trust must ultimately have the Note and Mortgage. Second, *Perry* does not harm lenders who never sold the borrower's note or assigned the mortgage. These lenders already have the documents needed to comply with *Perry*. Third, *Perry* does not harm careful trustees who obtained a loan and recorded an assignment of the mortgage in a timely manner as required by R.C. 5301.32. Here, U.S. Bank waited three years before obtaining the mortgage.

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1. O. Const. Art. IV § 2(B)(2)(e); *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254, 168 N.E.2d 876, 877 (per curium).

- B. Appellant's case is not of public or great general interest; instead it is a request for an advisory opinion because the Appellant did not have the right to accelerate the loan when it filed.**

U.S. Bank asks this Court to decide whether a plaintiff can file a lawsuit to enforce a note without any indicia of the existence of a mortgage. Enforcing includes accelerating the debt. Whether U.S. Bank can accelerate installment payments on a note without the mortgage, as it claims, is a hypothetical question because the mortgage in this case, not the note, contained the acceleration clause.

## **II. STATEMENT OF FACTS AND STATEMENT OF THE CASE.**

- A. The original transaction between the Perrys and American Brokers Conduit.**

The Defendant-Appellee Worley V. Perry purchased his home on or about August 5, 2002.<sup>2</sup> The Perrys sustained financial difficulty due to the economy and Mrs. Perry's illness, subsequently falling behind on their payments.<sup>3</sup> The Perrys refinanced their home on September 1, 2005 with American Brokers Conduit as Lender,<sup>4</sup> according to the note and mortgage filed with U.S. Bank's Complaint and its Motion for Summary Judgment.

Little is known about what transpired to the note after Mr. Perry signed. Usually a securitized trust such as Credit Suisse First Boston, CSFB 2005-12 has to file documents with the Securities and Exchange Commission and these documents shed some light on what was supposed to happen with the note. Plaintiff may not have filed such documents.<sup>5</sup> The record does not reflect how or when American Brokers Conduit negotiated the note.

But more is known about the Mortgage. According to the recorded Mortgage, the mortgagee of record was Mortgage Electronic Registration Systems ("MERS") as "nominee" for

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2. *U.S. Bank, N.A. v. Perry* (8th Dist 2010), 2010 -Ohio- 6171, ¶6.

3. *Id.*

4. *Id.*

5. A review of the SEC's Edgar site reveals two trusts with "CSFB 2005-12." But these titles have different names.

American Brokers Conduit. Paragraph 22 of the Mortgage also set forth the requirement that the Lender was responsible for providing the Perrys with at least 30 days notice of acceleration prior to commencement of a foreclosure proceeding. MERS as nominee for American Brokers Conduit was the mortgage of record until U.S. Bank filed this lawsuit.

**B. Procedural history of this lawsuit.**

On July 10, 2008, U.S. Bank filed a Complaint against Worley V. Perry and Dorothy Perry ("Perrys"). U.S. Bank asserted that it had complied with conditions precedents and could accelerate the note.<sup>6</sup> On July 31, 2008, the Perrys filed a Motion to Dismiss, stating that U.S. Bank was not the mortgagee of record at the time of filing and therefore, failed to establish standing to sue.<sup>7</sup>

After the Motion to Dismiss was filed, U.S. Bank filed a copy of an Assignment of Mortgage, executed on July 10, 2008 and recorded on July 15, 2008.<sup>8</sup> That Assignment purported to assign the mortgage from Mortgage Electronic Registration Systems ("MERS") as "nominee" for American Brokers Conduit to U.S. Bank, N.A. as Trustee for Credit Suisse First Boston CSFB 2005-12. U.S. Bank's counsel, Lerner, Sampson & Rothfuss, had prepared the Assignment. On August 28, 2008, the Perrys' Motion to Dismiss was denied.

On October 15, 2008, U.S. Bank filed a Motion for Summary Judgment. In support of its Motion, U.S. Bank attached a couple of affidavits, one of which was a September 22, 2008 affidavit of an employee of Wells Fargo, China Brown, who stated that U.S. Bank was "the holder of the note and mortgage", that the account was due as of April 1, 2008, and that U.S.

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6. Complaint at ¶3.

7. *Id.*

8. Exhibit A to the affidavit of Matthew Taulbee, filed with the Court on October 15, 2008.

Bank “elected to accelerate the entire balance due.”<sup>9</sup> The only documents attached to China Brown’s affidavit were copies of the Note, Mortgage, and Assignment of Mortgage.<sup>10</sup>

The Perrys opposed the Motion for Summary Judgment, asserting U.S. Bank was not entitled to summary judgment because it was not the mortgagee of record prior to the date when it filed its Complaint. The Magistrate granted summary judgment on December 18, 2008, to which the Perrys filed objections. On February 23, 2010, the trial court overruled the objections and granted summary judgment.<sup>11</sup>

On March 2, 2010, the Perrys appealed to the Eighth District Court of Appeals. On December 16, 2010, the Eighth District issued its decision in favor of the Perrys finding that summary judgment was not warranted because there was insufficient evidence establishing U.S. Bank as the holder of the note and mortgage as of the date on which the Complaint was filed. The case was then reversed and remanded back to the trial court for further proceedings.

### III. ARGUMENT.

**A. This Court should deny the appeal because U.S. Bank’s Affiant, China Brown, is a robo-signer for U.S. Bank’s loan servicer, Wells Fargo Bank, N.A., and she did not have personal knowledge as to whether U.S. Bank held both the note and mortgage when the Complaint was filed.**

This Court has held that motions for discretionary appeals are like petitions for writs of certiorari.<sup>12</sup> As such, “whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the court may upon motion by a party or *ex mero motu* dismiss the [motion].”<sup>13</sup> This principal applies here because of the robo-signer<sup>14</sup>

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9. Affidavit in Support of Summary Judgment, ¶2-3.

10. *Id.*

11. *Perry* at ¶1.

12. *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254, 168 N.E.2d 876, 877 (per curium).

13. *Williamson*, 171 Ohio St. at 254-255, 168 N.E.2d at 877.

14. Although the term robo-signing has gained popular use for the en masse signing of legal documents that are filed with the courts, the proper term is perjury.

controversy in general and the March 9, 2010 deposition of China Brown's subordinate, Xee Moua.<sup>15</sup>

U.S. Bank's servicer, Wells Fargo Bank, N.A. ("Wells Fargo"), employed U.S. Bank's affiant, China Brown, as a document execution manager<sup>16</sup> to daily execute hundreds of affidavits and other documents that are filed in the courts without having been read or verified by the affiant. Within the context of an Ohio Civil Rule 56(E) analysis:

The assertion that an affiant is "duly authorized" to make statements in an affidavit does not show personal knowledge to which he can affirmatively swear, or that he is competent to testify to the matters stated therein. It is essential that an affiant have personal, rather than secondhand, knowledge, and thus be in a position to know the facts stated in the affidavit.<sup>17</sup>

In that vein, U.S. Bank's affiant, China Brown, did not aver as to having had any personal knowledge about the factual assertions contained in U.S. Bank's Affidavit in Support of Motion for Summary Judgment. As such, there was a resulting lack of a factual basis to support U.S. Bank's Motion for Summary Judgment, further supporting the Eighth District's questioning of whether U.S. Bank actually held the note and mortgage when the Complaint was filed,

As is reflected in the case caption and referenced at ¶ 1 of China Brown's affidavit, Wells Fargo services the Perrys' loan for U.S. Bank and employs China Brown. At the relevant time that China Brown signed the U.S. Bank affidavit (September 22, 2008), she was the manager of and supervised Xee Moua in Wells Fargo's Document, Execution Department, as is indicated in Xee Moua's March 9, 2010 deposition.<sup>18</sup> Wells Fargo employed a team of 13 people who

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15. The Moua deposition is from the case of *Wells Fargo Bank, NA v. Stipek*, Case No. 50 2009 CA 012434XXXXMB (15th Judicial Cir., Palm Beach Cty., Fla.) (hereinafter "Moua depo. at p. "). Copies are available online at: <http://www.scribd.com/doc/39666460/Deposition-Transcript-of-Xee-Moua>.

16. Moua depo. at p. 13, 18.

17. *Olverson v. Butler* (10th Dist. 1975), 45 Ohio App.2d 9, 12, 340 N.E.2d 436, 438; *see also* Ohio Evidence Rules 801(C) and 802.

18. Moua depo. at pages 8, 13, 18.

executed 300 to 500 documents per day or 100 documents per hour, including judgment affidavits, affidavits, deeds and substitution of trustees.<sup>19</sup>

Except for their name and title, Wells Fargo's document executioners do not verify document content other than to assure the correct spelling of their name and title, and do not interact with the attorneys and liaisons who draft the documents unless there is something out of the ordinary as to the processing of the documents.<sup>20</sup> The primary responsibility of the document executioner is to receive the document from the attorney's office, fill in the affiant's name and title and send the documents off to be notarized.<sup>21</sup>

Ms Moua is not the only Wells Fargo employee who admits to signing documents under oath without verifying the accuracy of the information they contained. "Herman John Kennerty, a Wells Fargo employee based in Fort Mill, South Carolina, said in a May 20, sworn deposition that he signed as many as 150 documents a day without checking their contents."<sup>22</sup>

Moua, China Brown, and two other individuals were authorized by Wells Fargo to engage in this sort of en masse robo-signing of documents to be filed with the courts albeit lacking in any indicia of integrity.<sup>23</sup> Xee Moua's deposition testimony about her completely perjured affidavit testimony is breathtaking in that she is compelled to disavow essentially all that she swore to be true and accurate.<sup>24</sup> It is within this context of Wells Fargo's document execution operation that U.S. Bank filed the questionable affidavit of China Brown with the court. The affidavit that is notably silent as to whether U.S. Bank owned the note and the mortgage upon the

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19. Moua depo. at p. 10-13, 14, 29-30.

20. Moua depo. at p. 29-34, 44-45.

21. Moua depo. at p. 26-27.

22. "Spotlight falls on Wells foreclosure procedures," Financial Times, October 14, 2010.  
<http://tinyurl.com/4aoxo4z>.

23. Moua depo. at p. 15-20, 39-40.

24. Moua depo. at p. 46-53.

filing of the Complaint and includes the false assertion that the Perrys defaulted on the loan on April Fools Day 2008, for purposes of accelerating the debt, notwithstanding that U.S. Bank was not assigned the right to accelerate the debt until July 10, 2008.

In fact, Xee Moua's deposition caused Wells Fargo to dismiss cases in Maryland.<sup>25</sup> But U.S. Bank thinks what applies in Maryland does not apply in Ohio. It continues to present China Browns' deposition to this Court. Based on these new facts but old story, this Court should refuse to hear the U.S. Bank appeal.<sup>26</sup>

**B. This Court should not accept the appeal because there is not an issue of public or great general interest as to whether a company that holds neither the note nor the mortgage has standing to sue.**

U.S. Bank has yet to establish the right to seek to foreclose; therefore, it is not entitled to ask the Court for a determination of when standing must be established. Regardless of the fundamental mischaracterizations and other failures involved with U.S. Bank's presentation of the Eighth District's decision, U.S. Bank is not entitled to ask this Court for a finding that it had standing to foreclose at the time the trial court rendered judgment in its favor based upon incontrovertible facts as follows: (1) the very language of the mortgage itself and (2) the execution date of the Assignment of Mortgage.

U.S. Bank argues that a question of great public interest requires that this Court take jurisdiction of the instant case. Namely, it states that there is a great rift among the appellate districts as to whether a plaintiff suing in foreclosure must show that it is the recorded mortgagee at the time of filing its Complaint. In making that argument, U.S. Bank attempts to argue that, but for the July 10, 2008 Assignment of Mortgage not being recorded at the time of filing, it had

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25. "Wells Fargo dismissing some Maryland foreclosures" Bloomberg News, January 20, 2011. See <http://minnesota.publicradio.org/display/web/2011/01/20/wells-fargo-foreclosures/>

26. *Williamson*, 171 Ohio St. at 254-255, 168 N.E.2d at 877.

otherwise conclusively satisfied all necessary conditions required to seek the remedy of foreclosure against the Perrys by the time judgment was rendered by the trial court. This is problematic for several reasons.

**(1) U.S. Bank's argument incorrectly characterizes the Eighth District's opinion**

U.S. Bank states that "there was no dispute that as of the time that it filed its motion for summary judgment, U.S. Bank was the holder of both the Note and, by that point, a recorded Assignment of Mortgage."<sup>27</sup> This is, at best, an overstatement of the Eighth District's opinion. At no point in time did the Eighth District specifically make a finding of fact that U.S. Bank was the holder of the Note. In fact, the only specific finding issued by that Court was that "the trial court did not have evidence to prove that U.S. Bank was indeed the holder of the note and the mortgage at the time the complaint was actually filed."<sup>28</sup> The Court makes no statement whatsoever as to the plaintiff's status as an alleged holder of the note and mortgage at the time of summary judgment.

**(2) In fact, the Eighth District questioned whether U.S. Bank held both the note and mortgage on July 10, 2008 when the Complaint was filed.**

A review of the Eighth District's opinion does indicate that there was a question as to U.S. Bank's standing vis-à-vis *both* the note and mortgage. This is initially noted at ¶18, where the Court quotes from affiant China Brown's statement that "Plaintiff is the holder of the note and mortgage...." It then pointed out that Ms. Brown's averment "[did] not state that plaintiff was the holder of the *note and mortgage* at the time the complaint was filed."<sup>29</sup> Later in ¶ 26, the Court reiterates that "China Brown's affidavit does not state that U.S. Bank was the holder of the *note and mortgage* at the time the complaint was filed. Accordingly, the trial court did not

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27. U.S. Bank's Memorandum in Support of Jurisdiction, p. 10.

28. Opinion, ¶26.

29. Opinion, at ¶19 (emphasis added).

have evidence to prove that U.S. Bank was indeed the holder of the *note and mortgage* at the time the complaint was actually filed.” (Emphasis added.)

In all three references, the Eighth District did not merely refer to a lack of evidence to show that U.S. Bank was the holder of the mortgage at the time of the Complaint as an issue—it actually referred to the lack of evidence that Plaintiff was in fact the holder of BOTH the note AND mortgage at that time.

**C. U.S. Bank’s first proposition of law does not raise an issue of general importance because U.S. Bank separated the note and mortgage to avoid recording the assignment of the mortgage.**

U.S. Bank asks this Court to apply “the security follows the debt” rule to confer standing. This Court should refuse. First, the rule rests on the *idea* that a note and mortgage are inseparable and the mortgage only provided security.<sup>30</sup> In this case, however, U.S. Bank separated the note from the mortgage, but only the mortgage contained the acceleration clause. Second, “the security follows the debt” is an equitable rule and equity should not rescue U.S. Bank from its attempt to circumvent R.C. 5301.32. Third, applying this rule generally would be a *de facto* invalidation of Ohio’s recording statutes, R.C. 5301.25 and R.C. 5301.32.

Although U.S. Bank cites this Court’s decisions in *Edgar* and *Kernohan*,<sup>31</sup> neither supports its position because the facts differ. Both cases arose from the fraud by a non-party.<sup>32</sup> In both cases, the party holding all or part of the actual mortgage claimed a superior interest in the security over the party holding the actual note.<sup>33</sup> In each case, this Court decided in favor of

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30. *In re Agard* (Bkrcty.E.D.N.Y.,2011), 2011 WL 499959, 13, citing *Carpenter v. Longan* (1872), 83 U.S. 271, 274.

31. *Edgar v. Haines* (1923), 109 Ohio St. 159, 141 N.E. 837; *Kernohan v. Manss* (1895), 53 Ohio St. 118, 41 N.E. 258.

32. *Edgar*, 109 Ohio St. at 166, 141 N.E. at 839; *Kernohan*, 53 Ohio St. 118, 41 N.E. 258.

33. *Edgar*, 109 Ohio St. at 164, 141 N.E. at 838, *Kernohan*, 53 Ohio St. at 134, 41 N.E. at 260.

the party holding the note because they had an *equitable* ownership of the mortgage.<sup>34</sup> Of relevance here, the *Edgar* Court held “the mortgage security is an incident of the debt which it is given to secure, and, *in the absence of a specific agreement to the contrary*, passes to the assignee or transferee of such debt.”<sup>35</sup> An agreement to the contrary exists here, e.g., U.S. Bank’s “specific agreement to the contrary” to separate the debt from the security interest.

Unlike *Edgar* and *Kernohan*, U.S. Bank separated the note and mortgage to participate in an electronic mortgage filing and storage system with the Mortgage Electronic Registration Systems, Inc., commonly known as MERS.<sup>36</sup> MERS’s website states it “*eliminates* the need to prepare *and record assignments* when trading residential and commercial mortgage loans.”<sup>37</sup>

MERS’s business model *requires* that the note and mortgage travel on divergent paths.<sup>38</sup> Here MERS is the mortgagee in the Perrys’ mortgage as nominee for the lender, American Brokers Conduit.<sup>39</sup> The note in the case went from American Brokers Conduit to others and supposedly to U.S. Bank. Under R.C. 5301.32, each assignment should have been recorded and a fee assessed. But with MERS, *assignments are not publicly recorded*; instead they are tracked electronically in MERS’s private system.<sup>40</sup>

U.S. Bank used MERS to avoid recording under R.C. 5301.32 and paying at least \$28.00. An assignment of a mortgage is subject to recording requirements under R.C. 5301.32.<sup>41</sup> R.C. 317.32 allows the county recorder to charge a fee for recording an assignment of a mortgage.

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34. *Edgar*, syllabus; *Kernohan*, ¶2 of the syllabus.

35. *Edgar*, 109 Ohio St. at 164, 141 N.E. at 838 (emphasis added).

36. See Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, Christopher L. Peterson, University of Cincinnati Law Review, 78 U. Cin. L. Rev. 1359 for a detailed history of MERS.

37. <http://www.mersinc.org/> (emphasis added).

38. *In re Agard*, 2011 WL 499959 at 13.

39. Mortgage at Definitions (C) and (D).

40. *Agard*, 2011 WL 499959 at 14.

41. *In re Williams* (Bkrcty. S.D. Ohio, 2008), 395 B.R. 33, 41.

That fee is \$28.00 in Cuyahoga County.<sup>42</sup> Without MERS, the transactions in this case would have been as follows: American Brokers Conduit would have been the mortgagee of record and paid \$172.00. If, American Brokers Conduit transferred the note directly to U.S. Bank, then U.S. Bank would have paid \$28.00 to record the assignment of the mortgage.<sup>43</sup> If the loan performed, U.S. Bank would have paid another \$28.00 to release the mortgage. With MERS, U.S. Bank did not have to record and pay for any assignment of the mortgage, saving \$28.00 with each assignment. And if the loan performs, then the servicer would have prepared and recorded a release of mortgage in MERS's name.<sup>44</sup>

U.S. Bank cannot seek equity because to get equity one must do equity.<sup>45</sup> "Inequitable acts by a party seeking to recover in equity will prevent that party's recovery." And a court will deny equitable relief "if, in granting the relief which he seeks, the court would be required, by implication even, to ... give its approval to inequitable conduct on his part."<sup>46</sup> U.S. Bank wants to be bailed out by this Court for its inequitable conduct.

Finally, applying the security always follows the debt generally would eliminate the need to record not only assignments, but mortgages themselves. The rational holder of a note would not pay to record a mortgage. Instead, the holder would be able to assume a superior claim to property. This would, in essence result in a *de facto* repeal of Ohio's recording statutes, R.C. 5301.25 and R.C. 5301.32.

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42. Cuyahoga County Recorder's Website <http://recorder.cuyahogacounty.us/fees.aspx>.  
43. This is likely wrong. Notes in securitized trusts usually are negotiated or transferred more than once, but this cannot be ascertained here without the SEC filings.  
44. Peterson, 78 U. Cin. L. Rev. at 1371.  
45. *In re Nelson* (Bkrcty.N.D. Ohio, 1997), 206 B.R. 869, 881  
46. *Kinner v. Lake Shore & M. S. Ry. Co.* (1904), 69 Ohio St. 339, 344, 69 N.E. 614, 615.

**D. In both propositions of law, U.S. Bank seeks an advisory opinion because it did not have the right to accelerate the debt when it filed the Complaint.**

An advisory opinion is merely the opinion of a judge or judges of a court, which adjudicates nothing and *is binding on no one*.<sup>47</sup> An Ohio court does not have “the constitutional or statutory authorization ... for the issuance of an advisory opinion and this court, for sound legal reasons, has never issued advisory opinions.”<sup>48</sup> U.S. Bank asks this Court to decide whether the holder of a promissory note indorsed as bearer paper “has standing “to accelerate the entire balance due”<sup>49</sup> on a note and foreclose on a mortgage.<sup>50</sup>

Whether U.S. Bank can accelerate installment payments on a note without the mortgage, as it claims, is a hypothetical question because the mortgage in this case, not the note, contained the acceleration clause.

With installment notes, the general rule is that the failure to pay one or more installments is not a breach of the entire contract and the holder of the note cannot sue for future payments.<sup>51</sup> Parties can, however, modify this rule by including an acceleration clause in a note.<sup>52</sup> Basically, an acceleration clause requires an obligor to pay the full balance upon a default, usually the failure to pay one or more installments.<sup>53</sup>

But a “court cannot imply an acceleration clause in a promissory note when the promisee has not proven that one exists.”<sup>54</sup> Nor can a court, in equity, construe a note to contain an

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47. *State ex rel. Draper v. Wilder* (1945), 145 Ohio St. 447, 455, 62 N.E.2d 156, 160.

48. *State ex rel. Park Inv. Co. v. Board of Tax Appeals* (1972), 31 Ohio St. 2d 183, 184, 285 N.E.2d 356, 357.

49. Affidavit of China Brown at ¶3.

50. App. Brief at 6 (emphasis added).

51. *U.S. National Bank Assn. v. Gullotta*, 120 Ohio St.3d 399, 2008-Ohio-6268, 899 N.E.2d 987, ¶30.

52. *Gullotta*, 2008-Ohio-6268 at ¶30.

53. *Id.*

54. *Citizens Bank of Logan v. Marzano* (4th Dist. 2005), 2005 -Ohio- 163, ¶ 17.

acceleration clause where none exists.<sup>55</sup> Yet this is what U.S. Bank wants this Court to do.

As will be addressed in detail below, the acceleration clause in this case is in the mortgage, not the note.<sup>56</sup> Furthermore, the mortgage required a 30 day notice by the *lender* as a condition precedent to accelerating the debt. *American Brokers Conduit was the lender until the mortgage was allegedly assigned to U.S. Bank on the day U.S. Bank filed this lawsuit.* As such, U.S. Bank could not have accelerated the debt without the mortgage.

Thus, the question U.S. Bank poses to the Court in both propositions — standing to sue, accelerate, and foreclose based simply on holding bearer paper — is not before this Court.

Therefore, it is an advisory opinion and the appeal should not be allowed.<sup>57</sup>

**E. U.S. Bank's second proposition of law does not present an issue of public or great general interest because U.S. Bank failed to satisfy a condition precedent to foreclosing.**

This Court has previously held that “if the contract provides conditions to be performed in case of a breach, the conditions must be complied with before damages can be recovered by reason of breach.”<sup>58</sup> U.S. Bank filed the instant case against the Perrys due to an alleged default on a note and mortgage, and sought damages by asking to foreclose on the Perrys' home and to obtain a money judgment against them. In support of its complaint as well as its motion for summary judgment, U.S. Bank submitted a copy of a mortgage as Exhibit B. Paragraph 22 of Exhibit B states as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument\*\*\* The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result

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55. *Market Control Systems, Inc. v. Vertucci* (9th Dist 1992), 1992 WL 74209, 2.

56. Mortgage at ¶ 22.

57. *State ex rel. Park Inv. Co.*, 31 Ohio St. 2d at 184, 285 N.E.2d at 357.

58. *Ladd v. New York Cent. R. Co.* (1960), 170 Ohio St. 491, 500, 166 N.E.2d 231, 237.

in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding\*\*\*

This section of Paragraph 22 of the Perrys' Mortgage is critical because (1) it sets forth a clear condition precedent that must be complied with before acceleration of the debt can occur; (2) it sets forth how and when the condition precedent must be met prior to pursuit of a foreclosure proceeding; and (3) it establishes a genuine issue of material fact that precludes summary judgment when considered in light of the July 10, 2008 Assignment date and China Brown's affidavit which asserted a default on or about April 1, 2008 and an election to accelerate prior to filing its Complaint.

Various appellate districts have indeed found this pre-acceleration notice requirement to be a condition precedent that must be complied with in order for the foreclosing party to be allowed to proceed with its claims for damages.<sup>59</sup> In the case at hand, U.S. Bank alleged in its complaint that all conditions precedent were performed.<sup>60</sup> However, *that is a factual and legal impossibility*. U.S. Bank's affiant, China Brown, testified that default occurred around April 1, 2008 and that U.S. Bank subsequently elected to accelerate the debt.<sup>61</sup> Yet, U.S. Bank was not assigned any rights in or to the mortgage until *July 10, 2008*, the date of its execution.

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59. *National City Mortgage Co. v. Richards*, 182 Ohio App. 3d 534, 2009-Ohio-2556, 913 N.E.2d 1007, ¶ 20; see also e.g., *LaSalle Bank, NA v. Kelly* (9th Dist. 2010), 2010-Ohio-2668, ¶ 13; *First Financial Bank v. Doellman* (12th Dist. 2007), 2007-Ohio-222, ¶ 20; *Wells Fargo Bank, NA v. Shalvey* (5th Dist. 2007), 2007-Ohio-3928, ¶ 20; *Bankers Trust Co. v. Robertson* (5th Dist. 2003), 2003-Ohio-252, ¶¶ 22-23.

60. Complaint at ¶ 3.

61. Affidavit of China Brown, at ¶ 3.

Indeed, it cannot be true that U.S. Bank met the notice requirement and accelerated the debt properly prior to the time of filing its Complaint because *U.S. Bank had no right to do anything under the terms of the Mortgage until the Assignment of Mortgage was executed.*<sup>62</sup> The earliest possible date upon which U.S. Bank could have possibly complied with Paragraph 22's condition precedent is July 10, 2008 and the earliest date upon which acceleration could have occurred would have been 30 days later, Saturday, August 9, 2008. Nothing in the record suggests that compliance with the condition precedent ever took place. Thus, U.S. Bank *did not* have a right to foreclose as of the trial court's judgment dated February 23, 2010 and to date, *has not* yet cured this defect.

As such, U.S. Bank's proposition of law #2 is prematurely raised and should not be considered by this Court.

**F. U.S. Bank's first proposition of law does not raise an issue of general importance because U.S. Bank was dismissed without prejudice and can refile.**

This Court should not accept appeals addressing private concerns of the litigants. U.S. Bank only suffered a private harm of having to refile its lawsuit. The Court of Appeals ordered the trial court to dismiss the case without prejudice. Thus, U.S. Bank could re-file tomorrow if it truly possesses the Note and the assignment of the mortgage. This minor inconvenience is not a matter of public interest.

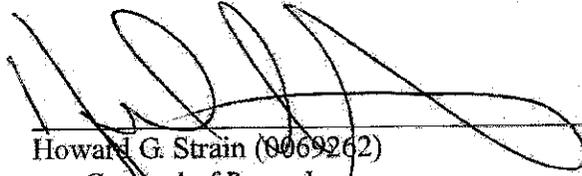
#### **IV. CONCLUSION**

For the reasons stated above, the *Amici Curiae*, The Legal Aid Society of Cleveland and Southeastern Ohio Legal Services, respectfully ask this Court to deny the Appellant's Motion.

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62. See *U.S. Bank National Association v. Meyer* (Conn. Super. 11-28-07), 2007 WL 4577584 (Summary judgment denied where genuine issue remained as to whether U.S. Bank had properly accelerated per the terms of the mortgage).

Respectfully Submitted,



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CERTIFICATE OF SERVICE

On February 28, 2011, a copy of the foregoing *Memorandum of the Legal Aid Society of Cleveland and Southeastern Ohio Legal Services as Amici Curiae in Support of Defendant-Appellees Worley V. Perry and Dorothy Perry* was served via regular mail upon:

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