ORIGINAL

IN THE SUPREME COURT OF OHIO

U.S. Bank, National Association, as Trustee for CMLTI 2007-WFHE2 C/O Wells Fargo Bank, N.A., Plaintiff-Appellant, v. Antoine Duvall, et al., Defendants-Appellees.	:	Case No. 2011-0218 On Appeal from Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. CA-10-094714

MERIT BRIEF OF AMICI CURIAE, FANNIE MAE AND FREDDIE MAC, IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

Ohio

Federal

<u>LAW REVIEWS</u>:

<u>RESTATEMENTS</u>:

<u>TREATISES</u>:

<u>MISCELLANEOUS</u>:

INTRODUCTORY STATEMENT

The Eighth District Court of Appeals certified that a conflict exists among Ohio's courts of appeal regarding the following question: "To have standing as a plaintiff in a mortgage foreclosure action, must a party show that it owned the note and the mortgage when the complaint was filed?" *Journal Entry*, Jan. 31, 2011. The concept of ownership injected into the certified question did not appear in appellant's Motion to Certify Conflict.[1] This issue of ownership is foreign to the enforcement of mortgage notes and mortgages under relevant Ohio law and poisonous to the concept of negotiability that has developed over the course of centuries. Today, Ohio's courts are conflicted about the meaning and necessity of ownership in this area of the law. Amici are particularly well-situated to seek clarity on this question and thus offer this brief.

As will be shown below, the concept of ownership set forth in the Eighth District Court of Appeals' certified question to the Court is simply incompatible with the law of negotiable instruments. If ownership were to control the enforcement of promissory notes in Ohio, it would pose a significant threat to the liquidity of the instruments, the universality of the commercial law system, and freedom of contract. If owners alone are permitted to sue for foreclosure of promissory notes secured by mortgages, the market for them in Ohio would consist only of the parties willing to take on the substantial burden of personally prosecuting all defaults. What's more, it would drive Ohio out of sync with the prevailing commercial law of the United States, creating a jurisprudential quagmire that is incompatible with participation in the vital secondary market for

[1] The questions originally posed were, "In a mortgage foreclosure action, is a plaintiff required to establish that it had standing as of the date that the Complaint was filed, or is a plaintiff only required to establish that it had standing prior to entry of judgment?" and "Does possession of bearer paper alone entitle its holder to foreclose a mortgage securing its payment, regardless of whether there is a separate notice of assignment of mortgage?" *Mot. to Certify Conflict.*

such instruments. This result cannot be tolerated by the Court; as such, Amici curiae urge the Court to answer the question presented in the negative.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are government-sponsored entities with significant holdings in residential mortgage loans in Ohio and throughout the United States. The Federal National Mortgage Association ("Fannie Mae") and The Federal Home Loan Mortgage Corporation ("Freddie Mac") (collectively "Amici") are independent corporations chartered by the United States Federal Government. Section 1716, Title 12, U.S.Code; Section 1451, Title 12, U.S.Code. Each was established for the express purposes of providing stability to the secondary market for residential mortgage loans and increasing the liquidity of mortgage investments in order to improve the capital available for mortgage financing. Federal Home Loan Mortgage Corporation Act, Pub. L. No. 91-351, § 301, 84 Stat. 450 (1970) (as amended by Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, § 731(a), 103 Stat. 183, and Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 1382(a), 106 Stat. 3672 (codified at Section 1451 Note, Title 12, U.S.Code); Section 1716, Title 12, U.S.Code.

Specifically, the United States Code provides identical purposes for Fannie Mae and Freddie Mac, as follows (in pertinent part):

Statutory purposes of Fannie Mae:

> The Congress hereby declares that the purposes of this title are to establish secondary market facilities for residential mortgages, to provide that the operations thereof shall be financed by private capital to the maximum extent feasible, and to authorize such facilities to--
>
> (1) provide stability in the secondary market for residential mortgages;
>
> (2) respond appropriately to the private capital market;
>
> (3) provide ongoing assistance to the secondary market for residential mortgages (including activities relating to mortgages on housing

for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities) by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing;

(4) promote access to mortgage credit throughout the Nation (including central cities, rural areas, and underserved areas) by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing; and

* * *.

Section 1716, Title 12, U.S. Code.

Statutory purposes of Freddie Mac:

(b) It is the purpose of the Federal Home Loan Mortgage Corporation—

(1) to provide stability in the secondary market for residential mortgages;

(2) to respond appropriately to the private capital market;

(3) to provide ongoing assistance to the secondary market for residential mortgages (including activities relating to mortgages on housing for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities) by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing; and

(4) to promote access to mortgage credit throughout the Nation (including central cities, rural areas, and underserved areas) by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing.

Act July 24, 1970, P.L. 91-351, Title III, § 301(b), as added Aug. 9, 1989, P.L. 101-73, Title VII, Subtitle B, § 731(a)(1)(B), 103 Stat. 429; Oct. 28, 1992, P.L. 102-550, Title XIII, Subtitle D, § 1382(a), 106 Stat. 4002 (effective and applicable on enactment, as provided by § 2 of such Act, which appears as Section 5301, Title 42, U.S.Code note). See also, *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, at ¶23-29. In both purpose and function, Amici are in a unique position to assist the Court in addressing issues of negotiability and liquidity on the national secondary mortgage market.

The very structure of Amici's practices relative to mortgage loans demonstrates their interest in a sound resolution of the present question. Fannie Mae and Freddie Mac do not originate loans, but purchase loans originated by other banks and lenders. Many of these loans are then pooled, and interests are sold to third party investors. This process frees capital for lenders to finance the purchase of additional new homes. Amici's portfolio of mortgage loans, and the mortgage-backed securities and other instruments they guarantee, represent over $6 trillion in investments in mortgage loans throughout the country. Fannie Mae, *Monthly Summary: April 2011*;[2] Freddie Mac, *Monthly Volume Summary: March 2011*.[3]

Fannie Mae and Freddie Mac maximize fluidity, both for investors and for homeowners, by contracting with independent mortgage loan servicers to conduct virtually all interaction with homeowners. The relationships between Amici and sellers and servicers of mortgage loans are prescribed by Amici's Mortgage Selling and Servicing Contracts, as well as communications provided by Amici, such as Guides, Announcements, and letters to servicers. Fannie Mae, Servicing Guide, Part I, § 201 (2010) [hereinafter *FNMA Guide*];[4] Freddie Mac, Single-Family Seller/Servicer Guide, Vols. 1-2 (2010). [hereinafter *FHLMC Guide*].[5]

When Amici purchase mortgage loans, they require that notes be indorsed in blank by the sellers before Amici take possession of the notes. Fannie Mae 2011 Selling Guide, Part E, Chapter

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2 Available at http://www.fanniemae.com/ir/pdf/monthly/2011/043011.pdf
3 Available at http://www.freddiemac.com/investors/volsum/pdf/0311mvs.pdf.
4 Available at https://www.efanniemae.com/sf/guides/ssg/svcgpdf.jsp.
5 Available at http://www.freddiemac.com/sell/guide.

E-2, Exhibits E-2-02;[6] *FHLMC Guide,* Vol. 1, § 16.4. While Amici retain ownership of the note and mortgage, the note is often physically possessed by a document custodian holding it on behalf of Fannie Mae or Freddie Mac. *FNMA Guide*, Part I, § 403 (2010); *FHLMC Guide*, Vol. 1, §§ 16.1, 18.1, and 52.5(a). The custodian may be Fannie Mae or Freddie Mac, the servicer, an affiliate or subsidiary of the servicer, or another entity designated by Fannie Mae or Freddie Mac. *FNMA Guide*, Part I, § 403; *FHLMC Guide*, §§ 18.1 and 18.2. When the note is held in custody by a party other than Amici, all parties involved (Amicus, servicer, and custodian) execute a custodial agreement specifying that ownership is still vested in Fannie Mae or Freddie Mac, as appropriate, and outlining the circumstances under which the note may be delivered to the servicer. *FNMA Guide*, Part I, § 403.02; see, also, Fannie Mae, *Master Custodial Agreement (Fannie Mae Form 2003)* [hereinafter *Form 2003*],[7] and Freddie Mac, *Custodial Agreement: Single-Family Mortgages*, [hereinafter *Form 1035*].[8]

In the event of payment default, Amici's guidelines call for foreclosure actions to be carried out in the name of the servicer. *FNMA Guide*, Part VIII, § 105; *FHLMC Guide*, § 66.17. Fannie Mae's guidelines provide for possession of the note by the servicer to allow the servicer, acting in its own name, to represent Fannie Mae's interests in legal proceedings. *FNMA Guide*, Part I, § 403.03; Fannie Mae, *Note Holder Status for Legal Proceedings Conducted in the Servicer's Name*, Announcement 08-12, May 23, 2008 [hereinafter *Fannie Mae Announcement 08-12*].[9] Freddie Mac's guidelines allow the servicer to obtain possession of the original note from the document custodian prior to, or during, a foreclosure. *FHLMC Guide*, § 66.20. Thus,

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6 Available at https://www.efanniemae.com/sf/guides/ssg/svcgpdf.jsp.
7 Available at https://www.efanniemae.com/sf/formsdocs/forms/pdf/contractualobligs/2003.pdf.
8 Available at http://www.freddiemac.com/cim/pdf/Form1035.pdf.
9 Available at https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2008/0812.pdf.

servicers proceed with foreclosure as holders of the notes on behalf of the beneficial owners -- Fannie Mae and Freddie Mac. *Fannie Mae Announcement 08-12*; *FHLMC Guide*, § 66.17.

The procedures of Fannie Mae and Freddie Mac set forth above use the natural liquidity of negotiable instruments to further the Congressional purposes of facilitating an efficient, national, secondary market for mortgage loans. The free transferability also provides stability for homeowners, who – in spite of changes in ownership and possession of the note – may interact only with a servicing company that has the systems and infrastructure to account for payments, maintain escrow accounts for the payment of taxes and insurance, and respond to homeowner inquiries. Amici have a strong interest in the resolution of the question before the Court since they are the owners of a significant number of mortgages that would become substantially more difficult to sell, service, and enforce if Ohio diverges from centuries of law supporting the right of non-owners to collect on promissory notes.

STATEMENT OF FACTS

Amici curiae adopt the Statement of the Case and Facts set forth in Appellant's Merit Brief. However, Amici note the following pertinent selection from the decision of the court of appeals below:

> In *Jordan, supra*, this court held that "the **owner** of rights or interest in property is a necessary party to a foreclosure action. * * * Thus, if plaintiff has offered no evidence that it **owned** the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law."
>
> Accordingly, we conclude that plaintiff had no standing to file a foreclosure action against defendants on October 15, 2007, because, at that time, Wells Fargo **owned** the mortgage.

U.S. Bank Nat'l Assoc. v. Duvall, 8th Dist. No. 94714, 2010-Ohio-6478, at ¶14-15 (emphases added).

ARGUMENT

Proposition of Law:

Whether a person is an "owner" of an instrument is irrelevant to that person's standing as a plaintiff in a mortgage foreclosure action.

1. **For centuries, the law has emphasized the importance of universality and free assignability of negotiable instruments.**

The law of negotiable instruments shows a longevity surpassed only by the importance of negotiable instruments themselves to the economy, which some scholars have dated back to as early as 2100 B.C. See 2 Britton, Handbook of the Law of Bills and Notes (2 Ed. 1961). Regulation of these instruments grew steadily through the English common law, beginning with travelling merchants' courts in the late thirteenth century. Beutel, The Development of Negotiable Instruments in early English Law (1938), 51 Harv. L. Rev. 813, 815. Even at that time, the law was administered with relative uniformity due to reliance on ancient mercantile customs to govern then-modern law. *Id.* at 816. Contracts to pay, both to order and to bearer, were readily transferable and rapidly changed hands in the conduct of trade. *Id.* at 817. While doctrine of the holder in due course and other limitations on defenses were slower to develop, even these fourteenth century courts recognized free assignability of the negotiable instruments and the right of bearers to bring an action for payment of the debt, personally or through an agent such as an attorney. *Id.* at 818-31.

Common law courts took jurisdiction over negotiable instruments in the seventeenth century, and the law of negotiable instruments took on essentially its current form under Lord Mansfield and the Statute of Anne (1704) in the eighteenth century. *Id.* at 832-42. The central benefits of recognizing the stable laws of negotiability were apparent even in Mansfield's early decision in *Miller v. Race*: "a bank-note is constantly and universally, both at home and abroad, treated as money, as cash; * * * and it is necessary, for the purposes of commerce, that their currency should be established and secure." (K.B. 1758), 1 Burr. 452, 97 Eng. Rep. 398. This statement reveals the importance of both universal liquidity and certainty in the law. The former permits investors and others engaging in commerce to freely transfer and enforce the instrument, even through an agent, with the understanding that any bearer possesses the same rights without concern for defenses against the original payee. The latter allows for national and international commerce by assuring that legal interpretation of the instrument will be consistent whether a promissory note is sold to a party in Ohio or one in Texas. Certainty in the law also allows those acting in commerce to reasonably rely on the assumption that liquidity will remain without extraneous requirements years after the debt is assigned. This stable and universal set of rules for negotiable instruments was developed from the common law and codified through the American Negotiable Instrument Laws of the 1890s and the Uniform Commercial Code that survives substantively unchanged to this day. Rubin, Learning from Lord Mansfield: Toward a Transferability Law for Modern Commercial Practice (1995), 31 Idaho L. Rev. 775, 777-78.

2. **Universality and consistency in the law of negotiable instruments remain crucial to the development of the economy.**

This Court has recognized the importance of the secondary mortgage market to the overall economy. In *Wilborn,* the Court opined:

> Moreover, public policy strongly favors the use of these uniform mortgage forms to further Congress's stated purpose and to permit the trading of Ohio's conventional mortgages on the secondary market. To declare some part of these forms unenforceable would make Ohio less competitive in the secondary mortgage market, thwarting the objectives of the Fannie Mae and Freddie Mac enabling legislation, denying lenders liquidity for their investment portfolios, and decreasing the capital available to borrowers for mortgages. In light of the economic difficulties afflicting the national economy as of late, and particularly in the housing sector, our decision today also serves the public policy of this state by avoiding further destabilization.

Wilborn v. Bank One Corp., 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, at ¶38.

3. Ohio's version of UCC Article 3 governs who may enforce a note.

R.C. 1303.01, et. seq., Article 3 of the Uniform Commercial Code ("UCC"), governs the creation, transfer and enforceability of negotiable instruments, including promissory notes secured by mortgages on real estate. *Federal Land Bank of Louisville v. Taggart* (1987), 31 Ohio St.3d 8, 10, 508 N.E.2d 152. According to Article 3, there are three relevant classes of persons entitled to enforce an instrument: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a party who was in possession of a note that is now lost. R.C. 1303.31(A)[10]; see also, 1303.52(B) ("The obligation is owed to a person entitled to enforce the instrument…").

In order to be a holder of an instrument, a party must first and foremost be in possession of the instrument. R.C. 1301.01(T)(1).[11] The instrument must also be payable either to the party in possession or to bearer. *Id.* The party to whom the instrument is payable may be changed after the instrument is issued through the process of negotiation. R.C. 1303.10. Negotiation is the transfer – either voluntary or involuntary – of possession of an instrument by a person other than the issuer to

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[10] There is another circumstance where an entitlement to enforce can be created, but it only arises when the draft is presented and mistakenly accepted before subsequently being dishonored, and is thus irrelevant in the mortgage context. R.C. 1303.31(A)(3).

[11] Where the requirements for being a holder or transferee are otherwise met with regard to negotiation and intentional transfer of rights, the UCC does not articulate any reason why the requisite possession must be physical. Numerous cases have held that a holder or owner may have a document custodian maintain actual physical possession of the note on the holder or owner's behalf, often called "constructive possession." *A.I. Credit Corp v. Gohres* (D. Nev. 2004), 299 F. Supp. 2d 1156, 1160; *Mid First Bank, SSB v. C.W. Haynes & Co., Inc.* (D.S.C. 1994), 893 F. Supp. 1304, 1314-15; *Bankers Trust v. 236 Beltway Inv.* (E.D. Va. 1994), 865 F. Supp. 1186, 1195; *Schranz v. I.L. Grossman, Inc.* (1980), 90 Ill. App. 3d 507, 412 N.E. 2d 1378, 1386; *Lazidis v. Goidl* (Tx. Civ. App. 1978), 564 S.W. 2d 453, 455; *Billingsley v. Kelly* (1971), 261 Md. 116, 274 A.2d 113, 117-18; *Snyder v. Town Hill Motors, Inc.* (1960), 193 Pa. Super. 578, 165 A.2d 293, 295; *Georg v. Metro Fixtures Contrs., Inc.* (Colo. 2008), 178 P.3d 1209, 1214;

a person who becomes the holder of the instrument. R.C. 1303.21. If the note is payable to bearer, transfer of possession alone constitutes a negotiation and makes the receiving party the holder. R.C. 1303.21(B). If it is payable to an identified person, transfer must be accompanied by an indorsement by the holder. *Id.* This may be either a special indorsement – one which identifies a person to whom the instrument is now payable – or a blank indorsement that makes the instrument bearer paper. R.C. 1303.25.

Even where possession of the note is not accompanied by an indorsement to make the transferee a holder, the party in possession may be entitled to enforce the instrument where it has the rights of the holder. R.C. 1303.31(A)(2). This occurs when the instrument is transferred – delivered by a person other than the issuer for the purpose of giving the receiver the right to enforce the instrument. R.C. 1303.22(A). The transferee, even if it does not become the holder, gains any right the transferor had to enforce the note.[12] *Id.*

Under the UCC provisions setting forth which parties have the right to enforce a negotiable instrument, persons need not rely on their status as "owners." In fact, the UCC explicitly states that "[a] person may be a 'person entitled to enforce' the instrument *even though the person is not the owner of the instrument* or is in wrongful possession of the instrument." R.C. 1303.31(B) (emphasis added).[13]

Corporacion Venezolana de Fomento v. Vintero Sales Corp. (S.D.N.Y. 1978), 452 F. Supp. 1108, 1117.

12 The sole exception is that the full rights of a holder in due course may not transfer if the transferee engaged in fraud or illegality affecting the instrument. R.C. 1303.22(B).

13 Borrowers need not fear that they will be subject to double payment if non-owners are permitted to obtain foreclosure judgments, as the UCC has provided a means of protection for borrowers under these circumstances. Under R.C. 1303.67(A) (UCC 3-602), payment is to be made to a "person entitled to enforce the instrument." To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even if payment is made with knowledge that someone else claims ownership to the instrument. R.C. 1303.67(A). The only

This is also true under Ohio common law. In *Hays v. The Galion Gas Light and Coal Co.* (1876), 29 Ohio St. 330, sixty-five promissory notes were made payable to William Hays or bearer. William Hays was a trustee on behalf of the owners of the debts. The Galion Gas Light and Coal Co. challenged William Hays' ability to prosecute a foreclosure, in part because he was not the owner of the debts. The Supreme Court found that Hays was a proper party to bring suit, notwithstanding that he did not own the debts, noting that having one trustee over the sixty-five notes was "less cumbersome and less expensive … a leading objective of the provisions of the code regulating parties to a civil action." *Id.* at 337.

To formulate an alternate definition of standing that requires proof of ownership rights – as the Eighth District Court of Appeals appears to do – would create the incongruous result that, in mortgage foreclosure actions, parties with a statutory right to enforce a promissory note and mortgage may not have standing to do so.

4. <u>Under Ohio law, the mortgage follows the note.</u>

The right to enforce the note also includes the right to enforce the mortgage providing security for the note. *Kernohan v. Manss* (1895), 53 Ohio St. 118, 133, 41 N.E. 258 (Manss, as the holder of the original notes, had the right to proceeds from a sale of the mortgaged property, even though Kernohan had possession of the original mortgage, and McGill was the recorded mortgagee). The Court in *Kernohan* wrote as follows:

> The following propositions we consider are settled in Ohio:

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exceptions to this rule are if: (a) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction; (b) the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or (c) the person making payment knows that the instrument is stolen. R.C. 1303.67(B).

1. Where a promissory note is secured by mortgage, the note, not the mortgage, represents the debt. The mortgage is, therefore, a mere incident, and an assignment of such incident will not, in law, carry with it a transfer of the debt; on the other hand a transfer of the note by the owner so as to vest legal title in the indorsee will carry with it equitable ownership of the mortgage. And so, if the debt be evidenced by several promissory notes, the legal transfer of a portion of the notes carries with it such proportional interest in the security as the notes transferred bear to the whole. *Harkrader* v. *Leiby*, 4 Ohio St., 602; *Ex'rs of Swartz* v. *Leist*, 13 Ohio St. 419; *Fithian* v. *Corwin*, 17 Ohio St., 118; *Allen* v. *Bank*, 23 Ohio St., 97; *Holmes* v. *Gardner*, 50 Ohio St., 167.

2. Being but an incident of the debt, the mortgage remains, until foreclosure or possession taken, in the nature of a *chose in action*. Where given to secure notes it has no determinate value apart from the notes, and, as distinct from them, is not a fit subject of assignment. And where the notes are legally transferred, the mortgagee, and all claiming under him, will hold the mortgaged property in trust for the holder of the notes. *Jordon* v. *Cheney*, 74 Me., 359; Jones on Mortgages, 818; Pomeroy's Eq. Jur., section 1210.

Kernohan, 53 Ohio St. at 133; see also, *U.S. Bank Nat'l Ass'n v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, at ¶52. Therefore, negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered. *Marcino*, 2009-Ohio-1178 at ¶52 (citing *Kuck v. Sommers* (1950), 100 N.E.2d 68, 75, 59 Ohio Abs. 400).

Revised Article 9 of the UCC also provides that one who has rights to enforce a note is entitled to enforce the security interest in the note. In 2001, Article 9 of the UCC was revised to incorporate the practice of asset securitization and was enacted into law in every state. Revised Article 9 expressly includes the sale of promissory notes within its scope to the extent they are pledged as collateral for a separate loan. R.C. 1309.109(A)(3), UCC 9-109(a)(3). R.C. 1309.203(G) states, "The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage or other lien." R.C. 1309.203(G). Official Comment 9 to R.C. 1309.203 confirms that "[s]ubsection (G) codifies the common law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." *Id.*

Article 9 also provides for judicial enforcement after default. "A secured party: (1) may reduce a claim to judgment, foreclosure, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure." R.C. 1309.601(A)(1). A "secured party" includes, "A person to whom accounts, chattel paper, payment intangibles, or promissory notes have been sold" and "[a] trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for." R.C. 1309.102(d) and (e).

The American Law Institute also takes the position that the mortgage follows the note. The Third Restatement of Property (Mortgages) provides:

(a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.

(b) Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.

(c) A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.

Restatement of the Law 3d, Property (1997) Mortgages, Section 5.4.

Therefore, a person with the right to enforce the note is also entitled to enforce the mortgage which provides security for the note, regardless of whether that person is also in possession of the original mortgage or has an assignment of mortgage from the last mortgagee of record.

5. **The departure of the Ohio First and Eighth District Courts of Appeal from the long-standing rules regarding the enforcement of negotiable instruments and security instruments should be reversed.**

The Court may question how the current confusion arose regarding who has standing to initiate an Ohio mortgage foreclosure, despite the universality of negotiable instrument law and the historical acceptance of these rules in Ohio. On September 12, 2008, the First District Court of Appeals (Hamilton County) decided, in *Wells Fargo v. Byrd,* that Wells Fargo was not the real party in interest because a formal assignment of the mortgage was not executed until after the complaint was filed. Formal assignment of mortgage after the suit had been commenced was not sufficient to cure what the court saw as a jurisdictional defect. The court held that the case was properly dismissed. *Wells Fargo Bank, N.A. on behalf of Certificate Holders of Morgan Stanley ABS Capital, in Trust 2005-WMC5 Mortgage Pass-Through Certificates, Series 2005 c/o Countrywide Home Loans v. Byrd*, 178 Ohio App. 3d 285, 2008-Ohio-4603, 897 N.E.2d 722, at ¶16. The appellate court opined, "A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of the action." *Id.* at ¶9 (citing *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 298 N.E.2d 515, syllabus).

A few months later, the Eighth District Court of Appeals (Cuyahoga County) followed the *Byrd* decision, in *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092. In that foreclosure, Jordan failed to raise any defense or counterclaim regarding Wells Fargo's standing, and he failed to respond to Wells Fargo's motion for summary judgment. *Id.* at ¶3-4. The trial court granted summary judgment to the foreclosure plaintiff, and Jordan appealed. *Id.* at ¶1. Although Jordan apparently had never raised the issue in the trial court, he argued on appeal that the foreclosure plaintiff did not present evidence below that it "owned" the note and mortgage. *Id.* at ¶15. Nevertheless, the Eighth District, relying upon *Byrd* and a line of cases considering federal subject matter jurisdiction, reversed and dismissed the foreclosure, finding:

> "* * * Several judges have held that a complaint must be dismissed if the plaintiff cannot prove that it **owned** the note and mortgage on the date the complaint was filed. [Citations omitted.] Thus, if plaintiff has offered no evidence that it **owned** the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law."

Id. at ¶25-26 (quoting *Deutsche Bank National Trust Co. v. Steele* (S.D. Ohio, Jan 8, 2008), Case No. 2:07-CV-886, 2008 U.S. Dist. LEXIS 4937) (emphases added). Rather than allowing Wells Fargo to cure the issue of standing under Civ. R. 17, or sending the case back to the trial court to take evidence on who was entitled to enforce the note, the appellate court "order[ed] the trial court to dismiss the complaint without prejudice." *Id.* at ¶26.

Following the misguided path blazed by the *Byrd* and *Jordan* courts, the court below ignored Ohio law regarding the enforcement of negotiable instruments and, instead, found the date of execution of a formal assignment of mortgage dispositive of the issues. *U.S. Bank Nat'l Assoc. v. Duvall,* 8th Dist. No. 94714, 2010-Ohio-6478, at ¶8, 15. The Eighth District found that the foreclosure plaintiff was the holder of the note prior to filing the Complaint, but concluded that this was insufficient, because a foreclosure plaintiff is required to prove "that it owned the note *and the mortgage* on the date the complaint was filed." *Id.* at Opinion, n.1 and ¶5, quoting *Jordan, supra* (emphasis added by *Duvall* court).

In *Byrd, Jordan*, and the decision below, each court found that the plaintiff was not the real party in interest because the plaintiff's "ownership" of the mortgage at issue was not established through a formal assignment of mortgage which predated the complaint. There was no analysis regarding whether the plaintiffs were entitled to enforce the notes secured by the mortgages pursuant to Article 3, as codified in Ohio. None of these appellate decisions mention the UCC. Moreover, in reaching these decisions, the First and Eighth Districts also failed to mention this Court's decision in *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 701 N.E. 2d 1002, 1008 ("The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter").

Since *Byrd* and *Jordan*, other Ohio appellate districts have issued contrary decisions as to what constitutes standing and jurisdiction in a mortgage foreclosure action. The Seventh District held that a blank indorsement on a promissory note created bearer paper, making the plaintiff, as the party in possession, a person entitled to enforce. *U.S. Bank Nat'l Ass'n v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, at ¶50-51. After properly applying the UCC to determine standing in an Ohio foreclosure, however, the Seventh District ignored the UCC's nomenclature in holding that "the owner of a promissory note should be recognized as the owner of the related mortgage," even though no assignment of mortgage was entered into the record. *Id.* at ¶52-53

The Fifth District held that any defect in standing was cured pursuant to Civ.R. 17(A) by obtaining possession of the note and an assignment of mortgage after the complaint was filed, but before judgment was entered in the case. *U.S. Bank, N.A. v. Bayless*, 5th Dist. App. No. 09 CAE 01 004, 2009-Ohio-6115, at ¶23, applying its previous precedent in *Wachovia Bank, N.A. v. Cipriano*, Guernsey App. No. 09CA007, 2009-Ohio-5470, at ¶38. The Tenth District held that where plaintiff held the note at the time the complaint was filed, and the note was transferred to the substitute plaintiff prior to summary judgment, that was all that was required to enforce the mortgage. *Countrywide Home Loan Servicing, L.P. v. Thomas*, 10th Dist. App. No. 09AP-819, 2010-Ohio-3018, at ¶8-11.

The Eighth District has also issued conflicting decisions regarding whether standing can be waived as a defense. *Compare, e.g., First Horizon Home Loan Corp. v. Roberts*, 8th Dist. Case No. 93076, 2010-Ohio-60, at ¶10 ("they have waived that issue [of standing] and are precluded from raising it on appeal"); *with, Mortgage Electronic Registration Systems, Inc. v. Mosley*, 8th Dist. Case No. 93170, 2010-Ohio-2886, at ¶16 ("'Standing is a jurisdictional requirement and cannot be waived.'" (citation omitted))

The Eighth District cases holding that standing in a foreclosure case is a jurisdictional requirement also conflict with other Ohio appellate courts. *See, e.g., JPMorgan Chase Bank Trustee v. Murphy,* 2nd Dist. Case No. 23927, 2010-Ohio-5285, at ¶19 ("Murphy did not timely challenge the standing of JPMorgan Chase to prosecute the foreclosure action, and Murphy accordingly waived this argument."); *Wachovia Bank, N.A. v. Cipriano,* 5th Dist. Case No. 09CA007, 2009-Ohio-5470, at ¶40 ("the trial court had subject matter jurisdiction regardless of who filed the action. It is undisputed that appellant signed the note, the note was in default, and the subject property was within the trial court's jurisdiction."); *Bank of New York v. Stuart*, 9th Dist. Case No. 06CA008953, 2007-Ohio-1483, at ¶9.

There is a split between the two judges in the Common Pleas Court of Erie County, Ohio, regarding whether a foreclosure plaintiff must be both the owner and holder of a note and mortgage in order to file a foreclosure. *Compare, U.S. Bank, N.A. v. Coffey* (March 2, 2011), Erie C.P. No. 2010-CV-0531, unreported (granting defendant's motion to dismiss based on plaintiff's failure to allege in its complaint that it is the holder *and owner* of the subject note), *with, CitiMortgage, Inc. v. Schippel* (March 2, 2011), Erie C.P. No. 2010-CV-0684, unreported (denying defendant's motion to dismiss based on plaintiff's failure to allege it is the holder *and owner* of the note and mortgage). There are several cases pending in the Sixth District Court of

Appeals resulting from these conflicting orders. *See, e.g., U.S. Bank, N.A. v. Coffey* (2011), Erie App. No. E-11-0026; *U.S. Bank, N.A. v. Harper* (2011), Erie App. No. E-11-0025.

Amici allow their servicers to pursue foreclosure of defaulted loans in their own names. *FNMA Guide*, Part VIII, § 105; *FHLMC Guide*, § 66.17. Freddie Mac's and Fannie Mae's policies are supported by the UCC, the Ohio Revised Code, and contract and property law. Servicers are themselves entitled to enforce under R.C. 1301.01(T)(1) where notes indorsed in blank are in their possession. See *Fannie Mae Announcement 08-12*. Through their agreements with servicers and document custodians, Amici specifically assent to temporary transfer of the note to the servicer for purposes of possession for litigation. See *Form 2003* and *Form 1035*.

Refusing standing to all but *owners* of the notes, as the Eighth District Court of Appeals suggests, would make it impossible to involve servicers in the foreclosure process in any meaningful way. Efficient servicing, including the benefit to homeowners of consistency in interaction with the party responsible for their mortgage loans, would be forever lost. The confusion in the Ohio trial courts and courts of appeal threatens to undermine the liquidity of negotiable instruments, the universality of the law of commercial paper, and the very stability in the secondary market for mortgage loans that Congress sought to protect.

6. Nationwide servicing contracts governing the relationship between holders and owners of notes and mortgages sold on the secondary market are enforceable under the doctrine of freedom of contract.

Amici's Servicing and Custodial Agreements are valid, enforceable contracts that determine who has the right to enforce the note and mortgage by demanding and accepting payments due thereunder and filing foreclosure actions when necessary to foreclose defaulted mortgage loans. These contracts are neither illegal nor contrary to public policy, and they are contracts that apply across the United States. The right to contract freely with the expectation that the terms of the contract will be enforced is a fundamental right, guaranteed by the Ohio Constitution. *Wilborn v. Bank One Corp.*, 121 Ohio St. 3d 546, 2009-Ohio-306, 906 N.E.2d 396, at ¶8-9. Therefore, courts should not re-write or refuse to follow these agreements, but should enforce them in accordance with the evidence and recognized principles of law. *United States v. Bethlehem Steel Corp.,* U.S. 289, 310 (1942) (concurring opinion).

These Freddie Mac and Fannie Mae servicing guidelines and agreements are national contracts. The court below would have this Court depart from centuries of commercial law, reflected in Amici's national servicing guidelines, by requiring the *owner of the note and mortgage*, rather than a person entitled to enforce the note, to be the foreclosure plaintiff. This is opposite public policy, expressed by Congress in the Fannie Mae and Freddie Mac enabling legislation, as it would impair the marketability of residential mortgage loans in Ohio. In turn, such a holding would reduce the liquidity of Amici's investment portfolios and decrease the capital available to borrowers for mortgages. *Wilborn v. Bank One Corp.*, 121 Ohio St. 3d 546, 2009-Ohio-306, 906 N.E.2d 396, at ¶38.

The drastic changes which would be required in the policies of Fannie Mae and Freddie Mac would needlessly alter the way Ohio mortgages in particular are purchased, how ownership is vested, how the loan documents are held, and increase the complexity of initiating and pursuing foreclosure.[14] Ohio mortgages would become a unique species, the additional administrative costs for which could make them incompatible with the process of selling uniform loans on the secondary market. This creates a danger that investment in Ohio mortgages would be destabilized, diminishing the borrowing opportunities for Ohio homeowners. This may also have a direct effect on low- and moderate-income housing, which is the subject of over half of Amici's funding, and could likewise change the policies of other independent investors and guarantors of mortgage-backed securities. See, Section 81.12, Title 24 C.F.R.; see also, *Fannie Mae 2010 Annual Housing Activities Report and Annual Mortgage Report*, March 16, 2011.[15]

CONCLUSION

Article 3 of the UCC, as codified in Ohio, is a reflection of centuries-old policies meant to promote free and uniform commerce. It achieves this purpose by providing a framework for the creation, transfer, and enforcement of negotiable instruments, such as mortgage notes, which can be utilized as security or purchased as investments. A free and uniform commerce in mortgage notes promotes the ready availability of funding for loans in Ohio, especially in low- and moderate-income housing. The Eighth District Court of Appeals, through its recent decisions in mortgage foreclosure actions, suggests what amounts to abandoning these established rules in favor of a strict and (with respect to verification) cumbersome requirement of ownership. As such a process would be inconsistent with UCC Article 3 and incompatible with the commercial process developed in reliance on the UCC, it cannot be established without threatening the continued viability of the secondary mortgage market in Ohio. The question posed by the Court of Appeals does not reflect the language of commerce codified in the Ohio Revised Code and must be answered in the negative.

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14 Fannie Mae and Freddie Mac were placed in conservatorship under the auspices of the Federal Housing Finance Agency ("FHFA") to ensure their financial soundness. *Wilborn v. Bank One Corp.*, 121 Ohio St. 3d 546, 2009-Ohio-306, 906 N.E.2d 396, at fn. 5.

15 available at http://www.fanniemae.com/media/pdf/2011/AHAR-2011.pdf.

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CERTIFICATE OF SERVICE

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