

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

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MERIT BRIEF OF APPELLEES ANTOINE DUVALL & MADINAH SAMAD

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES**.....iii

**STATEMENT OF FACTS**.....1

**ARGUMENT**.....2

**I. The instant appeal must be dismissed for lack of jurisdiction because the trial court’s dismissal without prejudice does not constitute a final order under R. C. 2505.02**.....2

**II. The instant appeal must be dismissed as moot because the release of the subject mortgage renders the certified conflict question non-justiciable as to the parties herein**.....4

**III. To have standing as a plaintiff in a mortgage foreclosure action, a party must show that it owned the note and the mortgage when the Complaint was filed**.....6

**IV. Even assuming all facts alleged by Appellant as true, accepting all propositions of law and interpretations of authority asserted by Appellant as controlling, and answering the conflict question in the negative, Appellant’s Complaint was nevertheless properly dismissed by the trial court for lack of standing**.....15

**V. Conclusion**.....16

**CERTIFICATE OF SERVICE**.....18

## TABLE OF AUTHORITIES

### Cases:

<u>Adams v. Madison Realty &amp; Development, Inc.</u> (C.A.3 1988), 853 F.2d 163.....	16
<u>Bates v. State ex rel. Fulton</u> (1935), 130 Ohio St. 133, 198 N.E. 34.....	7
<u>Burger Brewing Co. v. Liquor Control Comm.</u> (1973), 34 Ohio St.2d 93.....	5
<u>Chase Manhattan Mtge. Corp. v. Smith</u> , 1 <sup>st</sup> Dist. No. C061069, 2007-Ohio-5874.....	7
<u>Countrywide Home Loan Servicing, L.P. v. Thomas</u> , 2010-Ohio-3018.....	13
<u>Cuyahoga Cty. Bd. Of Commrs. v. State</u> , 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330.....	6
<u>First Nat'l Bank v. Randal Homes Corp.</u> , Pike App. 05CA739, 2005-Ohio-6129.....	8
<u>Fortner v. Thomas</u> (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371.....	5,7
<u>General Acc. Ins. Co. v. Insurance Co. of North America</u> (1989), 44 Ohio St.3d 17, 540 N.E.2d 266.....	2
<u>Helms v. Koncelik</u> , Franklin App. No. 08AP-323, 2008-Ohio-5073.....	7
<u>HSBC Bank USA v. Thompson</u> , Montgomery App. No. 23761, 2010-Ohio-4158.....	16
<u>Kincaid v. Erie Ins. Co.</u> , 128 Ohio St.3d 322, 2010-Ohio-6036.....	9
<u>Kuck v. Sommers</u> (1950), 100 N.E.2d 68, 75, 59 Ohio Abs. 400.....	14
<u>Liner v. Jafco, Inc.</u> (1964), 375 U.S. 301.....	5
<u>MB West Chester, L.L.C. v. Butler Cty. Bd. Of Revision</u> (2010), 126 Ohio St.3d 430, 2010-Ohio-3781, 934 N.E.2d 928.....	2
<u>Morrison v. Steiner</u> (1972), 32 Ohio St.2d 86.....	6
<u>National City Commercial Capital Corporation v. AAAA at Your Service, Inc.</u> (2007), 114 Ohio St.3d 82, 868 N.E.2d 663, 2007-Ohio-2942.....	2
<u>Nebraska Press Assn. v. Stuart</u> (1976), 427 U.S. 539.....	5
<u>Northland Ins. Co. v. Illuminating Co.</u> , 11 <sup>th</sup> Dist. Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529.....	11,14

<u>Ohio Cent. RR Sys. v. Mason Law Firm Co., L.P.A.</u> , 182 Ohio App.3d 814, 2009-Ohio-3238.....	11
<u>Ohio Pyro, Inc. v. Dept. of Commerce</u> , 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550.....	6-7,9
<u>Rickard v. Trumbull Township Bd. Zoning Appeals</u> , 11 <sup>th</sup> Dist. No. 2008-A-0024, 2009-Ohio-1529.....	7
<u>State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton Cty.</u> (1996), 74 Ohio St.3d 536, 1996-Ohio-286.....	5
<u>State ex rel. Dallman v. Court of Common Pleas</u> (1975), 35 Ohio St.2d 176, 298 N.E.2d.....	6
<u>State ex rel. Jones v. Suster</u> (1998), 84 Ohio St.3d 70, 701 N.E.2d 1002.....	7-9,11,15
<u>United States Parole Comm. v. Geraghty</u> (1980), 445 U.S. 388.....	4
<u>Shealy v. Campbell</u> (1985), 20 Ohio St.3d 23.....	10
<u>Travelers Indemn. Co. v. R.L. Smith Co.</u> (Apr. 13, 2001), 11 <sup>th</sup> Dist No. 200-L-014.....	11,14
<u>U.S. Bank Natl. Assn. v. Bayless</u> , 2009-Ohio-6115.....	13-14
<u>U.S. Bank Natl. Assn. v. Marcino</u> , 181 Ohio App.3d 328, 2009-Ohio-1178.....	13-14
<u>Wachovia Bank v. Cipriano</u> , Guernsey App. No. 09CA007, 2009-Ohio-5470.....	14
<u>Ward v. Summa Health Sys.</u> , 184 Ohio App.3d 254, 2009-Ohio-4859, 920 N.E.2d 421.....	3
<u>Wells Fargo Bank, N.A. v. Byrd</u> , 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722.....	12-14
<u>Wells Fargo Bank, N.A. v. Jordan</u> , 2009-Ohio-1092.....	13-14
<u>Wells Fargo Bank, N.A. v. Sessley</u> , 188 Ohio App.3d 213, 2010-Ohio-2902.....	6,11-14
<u>Wells Fargo Bank, N.A. v. Stovall</u> , Cuyahoga App. No. 91802, 2010-Ohio-236.....	7
<u>West Clermont Ed. Ass'n v. West Clermont Local Bd. of Ed.</u> , 67 Ohio App.2d 160.....	10
<b>Statutes:</b>	
R.C. 2505.02.....	2-4

U.C.C. § 3-117.....16

**Constitutional Provisions:**

Article III, Section 2, United States Constitution.....4-5

Article IV, Section 4(B), Ohio Constitution.....5,7

**Other Authorities:**

Monaghan, Constitutional Adjudication: The Who and When (1973), 82 Yale L. J. 1363.....4

## STATEMENT OF FACTS

S.Ct. Prac. R. 6.3(B) provides in pertinent part that “[a] statement of facts may be omitted from the appellee’s brief if the appellee agrees with the statement of facts given in the appellant’s merit brief.” Appellees Antoine Duvall and Madinah Samad (collectively hereinafter “Appellees”) agree with the statement of facts given in the merit brief of Appellant U.S. Bank, National Association, as Trustee for CMLTI 2007-WFHE2 (hereinafter “Appellant”) and therefore so decline to provide a separate statement of facts save to note one event that has occurred since the time period covered by Appellant’s statement of facts and to further dispute two specific factual contentions made elsewhere in Appellant’s merit brief as being without basis in the record. See Brief of Appellant U.S. Bank, National Association, as Trustee for CMLTI 2007-WFHE2 at 35.

Appellees first note for the record that on June 3, 2011, Appellant executed, and on June 6 caused to be filed with the Recording Division of the Office of the Fiscal Officer of Cuyahoga County, a certificate of release with respect to the mortgage at issue herein in which it “acknowledge[d] that it has received full payment and satisfaction of the same, and in consideration thereof, does hereby cancel and discharge said Mortgage.” Notice of Suggestion of Mootness Ex. A, Certificate of Release.

Next, Appellant asserts that “[t]he evidence before the court was that possession of the Note was transferred to U.S. Bank on March 1 or April 1, 2007.” See Brief of Appellant U.S. Bank, National Association, as Trustee for CMLTI 2007-WFHE2 at 35. Rather, the evidence before the court was that “Wells Fargo has physical possession and custody of the original signed Promissory Note executed by Andre Duvall.” Renewed Motion Ex. B, Affidavit in Support of Plaintiff’s Motion for Summary Judgment at ¶ 4.

Finally, Appellant alleges that “U.S. Bank filed the Complaint, attaching the indorsed Note as an exhibit.” See Brief of Appellant U.S. Bank, National Association, as Trustee for CMLTI 2007-WFHE2 at 35. It is a matter of record that the Note attached as an exhibit to the Complaint does not bear an indorsement. Complaint Ex. A, Adjustable Rate Note.

### ARGUMENT

I. **The instant appeal must be dismissed for lack of jurisdiction because the trial court’s dismissal without prejudice does not constitute a final order under R.C. 2505.02.**

Appellant’s Complaint was dismissed without prejudice by the trial court. See Brief of Appellant Appx. A-60, Journal Entry of the Cuyahoga County Common Pleas Court (January 21, 2010, Docket #40. A trial court’s dismissal without prejudice is not a final order under R.C. 2505.02. National City Commercial Capital Corporation v. AAAA at Your Service, Inc. (2007), 114 Ohio St.3d 82, 868 N.E.2d 663, 2007-Ohio-2942 at ¶ 8. Because a dismissal without prejudice is not a final order under R.C. 2505.02, an appeal of that order must be dismissed for lack of jurisdiction. General Acc. Ins. Co. v. Insurance Co. of North America (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266, 270.

A final order “affects a substantial right in an action that in effect determines the action and prevents judgment.” R.C. 2505.02(B)(1). An order “affects a substantial right” if it would foreclose appropriate relief in the future if not immediately appealable. MB West Chester, L.L.C. v. Butler Cty. Bd. Of Revision (2010), 126 Ohio St.3d 430, 432, 2010-Ohio-3781, 934 N.E.2d 928. A dismissal without prejudice, as this Court held, is not a final order under R.C. 2505.02 when the party can re-file the lawsuit. National City, 114 Ohio St.3d 82, 868 N.E.2d 663, 2007-Ohio-2942 at 8. National City and MB West Chester are consistent: where a dismissal is without prejudice and the party may re-file the lawsuit, the order of dismissal does not foreclose

appropriate relief in the future and as such does not meet the definition of a final order under R.C. 2505.02.

Appellants argue that the issue at bar is analogous to that in Ward v. Summa Health Sys., 184 Ohio App.3d 254, 2009-Ohio-4859, 920 N.E.2d 421 ¶¶ 7, 8, in which it was reasoned that a dismissal without prejudice can constitute a final appealable order if the complaint, re-filed under the same circumstances, would result in the same dismissal. See Amended Memorandum in Opposition of Motion to Dismiss at 9. In Ward, the complaint was dismissed for failing to comply with Civ. R. 10(D)(2)(a), which requires affidavits of merit to be appended to complaints in medical malpractice cases). The plaintiffs did not attach an affidavit, and instead sought discovery to allow their experts to evaluate the substantive issues. The trial court denied discovery and dismissed the action, without prejudice, for failure to comply with the rule. On appeal, the defendants asserted that there was no final appealable order because the dismissal was without prejudice, and the plaintiffs could simply re-file, attaching the affidavit. The court in Ward rejected defendants' argument in that case because the plaintiffs' complaint would suffer from the same defect if plaintiffs re-filed *without* the affidavit.

The conflict scenario is plainly distinguishable. Where a plaintiff's complaint is dismissed for lack of standing because it became the owner of the subject note and mortgage after filing, a re-filed complaint is necessarily free of the same defect. Unlike Ward, there is no additional step required for the plaintiff to cure the defect upon which the dismissal was predicated. Now being the owner of the note and mortgage, the plaintiff does not even have the option of incurring the same result as the plaintiffs in Ward could have by once again failing to attach the affidavit. Further, it is clear that the issue could not evade review in circumstances where the dismissal constitutes a final order giving rise to recourse to the appellate courts. If, for

example, the plaintiff alleged that it did not at the time of the complaint and still did not own the note and mortgage, although the plaintiff can re-file per National City, a re-filed complaint would suffer the same defect per Ward. In such an instance, a determination that the order lacked finality would itself foreclose future relief. Such is not the case where a plaintiff's complaint is dismissed for lack of standing because it became the owner of the subject note and mortgage after filing. The plaintiff may simply re-file.

In light of the foregoing, the trial court's order of January 21, 2010 was not a final order under R.C. 2505.02. As such, pursuant to General Acc. Ins. Co., 44 Ohio St.3d 17, the Eighth Appellate District lacked, and this Court lacks, jurisdiction over this appeal.

**II. The instant appeal must be dismissed as moot because the release of the subject mortgage renders the certified conflict question non-justiciable as to the parties herein.**

Even assuming arguendo that the trial court's dismissal without prejudice constitutes a final order under 2505.02, the instant matter was rendered moot by virtue of Appellant's execution and recording of a release of the subject mortgage. As such, the issue of whether Appellant was required to own the note mortgage as of the date on which it filed its complaint in order to have had standing in the foreclosure action is non-justiciable, and any decision rendered thereupon would constitute an advisory opinion for want of any present controversy extant between the parties to the instant appeal.

"One commentator has defined mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" United States Parole Comm. v. Geraghty (1980), 445 U.S. 388, 397, quoting Monaghan, Constitutional Adjudication: The Who and When (1973), 82 Yale L. J. 1363, 1364. Article III, Section 2 of the United States Constitution requires

a “case or controversy” as a predicate for subject matter jurisdiction. In federal cases, mootness has been equated with the case or controversy jurisdictional requirement. In Liner v. Jafco, Inc. (1964), 375 U.S. 301, 306, fn. 3, the United States Supreme Court stated, “our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.” See also Nebraska Press Assn. v. Stuart (1976), 427 U.S. 539, 546.

The case or controversy limits of the United States Constitution do not apply to cases brought under the authority of the Ohio Constitution. Nevertheless, Article IV, Section 4(B) of the Ohio Constitution gives the courts of common pleas original jurisdiction “over all justiciable matters” before them. This provision has been interpreted in a manner similar to the case or controversy limitation of the federal constitution: “It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and render judgments which can be carried into effect.” Fortner v. Thomas (1970), 22 Ohio St.2d 13, 14.

“For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties.” See Burger Brewing Co. v. Liquor Control Comm. (1973), 34 Ohio St.2d 93, 97-98. More recently, in State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton Cty. (1996), 74 Ohio St.3d 536, 542, 1996-Ohio-286, the court stated, “[a]ctual controversies are presented only when the plaintiff sues an adverse party. This means not merely a party in sharp and acrimonious disagreement with the plaintiff, but a party from whose adverse conduct or adverse property interest the plaintiff properly claims the protection of the law.”

It follows that if the courts' jurisdiction is limited to "justiciable matters," the subject matter jurisdiction of the court – that is, "the power to hear and decide a case on the merits," see Morrison v. Steiner (1972), 32 Ohio St.2d 86, paragraph one of the syllabus – is directly limited to justiciable matters. If what were once justiciable matters have been resolved to the point where they become moot, the courts no longer have subject matter jurisdiction to hear the case. The instant matter is plainly moot. The mortgage upon which the foreclosure action from which this appeal is taken having been released as satisfied, the issue of when and whether Appellant might have had standing to foreclose upon said mortgage is simply non-justiciable as the parties are without the requisite adverse interests at law.

**III. To have standing as a plaintiff in a mortgage foreclosure action, a party must show that it owned the note and mortgage when the Complaint was filed.**

As discussed at length by the court in Wells Fargo Bank, N.A. v. Sessley, 188 Ohio App.3d 213, 2010-Ohio-2902, the pertinent analysis is not actually so simple as to yield such a neat result as to resolve the conflict question posed herein broadly in the affirmative or negative. It is nonetheless clear that Appellant's complaint was properly dismissed by the trial court for lack of standing because it did not own the subject note and mortgage when the complaint was filed.

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. State ex rel. Dallman v. Court of Common Pleas (1975), 35 Ohio St.2d 176, 298 N.E.2d, syllabus. Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim. Ohio Pyro, Inc. v. Dept. of Commerce, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27; Cuyahoga Cty. Bd. Of Commrs. v. State, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 22. To have standing, a party must have a personal stake in the outcome of a legal

controversy with an adversary. Ohio Pyro, ¶ 27. This holding is based upon the principle that “it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.” Fortner v. Thomas (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371. See also Section 4(B), Article IV of the Ohio Constitution.

The owner of the mortgage and note secured thereby is the proper party to institute a foreclosure action thereon. Bates v. State ex rel. Fulton (1935), 130 Ohio St. 133, 198 N.E. 34, syllabus ¶ 4. The current holder of the note and mortgage is the real party in interest in a foreclosure action. Wells Fargo Bank, N.A. v. Stovall, Cuyahoga App. No. 91802, 2010-Ohio-236, citing Chase Manhattan Mtge. Corp. v. Smith, 1<sup>st</sup> Dist. No. C061069, 2007-Ohio-5874. If a party is not a real party in interest, it lacks standing to prosecute the action. State ex rel. Jones v. Suster (1998), 84 Ohio St.3d 70, 77.

In light of the foregoing, it is plainly the case that, upon filing a foreclosure action in which it is not the present owner of the note and mortgage, the plaintiff lacks standing. The conflict of authority among Ohio courts is more specifically as to whether this lack of standing is cured by such a plaintiff's acquisition of the note and mortgage during the pendency of the action.

**A. Standing is jurisdictional.**

Standing is an element of the court's jurisdiction. Rickard v. Trumbull Township Bd. Zoning Appeals, 11<sup>th</sup> Dist. No. 2008-A-0024, 2009-Ohio-1529, ¶35. See also Helms v. Koncelik, Franklin App. No. 08AP-323, 2008-Ohio-5073, ¶22 (standing is a threshold

subject matter jurisdiction and voted to grant the writ of prohibition. Suster at 79-80. A majority of the judges explicitly declined to endorse the portion of the opinion cited by Appellant.

2. **The pertinent inquiry is whether the plaintiff had standing when it filed its complaint.**

Appellant further asserts that this Court's decisions in Kincaid v. Erie Ins. Co., 128 Ohio St.3d 322, 2010-Ohio-6036 involves a different, non-jurisdictional form of standing. Appellant asserts that the doctrine of standing at issue in Ohio Pyro, Inc. v. Ohio Dep't of Commerce, 115 Ohio St.3d 375, 381, 2007-Ohio-5024, 875 N.E.2d 550, cert. denied 552 U.S. 1275 (2008) is distinct from that in Kincaid, the latter form of standing being non-jurisdictional. In fact, Kincaid cites (at ¶ 9) Ohio Pyro, specifically invokes the constitutional requirement of an actual conflict between adverse parties as described in the internal citations in the portion of Ohio Pyro quoted by Appellant (see Ohio Pyro, Inc., 2007-Ohio-5024 at ¶ 27, and is bereft of any discussion as to whether standing is jurisdictional.

Instead, Kincaid is specifically instructive as to the issue of purported standing predicated upon an after-acquired interest. In Kincaid, an insured sued his insurer for reimbursement of covered expenses. This Court reversed the judgment of the court of appeals and reinstated the trial court's judgment dismissing the action, reasoning that the plaintiff lacked standing because he had not demanded payment of said expenses. This Court so held despite the fact that, as noted by Justice Pfeifer in dissent, "Kincaid chose to seek payment for expenses by filing suit against Erie. Erie asserts and the majority opinion holds that Kincaid should have made a request to Erie, been denied, and then filed suit. It is difficult to understand why Kincaid must follow that course of action, because the policy does not require it; the policy is silent about how to seek reimbursement." Kincaid v. Erie Ins. Co., 128 Ohio St.3d 322, 2010-6036 at ¶ 32 (Pfeifer, J., dissenting). The implications Kincaid are straightforward: if a plaintiff cannot cure

his lack of standing by acquiring the interest sued upon contemporaneously with and by virtue of the filing of the complaint, it follows logically that he cannot cure his lack of standing by acquiring such interest thereafter.

3. **The real party in interest rule does not confer standing; rather, compliance with the rule cures a lack of standing.**

Appellant further contend that the instant matter involves “real party in interest standing.” Although Appellant is hardly alone in its confusion on this point, the doctrine of standing and the real party in interest rule are distinct legal concepts. Standing, as discussed above, is the requirement of an actual controversy between adverse parties. The question of real party in interest, on the other hand, goes to whether the party suing is the one entitled to the relief sought. “To determine whether the requirement that the action be brought by the real party in interest is sufficed, courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief.” Shealy v. Campbell (1985), 20 Ohio St.3d 23, 25. The party suing has to be the one which is directly benefited or damaged by the case's decision. West Clermont Ed. Ass'n v. West Clermont Local Bd. of Ed., 67 Ohio App.2d 160, syll. ¶1 (Clermont Co. 1980). Thus, while standing requires the plaintiff to have a personal stake in the dispute, the status of real party in interest is limited to those possessing the legally cognizable interest to be vindicated.

Civ. R. 17(A) provides that:

Every action shall be prosecuted in the name of the real party in interest.  
\*\*\* No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

If a party is not a real party in interest, it lacks standing to prosecute the action. State ex rel. Jones v. Suster (1998), 84 Ohio St.3d 70, 77. Civ. R. 17 permits a plaintiff to cure by (1) showing that the real party in interest has ratified the commencement of the action or (2) joining or substituting the real party in interest. Wells Fargo Bank, N.A. v. Sessley, 188 Ohio App.3d 213, 2010-Ohio-2902 at ¶ 10, citing Ohio Cent. RR Sys. v. Mason Law Firm Co., L.P.A., 182 Ohio App.3d 814, 2009-Ohio-3238 at ¶ 33.

**B. Where the plaintiff in a mortgage foreclosure action lacks standing because it did not own the subject note and mortgage when it filed its complaint, such lack of standing is not cured by the plaintiff's subsequent acquisition of the note and mortgage.**

The foregoing well-settled law neatly frames the issue. A plaintiff which files a complaint in foreclosure upon a note and mortgage it does not own lacks standing. Such lack of standing may be cured through substitution or joinder of the owner of the note and mortgage. The point of contention is specifically as to whether such lack of standing may be cured through the plaintiff's acquisition of the note and mortgage. This Court should hold that it may not.

Civ. R. 17 is plainly inapplicable to the acquisition. The rule itself expressly contemplates joinder or substitution of the real party in interest and not the plaintiff's becoming the real party in interest. Ohio law is clear that Civ. R. 17 operates in favor of the nonparty so joined or substituted and not in favor of the plaintiff that files without standing. See Northland Ins. Co. v. Illuminating Co., 11<sup>th</sup> Dist. Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529 at ¶ 17 (Civ. R. 17 is not applicable when the plaintiff is not the proper party to bring the case and, thus, does not have standing to do so. A person lacking any right or interest to protect may not invoke the jurisdiction of a court.); Travelers Indemn. Co. v. R.L. Smith Co. (Apr. 13, 2001), 11<sup>th</sup> Dist No. 200-L-014 (Civ. R. 17(A) is not applicable unless the plaintiff had standing to

invoke jurisdiction of the court in the first place.); Wells Fargo Bank, N.A. v. Byrd, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722.

1. **This Court should adopt the interpretation of the doctrine of standing and the real party in interest rule in the context of a mortgage foreclosure action set forth by the Tenth District Court of Appeals in Sessley.**

In Sessley, the Tenth District Court of Appeals reviews the prior case law on point and formulates a comprehensive interpretation of the proper application of the real party in interest rule in the context of standing in a mortgage foreclosure action. Wells Fargo Bank, N.A. v. Sessley, 188 Ohio App.3d 213, 2010-Ohio-2902. In Sessley, Wells Fargo filed an action in foreclosure on February 26, 2007, attaching to its complaint a note identifying Option One as the lender and a mortgage identifying Option One as the mortgagor. On February 28, 2007, Option One assigned the note and mortgage to Wells Fargo. On December 3, 2007, Sessley filed an answer and counterclaim and a third party claim against Option One. Option One was joined to the action on March 11, 2008 and filed its answer on June 30, 2008. Sessley, 188 Ohio App.3d 213 at ¶¶ 3, 4. Thereafter, summary judgment was granted in favor of Wells Fargo, and Sessley appealed, arguing that Wells Fargo lacked standing.

Sessley notes that the initial inquiry is as to whether Wells Fargo was the real party in interest such that it had standing to file its complaint. First, concurring with Byrd on this point, Sessley explains that a plaintiff who sues upon a note and mortgage it does not own does not effect a “ratification” within the meaning of Civ. R. 17 when it subsequently acquires the note and mortgage. Sessley, 2010-Ohio-2902 at 7-8; Wells Fargo Bank, N.A. v. Byrd, 178 Ohio App.3d 285, 2008-Ohio-4603. Sessley proceeds to distinguish Byrd as to the dispositive issue:

Nevertheless, one glaring distinction separates the instant matter from Byrd. Specifically, the Byrd court analyzed ratification because the real party in interest had neither been substituted nor joined in the foreclosure suit. In the

instant matter, however, Option One has been involved in this suit since June 2008...Because Option One was joined in this matter, we find that the real-party-in-interest problem was cured.

Id. at ¶ 16. The rule is clear: when the plaintiff in a mortgage foreclosure action lacks standing because it did not own the note and mortgage when it filed its complaint, such lack of standing may be cured by joining or substituting the party that was the owner of the note and mortgage when the complaint was filed, not by the plaintiff's subsequently becoming the owner of the note and mortgage.

2. **Marcino, Thomas, Byrd, and Duvall are compatible with this reasoning.**

With the singular exception of Bayless, the conflict cases at issue herein can all be reconciled within the Sessley framework. The Seventh District in Marcino found, as did the Tenth District in Thomas, that the plaintiff was in fact the owner of the note and mortgage at the time it filed its complaint. U.S. Bank Natl. Assn. v. Marcino, 181 Ohio App.3d 328, 2009-Ohio-1178; Countrywide Home Loan Servicing, L.P. v. Thomas, 2010-Ohio-3018. In Sessley, the Tenth District found that the plaintiff lacked standing because it was not the owner of the note and mortgage at the time it filed its complaint but that such lack of standing was cured because the party who owned the note and mortgage at the time the plaintiff filed its complaint was joined. Wells Fargo Bank, N.A. v. Sessley, 188 Ohio App.3d 213, 2010-Ohio-2902. In Jordan (upon which the trial court's dismissal herein was predicated), the Eighth District found, as did the First District in Byrd, that the plaintiff lacked standing because it was not the owner of the note and mortgage at the time it filed its complaint and that such lack of standing was cured because the party who owned the note and mortgage at the time the plaintiff filed its complaint was not joined, even though the plaintiff subsequently acquired the note and mortgage. Wells

Fargo Bank, N.A. v. Jordan, 2009-Ohio-1092, Wells Fargo Bank, N.A. v. Byrd, 178 Ohio App.3d 285, 2008-Ohio-4603.

**3. Bayless was incorrectly decided and should be overruled.**

Alone among the conflict cases, Bayless does not comport with the analysis set forth in Sessley. In Bayless, the court found that a plaintiff which sued upon a note and mortgage it did not own cured its lack of standing at the time of, and by virtue of, its subsequent acquisition of the note and mortgage. U.S. Bank Natl. Assn. v. Bayless, 2009-Ohio-6115. The court viewed as determinative the fact that Civ. R. 17 states that “the real party in interest shall ‘prosecute’ the claim. The rule does not state ‘file’ the claim.” Bayless, citing at ¶ 22 Wachovia Bank v. Cipriano, Guernsey App. No. 09CA007, 2009-Ohio-5470 at ¶ 38. This simply ignores the pertinent analysis, specifically because it ignores settled precedent that Civ. R. 17 does not apply in favor of a plaintiff which lacks standing when it files its complaint. Northland Ins. Co. v. Illuminating Co., 11<sup>th</sup> Dist. Nos. 2002-A-0058 and 2002-A-0066, 2004-Ohio-1529 at ¶ 17; Travelers Indemn. Co. v. R.L. Smith Co. (Apr. 13, 2001), 11<sup>th</sup> Dist No. 200-L-014; Wells Fargo Bank, N.A. v. Byrd, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722. As it misinterprets the doctrine of standing and the real party in interest rule, Bayless was incorrectly decided and should be overruled to the extent that it is in conflict with Sessley, Marcino, Thomas, Jordan, and Byrd.

**4. The analysis does not change where the plaintiff purports to be a non-owner otherwise entitled to enforce the note.**

Appellant places great emphasis on the axiom that “the mortgage follows the note.” The law on this point is more precise, and dispositively so. *Negotiation* of the note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered. U.S. Bank Natl. Assn. v. Marcino, 181 Ohio App.3d 328; Kuck v. Sommers (1950), 100 N.E.2d

68, 75, 59 Ohio Abs. 400. Where the plaintiff files a complaint upon a note which it does not own but of which it is in possession and otherwise entitled to enforce, the note necessarily has not been negotiated to plaintiff (otherwise the plaintiff, in possession of the note negotiated to it, would in fact be its owner). As such, the owner of the mortgage is the real party in interest at the time of the filing of the complaint.

**IV. Even assuming all facts alleged by Appellant as true, accepting all propositions of law and interpretations of authority asserted by Appellant as controlling, and answering the conflict question in the negative, Appellant's Complaint was nevertheless properly dismissed by the trial court for lack of standing.**

Assuming arguendo that this Court:

- (1) finds the trial court's dismissal without prejudice to be a final order under R.C. 2505.02;
- (2) proceeds to review the issue absent a justiciable controversy between the parties;
- (3) holds, as a majority of the justices in Suster that standing is jurisdictional;
- (4) holds that a plaintiff need not own the note and mortgage when it files its complaint to have standing to maintain a foreclosure action; and
- (5) accepts Appellant's position that all that is required is that the plaintiff become a person entitled to enforce the note at some point prior to judgment

it nevertheless must conclude that the trial court properly dismissed Appellant's complaint for lack of standing. As the evidence of record indicates, the subject note was made payable to Wells Fargo, was endorsed in blank by Wells Fargo, and remains in the possession of Wells Fargo. Renewed Motion Ex. B, Affidavit in Support of Plaintiff's Motion for Summary Judgment at ¶ 4. The fact of Wells Fargo's possession of the original indorsed note precludes a finding either that U.S. Bank owns the note and mortgage or is a party in possession otherwise entitled to enforce the note. Even under the relaxed substantive and procedural standards advocated by Appellant itself, Appellant lacked standing when it filed complaint, lacked standing when the action was dismissed, and lacks standing now. As such, the trial court's dismissal of Appellant's complaint for lack of standing should be affirmed.

Amici curiae Fannie Mae and Freddie Mac (hereinafter “Amici”) address, though Appellant itself does not, what would be required in order for Appellant to prevail on the instant appeal. This Court would need to hold that standing to pursue a foreclosure action is governed not by the law of Ohio and the Uniform Commercial Code but rather by the terms of the pooling and servicing agreement (which agreement, it must be noted, Appellant failed to properly submit for the trial court’s consideration). Such a holding would be contrary to law and, Appellees would submit, poor policy. U.C.C. § 3-117 specifies that in order for the right to enforce the note to be varied by outside agreement, the obligation must have been incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. This condition is plainly not satisfied: the note was made in a loan transaction prior to (therefore not in reliance upon) and separate from the securitization transaction.

Amici prophesize various disastrous consequences which they claim will ensue upon a disposition of the present matter in Appellees’ favor, including capital flight, liquidity crisis, and, for some reason, retaliation against low- and middle-income borrowers. Overruling Appellant’s appeal will in fact have no such result; it will merely require that a putative mortgagee seeking to foreclose on a homeowner’s equity of redemption have its paperwork in order before coming to court. “Financial institutions, noted for insisting on their customers’ compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice.” HSBC Bank USA v. Thompson, Montgomery App. No. 23761, 2010-Ohio-4158, citing Adams v. Madison Realty & Development, Inc. (C.A.3 1988), 853 F.2d 163, 169.

V. **Conclusion**

In light of the foregoing, Appellees respectfully request that the instant appeal be dismissed for lack of jurisdiction because the trial court’s dismissal without prejudice of January

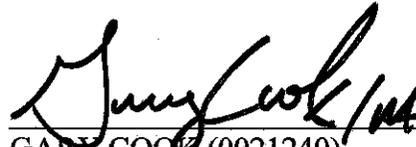
21, 2010 is not a final order under 2505.02. In the alternative, Appellees respectfully request that the instant appeal be dismissed for lack of jurisdiction because the matter has been rendered moot. In the alternative, Appellees respectfully request that this Court hold that, to have standing in a mortgage foreclosure action, a party must show that it owned the note and mortgage when the Complaint was filed. In the alternative, Appellees respectfully request that the Court find that the trial court properly dismissed Appellant's complaint for lack of standing irrespective of the disposition of the conflict issue herein.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing *Merit Brief of Appellees* was served via regular U.S. mail this 15<sup>th</sup> day of August, 2011 upon:

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