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I. INTRODUCTION.

This Court has accepted certification from the Eighth District to answer the 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?” The Eighth District noted that its holding on this issue was in conflict with those of Fifth, Seventh, Ninth and Tenth Districts. Since the Court accepted the certified question, the Second District has agreed with the majority of its sister courts, and certified this same question to this Court.¹ Since the filing of the original Brief (“Brief”) of Plaintiff-Appellant U.S. Bank, N.A. (“U.S. Bank”) as Trustee for the CMLTI 2007-WFHE2 Trust (“Trust”), the Twelfth District has also sided with the majority.²

Four parties filed a response to the Brief: Defendants-Appellants Antoine Duvall and Madinah Samad (collectively, the “Duvalls”), Amici Duane and Julie Schwartzwald (the “Schwartzwalds”), Amici representing all of Ohio’s “civil legal services programs” (“CLSPs”),³ and Amici purporting to represent “homeowners of the state of Ohio and ohiofraudclosure.blogspot.com” (“Ohiofraudclosure”).⁴

The opposing parties present a variety of arguments, but are consistent on a single point of confusion; each conflates the concept of “ownership” with being a party entitled to enforce an

¹ *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, Second Dist. App. No. 2010 CA 41, 2011-Ohio-2681; its certified conflict is pending in this Court as *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, Case No. 2011-1362.

² *Wash. Mut. Bank, F.A. v. Wallace*, 12th Dist. App. No. CA2010-10-103, 2011-Ohio-4174, ¶40

³ Advocates for Basic Legal Equality, Inc, Legal Aid Society of Cleveland, Community Legal Aid Services, Inc., Legal Aid Society of Columbus, Community Legal Aid Services, Inc., Legal Aid Society of Southwest Ohio, LLC, Southeastern Ohio Legal Services, Pro Seniors, Legal Aid of Western Ohio, and the Ohio Poverty Law Center.

⁴ The web site “Ohiofraudclosure.blogspot.com” does not appear to be a legal entity and it is unclear how counsel for it can represent “all Ohio homeowners.”

instrument. They further argue, without citation or support, that recording a notice of assignment of mortgage is necessary to have standing to enforce a mortgage, even though there is no requirement to record the mortgage in first instance to enforce it against the mortgagor. Finally, the opposing parties (like the First and Eighth Districts) seek to write Rule 17 out of existence. As detailed below, their arguments all fail as a matter of law, policy, and common sense. The certified question should be answered in the negative.

II. STATEMENT OF FACTS.

The facts of this case are undisputed. As the Eighth District put it: “On December 26, 2006, [the Duvalls] executed a promissory note for \$90,000 (“the Note”) secured by a mortgage on property located at 13813 Diana Avenue, in Cleveland (“the Mortgage”), with Wells Fargo Bank (“Wells Fargo”). On March 1, 2007, Wells Fargo transferred the Note, among other assets, to [the Trust], of which [U.S Bank] was trustee. Subsequently, [the Duvalls] defaulted on the Note. On October 15, 2007, [U.S Bank] filed a complaint in foreclosure.” Opinion, ¶¶2-3.

U.S. Bank attached a copy of the unindorsed Note to its Complaint. Complaint, Exh. A. On February 5, 2008 (after the Complaint was filed), Wells Fargo executed a notice of Assignment of Mortgage to U.S. Bank. The Assignment was subsequently provided to the Trial Court with a copy of the Note with an indorsement from Wells Fargo executed in blank.⁵

On December 8, 2009, the Trial Court ordered U.S. Bank to supplement its affidavit in support of its motion for summary judgment with “some definitive proof of the acquisition date of the subject note and mortgage” or be subject to dismissal. On December 28, 2009, U.S. Bank filed the Affidavit of Marc A. Kline, which attached and identified the Mortgage Loan Schedule

⁵ Pages 35-36 of the Brief incorrectly recited that the copy of the Note attached to the Complaint was indorsed. While that occurred in *U.S. Bank v. Perry*, Case No. 2011-0170, currently being held pending decision in this matter, the indorsed version of the Note in this case was introduced when U.S. Bank moved for summary judgment.

attached to the PSA, and confirmed that Wells Fargo transferred the Duvall Note to U.S. Bank on April 1, 2007.

The Trial Court dismissed the Complaint reasoning: “First, the original Complaint did not contain a blank endorsement. The blank endorsement only appeared after the filing of the Complaint. Second, the Mortgage Assignment was also dated and subsequently filed with the Recorder after the filing of the Complaint.” Judgment Entry, January 21, 2010. The Eighth District affirmed, reasoning that even though U.S. Bank was the owner of the Note as of the date the Complaint was filed, “[a]n action on a note and an action to foreclose mortgage are two different beasts,” and that U.S. Bank “had no standing to file a foreclosure action against defendants on October 15, 2007, because, at that time, Wells Fargo owned the mortgage” Opinion, ¶¶13-15.

III. ARGUMENT.

Certified Conflict 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?

A. The Court should answer the certified question.

The Duvalls first contend that the Court should not answer the question because the order dismissing the Complaint was without prejudice, an issue they raised in U.S. Bank’s discretionary appeal, Case No. 2011-0171. Duvalls Brief, 2-4. U.S. Bank already explained why this notion had no merit in its response to the Motion to Dismiss in Case No. 2011-0171, a copy of which is attached as “Exhibit A” to this Brief. Succinctly, a trial court’s imposition of unlawful jurisdictional prerequisites is a final appealable order, even if the imposition of the unlawful prerequisites resulted in a dismissal “without prejudice.” In any event, because this is a

certified conflict case over which the Court has agreed to exercise jurisdiction, the Court may answer that question directly.

The Duvalls also reiterate their arguments that the case is moot, as U.S. Bank released the Mortgage. Duvalls Brief, 4-6. Again, pursuant to this Court's order of August 8, 2011, U.S. Bank extensively briefed the issue of mootness, a copy of which is attached as "Exhibit B" to this Brief. While the direct controversy between the parties to this action is moot, this issue is also before the court in *U.S. Bank v. Perry*, 2011-0170 (which is being held pending the decision in this case), and there is another certified conflict and discretionary jurisdiction case awaiting review on the same issue (*Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 2011-1201 and 2011-1362). The interests of justice are served by this Court answering the certified question.

B. The contours of the analysis.

As discussed in the initial brief, the question posed by the Eighth District is comprised of four separate issues: (1) Must a party show that it *owned the note*? (2) Must a party show that it *owned the mortgage*? (3) Must there be a *recorded assignment* of mortgage? (4) Must these criteria exist *when a foreclosure complaint* is filed? The answer to each question is unequivocally "no."

C. Standing to sue on the promissory note is governed by the U.C.C.

In the initial brief, U.S. Bank detailed the extensive statutory procedures under the Uniform Commercial Code ("U.C.C.") that determine who is entitled to enforce a promissory note secured by a mortgage.⁶ The opposing parties urge the Court to hold that standing to sue on

⁶ The CLSPs and Ohiofraudclosure argue that because mortgages often times contain additional obligations, promissory notes whose payments are secured by mortgages may not be negotiable instruments subject to the U.C.C. CLSPs Brief, 15-16; Ohiofraudclosure Brief, 8-9. The U.C.C., however, makes clear that a note whose payment is secured by collateral remains negotiable, even if there are separate obligations under a security agreement. R.C. 1303.05(B) (U.C.C. § 3-

a promissory note and mortgage should be limited to the “owner” of the note, each offering different reasons. Duvalls Brief, 7; CLSPs Brief, 21; Ohiofraudclosure Brief, 7. Each argument is wrong.

The Duvalls contend in *Bates v. State ex rel. Fulton* (1935), 130 Ohio St. 133, 198 N.E. 34, syllabus ¶ 4, this Court held that only “owners” have standing to sue on a note and mortgage. In *Bates*, a purchaser at a foreclosure sale administered by a probate court believed she had purchased the property free of the underlying mortgage. *Bates*, 130 Ohio St. at 135-136. The original order of sale provided that the mortgage was to be assumed by the purchaser, but the confirmation order stated that the deed should be issued “free and clear.” *Id.* The Superintendent of Banks, which was “in possession of the assets” of the originating bank, filed suit on the note and mortgage, naming the original obligors under the note as well as the subsequent purchaser. *Id.*; see also, General Code Section 710-89. This Court held that the terms of the original order of sale, not the confirmation entry controlled. *Id.*

In opposing the action, the purchaser also argued that the Superintendent did not have standing to initiate suit. *Bates*, 130 Ohio St. at 137. The Court, without discussion of the standing principles, stated that the “owner” of the note and mortgage can initiate suit. *Id.*

Bates does not support the opposing parties for two reasons. First, *Bates* was decided in 1937, 25 years before Ohio enacted the Uniform Commercial Code (“U.C.C.”), and, in particular, R.C. 1303.31. As discussed in U.S. Bank’s Brief, the U.C.C. does not define standing in terms of “ownership,” but rather by looking at whether one is entitled to “enforce” the instrument. R.C. 1303.22 (U.C.C. § 3-203). The General Assembly has identified three

106(b)) (“A promise or order is not made conditional by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration”); see, also, R.C. 1303.05(B), Official Comment 1.

categories of such persons: holders, nonholders in possession with the rights of a holder and persons who can show that an instrument was lost or stolen. *Id.* Whatever authority *Bates* stood for has now been obviated by the U.C.C.

Second, and in any event, *Bates* is consistent with the U.C.C. rules. In *Bates*, the Superintendent had “possession” of the assets of the failed bank, presumably including the note, pursuant to its statutory powers under General Code 710-89. Therefore, the Superintendent qualified as a “nonholder” in possession with the rights of a holder. *Bates* is therefore irrelevant.

The CLSPs argue that the Court should require creditors to show that they are the “owners” instead of merely being holders or nonholders in possession with the rights of a holder. CLSPs Brief, 21. But the rules provided by the General Assembly are clear: the U.C.C. does not require proof of ownership, allowing even a “thief” to be a person entitled to enforce bearer paper. R.C. 1303.31, Official Comment 2. This is because the U.C.C. focuses on possession of the instrument as the key.

The CLSPs also argue that if the Court were to enforce the U.C.C., there is the potential for “double liability” if a party obtains judgment on the note and mortgage, and the “actual” party entitled to enforce the note seeks payment. CLSPs Brief, 28-29.⁷ But the U.C.C. appropriately addresses that issue as well: Under R.C. 1303.67 (U.C.C. § 3-602), payments made to a person entitled to enforce the note discharge liability, even if the payments are made to a thief. As long as the payments are made to a holder, a nonholder in possession or a person designated in R.C. 1303.38, there is no—**zero**—risk of double payment.

⁷ Neither the CLSPs nor any of the other opposing parties cite a single instance where a plaintiff obtained a foreclosure judgment against an Ohio defendant who was later subjected to an additional claim on the same note.

The first prong of the question at hand is who has standing to enforce a note? The U.C.C. provides the answer: any of the persons designated in R.C. 1303.31, *i.e.*, holders, nonholders in possession with the rights of a holder and persons designated in R.C. 1303.38. That is the rule the General Assembly enacted, and the rule that the Court should adopt in answering the question.

D. In a foreclosure action, persons who are entitled to enforce the promissory note have standing to foreclose a mortgage securing its payment.

The second element of the certified conflict question is “To have standing as a plaintiff in a mortgage foreclosure action, must a party show that it owned . . . the mortgage?” The answer to that question is also “no.”

None of the opposing parties cite any authority to contradict the general principle in Ohio that a mortgage is a mere incident of the debt evidenced by a note. *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶52; citing *Edgar v. Haines* (1923), 109 Ohio St. 159, 141 N.E. 837; see, also *Noland v. Wells Fargo Bank, N.A. (In re Williams)* (Bankr. S.D. Ohio 2008), 395 B.R. 33; *Gemini Servs. v. Mortg. Elec. Registration Sys. (In re Gemini Servs.)* (Bankr. S.D. Ohio 2006), 350 B.R. 74, 84. “Therefore, the 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.

Nor do any of the opposing parties offer any reason for this Court to abandon its *Kernohan v. Manss* (1895), 53 Ohio St. 118, 133, 41 N.E. 258. In fact, most of the opposing briefs do not even *cite* this case. *Kernohan* resolves the question before the Court entirely: if a party is entitled to enforce a note, it is entitled to enforce the mortgage securing the note,

regardless of whether some other entity is the recorded mortgagee, and regardless of whether someone else has possession of the original mortgage.

Nor do any of the opposing parties refute the fact that the U.C.C. adopted the common law principles which this Court enunciated in *Kernohan*. R.C. 1309.102(A)(72)(d) and 1309.203(G); *see e.g. U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶53. Again, the U.C.C. Permanent Editorial Board reached the same conclusion:

“What if a note secured by a mortgage is sold (or the note is used as collateral to secure an obligation), but the parties do not formally assign the mortgage that secures payment of the note? U.C.C. Section 9-203(g) explicitly provides that the mortgage automatically follows the note.”

PEB Report, at 8. Succinctly, **security follows the debt**. Because security follows the debt, a person entitled to enforce a note has the right to enforce the mortgage securing its payment.

One of the opposing parties argues that under the Third Restatement of Property (Mortgages), security will not follow the debt if the parties transferring the debt intend otherwise, and that in the world of mortgage backed securities and the development of the Mortgage Electronic Registration System (“MERS”), lenders *do intend* to separate the debt from the security. Ohiofraudclosure Brief, 10-11. Both assertions are incorrect.

The Third Restatement creates a presumption that a creditor intends to transfer the mortgage by transferring the note, “unless the parties otherwise agree.” Restatement of the Law 3d, Property (1997), Mortgages, § 5.4. The Third Restatement gives an example of when the parties might “otherwise agree”: when the property secures repayment of two debts, and the creditor is only transferring one. *Id.*

There is nothing in the creation of mortgage backed securities that would rebut this presumption. The securities represent the right to receive payments under promissory notes. U.S. Securities and Exchange Commission, *Mortgage-Backed Securities*, (Modified: July 23,

2010), <http://www.sec.gov/answers/mortgagesecurities.htm>. They are “mortgage backed” because the promise of payments is supported by mortgages against the underlying properties. Far from representing an intention to separate the note from the mortgage, these securities are based on the notion that the mortgage “backs” the notes which are their subject.⁸

Nor does the creation of MERS or the standard MERS mortgage evince an intention to separate the debt from its security. The standard MERS mortgage⁹ names MERS as the mortgagee, but only as “nominee” for the “Lender . . . and Lender’s successors and assigns.” *Hardesty v. Huntington Nat’l Bank (In re Payne)* (Bankr. S.D. Ohio Mar. 31, 2011), 2011 Bankr. LEXIS 1151, at *7. A “nominee” is merely an “agent” of the “Lender” and “its assigns.” *Gemini Servs. v. Mortg. Elec. Registration Sys. (In re Gemini Servs.)* (Bankr. S.D. Ohio 2006), 350 B.R. 74, 83. Again, far from rebutting the presumption that the original creditor intended to transfer the note without transferring the security, the language of the standard MERS mortgage—making MERS the agent for the both the “Lender” *and* its “successors and assigns”—confirms that the Lender continued to desire that whoever holds the debt to have the security provided under the mortgage.

Standing to enforce a mortgage is determined by being a person entitled to enforce the note. There is no requirement for a separate assignment of the mortgage to confer standing to

⁸ The CLSPs also argue that the Pooling and Servicing Agreement (“PSA”) for the Trust had separate requirements for the documents necessary for notes to be brought into the Trust. CLSPs Brief, 18-20. That statement is simply irrelevant. The provisions of the Trust could have limited the notes eligible for inclusion in a variety of ways (*e.g.*, to those with fixed rates, variable rates, insured by private mortgage insurance, etc.), and could have required documents beyond those mandated by law (*e.g.*, copies of a driver’s license or birth certificate of the borrower); any requirements of the PSA have nothing to do with the rules of standing at issue in this case.

⁹ The Mortgage in this case was not a MERS mortgage.

foreclose, and the presumption is that the transfer of the note was accompanied by a transfer of the mortgage.

E. The recording of a mortgage or an assignment of mortgage is not necessary to have standing to sue on the note or to foreclose.

In its initial brief, U.S. Bank detailed the wealth of Ohio statutes and case law that show that recording a mortgage and its assignment is only for the benefit of the mortgagee or subsequent creditors, and not the mortgagor. None of the opposing parties addressed the clear statement of this purpose in Ohio Jurisprudence: “Recording statutes are not enacted for the benefit of the mortgagor, but rather for the protection of third persons who might acquire legal interests in or liens upon the property.” 69 Ohio Jurisprudence 3d (2010), Mortgages and Deeds of Trust, Section 129.

None of the opposing parties addressed that the only statutory reference for recording is a potential penalty against subsequent bona fide purchasers: “Until so recorded or filed for record, [any documents that are supposed to be recorded] are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.” R.C. 5301.25(A).

None of the opposing parties address that an improperly recorded mortgage—**or even one that is never recorded at all**—is enforceable between the mortgagor and mortgagee. *Wood v. Smith* (Hamilton App. 1943), 38 Ohio Law Abs. 556, 50 N.E.2d 793; 69 Ohio Jurisprudence 3d (2010), Mortgages and Deeds of Trust, Section 129. “Ohio law clearly holds that ‘[a] defectively executed conveyance of an interest in land is valid as between the parties thereto, in the absence of fraud.’” *Lasalle Bank N.A. v. Zapata*, 184 Ohio App.3d 571, 2009-Ohio-3200, 921 N.E.2d 1072, ¶21, (quoting *Citizens Nat’l Bank v. Denison* (1956), 165 Ohio St. 89, 95, 133

N.E.2d 329, superseded by statute as stated in *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, ¶11).

None of the opposing parties address the clear statement in Ohio case law that recording of mortgage assignments is only relevant “to the extent of establishing creditor priority and subsequent notice to a bona fide purchaser of the land. The validity of the mortgage itself remains unaffected by the timing of the assignment’s recordation.” *Wead v. Kutz*, 161 Ohio App.3d 580, 2005-Ohio-2921, 831 N.E.2d 482, ¶16. The American Law Institute holds the same view: “Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it.” Restatement of the Law 3d, Mortgages (1997), Section 5.4, at Comment b.

None of the opposing parties addressed the plethora of cases holding that a mortgagor does not have standing to challenge an assignment of the mortgage: *Feinberg v. Bank of N.Y.* (*In re Feinberg*) (Bankr. S.D.N.Y. 2010), 442 B.R. 215, 224; *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC* (6th Cir. 2010), 399 Fed.Appx. 97, 102, 2010 WL 4275305, at *4, *cert. denied*, 131 S. Ct. 1696 (2011) (citations omitted); *Yuille v. Am. Home Mortg. Servicing, Inc.* (E.D. Mich. Sept. 22, 2010), No. 09-11203, 2010 U.S. Dist. LEXIS 113300, at *20; *Chase Home Fin., LLC v. Fequiere* (2010), 119 Conn. App. 570, 989 A.2d 606, 610; *Noland v. Wells Fargo Bank N.A.* (*In re Williams*) (Bankr. S.D. Ohio 2008), 395 B.R. 33, 47; citing *Gemini Servs. v. Mortg. Elec. Registration Sys.* (*In re Gemini Servs.*) (Bankr. S.D. Ohio 2006), 350 B.R. 74; *Bridge v. Aames Capital Corp.* (N.D. Ohio Sept. 28, 2010), No. 1:09 CV 2947, 2010 U.S. Dist. LEXIS 103154.

The recording system **has no bearing on or benefit for the mortgagor**. A mortgagee can foreclose a mortgage that has never been recorded. Given that reality, the notion that an

assignee can only foreclose if an assignment of mortgage has been recorded simply makes no sense.

Some of the opposing parties nonetheless contend that without the recording of the assignment, the court and the borrowers will not know who “owns” the mortgage or who is the proper plaintiff. Again, *Kernohan* and the U.C.C. easily answer those concerns. The proper party to foreclose on a mortgage is the entity entitled to enforce the note. The ability to enforce the note is not based on holding the original mortgage (*Kernohan, supra*), but on having the right to enforce the note. *Id.* The protection afforded to borrowers in making sure that they are paying the correct plaintiff is found in the U.C.C.’s requirements of either possession of the original note (R.C. 1303.31(A)) or by posting bond when one cannot. R.C. 1303.38. Recording of an assignment simply has nothing to with these issues or the concerns that the opposing parties express. Recording is irrelevant to the issue of standing.

F. Standing only needs to be proven prior to judgment.

The opposing parties also assert that “standing” must exist prior to initiating the complaint, and that if one is not the real party in interest at the time of filing, there is no “justiciable” controversy. This mixes apples, oranges, and bananas.

First, as noted in the Brief, courts have used “standing” to refer to three distinct concepts: (a) where no one has suffered a direct injury; (b) where the named plaintiff has not fulfilled procedural prerequisites to maintain the action; and (c) where there is a controversy, but someone other than the named plaintiff is the “real party in interest.”

The first context in which standing is used affects justiciability. In that context, there is no one—not the named plaintiff nor anyone else—that has the legal ability to seek redress for a claim. *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). Where the allegations of the complaint

make it obvious that there is no possible set of facts justifying **any** plaintiff to relief, there is no justiciable controversy. *Ohio Pyro*, 115 Ohio St.3d at 381.

The second context in which standing is used is where a plaintiff has not fulfilled procedural requisites that give rise to its claim. An example is *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, where an insured filed a class action lawsuit alleging that Erie Insurance had failed to pay “postage, travel expenses, and actual loss of earnings” incurred during the defense of a liability claim. *Id.*, at 322. Kincaid failed to allege (as required by Civ.R. 8(A) and 9(C)) that he had made a demand for insurance coverage for these items. *Id.*, at 326-327. This Court found that he lacked standing as he did not *yet* present a justiciable claim.

A third context in which courts use the phrase “standing” is to denote that there is a controversy, but that someone other than the named plaintiff is the “real party in interest.” This form of “standing” is not jurisdictional. *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 701 N.E.2d 1002. As this Court put it, in this context “[l]ack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.” *Id.*, at 77. Because this form of standing does not affect subject matter jurisdiction, any defect in real party in interest standing may be cured. *Schwartzwald*, 2011-Ohio-2681, ¶75.

The opposing parties want the Court to believe that all three contexts in which courts have used “standing” are equivalent; they are not. In the first context, because no individual will *ever* have a direct injury, the defect can never be cured, and thus the defect truly is jurisdictional. Because in this context the lack of standing cannot be corrected, it affects a court’s ability to render relief. In the real party in interest context, standing defects *are* curable, and thus are not a matter which affects jurisdiction.

The Duvalls argue that Article IV, Section 4 limits the jurisdiction of common pleas courts to only justiciable matters, that this reflects an intention to impose the limitations of Article III of the United States Constitution on common pleas courts, that in federal courts standing is jurisdictional, and, therefore, that in Ohio courts standing must also be jurisdictional. Duvalls Brief, 3-5. This too is incorrect. While federal courts are ones of limited jurisdiction, Ohio common pleas courts have plenary jurisdiction over all disputes—at common law, by statute or otherwise—where the amount in controversy is more than \$500. R.C. 2305.01; R.C. 1907.03. If a court is capable of rendering relief on a matter, common pleas courts have jurisdiction to grant it.

Finally, the opposing parties (and the First and Eighth Districts) insist that a party must prove his standing *as of* the commencement of the case, and that lack of that proof as of the commencement of an action mandates dismissal. That is ill conceived on both levels. To commence an action, a party need not “prove” anything, but only **allege** facts entitling it to relief. Civ. R. 8(A). A party must “prove” its case only prior to judgment.¹⁰

Once it comes time for “proof,” that proof need only be shown as of the date of judgment in the action, not its commencement. Fed. R. Civ. P. 17(A) is identical to Civ.R. 17. That rule, like its Ohio counterpart, only requires that the plaintiff prove that it is the real party in interest prior to judgment: “[t]here is no general requirement as to when an assignment must be made and it has been held that even when the claim is not assigned until after the action has been

¹⁰ The CLSPs argue that in many foreclosure actions, the borrowers do not answer, with the result that there never is a trial at which the lender is put to its proof. CLSPs Brief, 33-34. But the reason that many borrowers do not answer is that they are in default for payment in the first instance, and have no defense to assert. In any event, regardless of the standard which the Court would adopt, if a borrower does not participate in the action, there will be a default judgment.

instituted, the assignee is the real party in interest and can maintain the action.” 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (2d Ed. 2007 update), Section 1545.

As noted in the initial Brief, this result is embodied in Civ.R. 17. That Rule provides that “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.”

If the opposing parties (and *Wells Fargo Bank, N.A. v. Jordan*, Eighth Dist. App. No. 91675, 2009-Ohio-1092; *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722, and *Duvall*) were correct, then Civ.R. 17 is wrong. If the arguments of the opposing parties (and the holdings of the First and Eighth Districts) were correct, then Civ.R. 17 would *not* say “*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,” but would rather say “Every action shall be *immediately dismissed* on the ground that it is was not *commenced* in the name of the real party in interest.” If *Jordan*, *Byrd* and *Duvall* are correct—and the inability of a plaintiff to show that it was the real party at interest at the time of the filing of the complaint really did deprive the court of jurisdiction in the first instance—there would be no need for Rule 17 at all.

The First District held (and Ohiofraudclosure and the CLSPs argue) that the Court should engraft an requirement on to Rule 17 to limit it to situations where there has been a “mistake” in identifying the correct party in interest as opposed to a subsequent assignment. Ohiofraudclosure Brief, 12-13; CLSPs Brief, 31-32. But that was not the purpose of Rule 17. As Wright & Miller note, Rule 17 was written to enable assignees to sue in their own name, and permits post-filing

assignments. This is why, as the Fifth District noted, Rule 17 speaks to the ability of the real party in interest to “prosecute”—not file—an action. *U.S. Bank, N.A. v. Bayless*, Fifth Dist. App. No. 09 CAE 01 004, 2009-Ohio-6115, ¶22 (“Pursuant to Civ.R. 17(A), the real party of interest shall ‘prosecute’ the claim. The rule does not state ‘file’ the claim.”).

That one’s status as the real party in interest need only be proven at the time of judgment is best shown by the test used to measure whether one is the real party in interest. “The proper test to determine who is the real party in interest is: ‘Who would be entitled to damages?’” *Young v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1993), 88 Ohio App.3d 12, 16, 623 N.E.2d 94; citing *Nuco Plastics, Inc. v. Universal Plastics, Inc.* (1991), 76 Ohio App.3d 137, 143, 601 N.E.2d 152, 156; citing *Lyons v. Chapman* (1931), 40 Ohio App. 1, 6, 178 N.E. 24, 26. The answer to that question is not determined by who *was* entitled to damages at the commencement of the law suit, but who *is* entitled to damages at the time that judgment is rendered.

In this case, at the time of judgment, U.S. Bank—and only U.S. Bank—was entitled to damages under the Note and to foreclose the Mortgage. At the time of judgment, the unrefuted evidence was that U.S. Bank possessed a note indorsed in blank and submitted an affidavit describing how it was assigned the Note and Mortgage and verifying documentary evidence of the assignment in the PSA. The original creditor, Wells Fargo, was not entitled to the balance due on the Note at the time of judgment; U.S. Bank was the holder of the Note and the person entitled to enforce it.

Possession of the Note gave U.S. Bank the right to foreclose the Mortgage. But even if a recorded notice of Assignment were required, prior to judgment, U.S. Bank possessed that too. Again, standing to foreclose a mortgage is not based on who *was* the entity that had the right to

foreclose at the time of the filing of the complaint, but rather who *is* the entity entitled to judgment at the time that it is rendered.

The holdings of the First and Eighth District simply turn the Civil Rules on their head. These courts would not only write Civ.R. 17 out of existence, they would rewrite the basic principles of the Civil Rules themselves. In these courts it does not matter if the plaintiff has possession of the original note, if the note has been indorsed to the plaintiff, if there has been a separate notice of assignment of the mortgage, or if the plaintiff is the only entity under the law with the right to collect the note and foreclose its security. For these courts (and the opposing parties), if the plaintiff is clearly the only entity entitled to judgment at the time it is to be rendered but the plaintiff was not the real party in interest at commencement, the case must be dismissed and the plaintiff must start over. These courts would effectively rewrite the mandate of Civ.R. 1(B) to provide that courts should do everything to *increase*—not eliminate—“delay, unnecessary expense, and all other impediments to the expeditious administration of justice.” That simply is not and should never be the law.

When must standing be proven? Ohio law is clear: standing need only be proven prior to entry of judgment. The First and Eighth Districts have it wrong; the Fifth, Seventh, Ninth, Tenth (and now Twelfth) Districts have it right.

G. Answering the 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?

The answer to this question is “no.” Standing to enforce a note is not based on owning the note, but rather being a person entitled to enforce it as defined by R.C. 1303.31. Standing to enforce a mortgage is not based on owning the mortgage; rather, security follows the debt, giving the person entitled to enforce the note standing to enforce the mortgage. To enforce a mortgage

against the mortgagor, neither the mortgage nor its assignment need be recorded. Real party in interest standing need not be proven at the time of the filing of the complaint; if challenged, real party in interest standing need only be proven prior to the entry of judgment.

IV. CONCLUSION.

Mortgage foreclosure actions comprise a large portion of the civil dockets in Ohio and the law on who is entitled to bring them needs to be clear. This Court should answer each part of the certified question in the negative, adopt the rules being followed by the Fifth, Seventh, Ninth, Tenth (and now Second and Twelfth) Districts, affirm that the U.C.C. governs the right to enforce a promissory note, reaffirm the rule of *Kernohan* (and now of the U.C.C.) that whoever holds the note has the right to enforce a mortgage which secures its payment, and confirm that these rights need only to exist prior to judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 2nd day of September, 2011.

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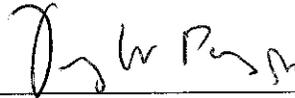
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ORIGINAL

IN THE SUPREME COURT OF OHIO

U.S. BANK, NATIONAL ASSOCIATION,)	CASE NO. 11-0171
)	
Plaintiff-Appellant,)	Appeals Case No. CA-10-094714
)	
vs.)	(Appeal from Cuyahoga County Common
)	Pleas Court Case No. CV-638676)
ANTOINE DUVALL, et al.,)	
)	
Defendants-Appellees.)	
)	

MEMORANDUM IN OPPOSITION OF MOTION TO DISMISS

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MAR 07 2011
CLERK OF COURT
SUPREME COURT OF OHIO

I. INTRODUCTION

Appellees, Antoine Duvall and Madinah S. Samad (the "Duvalls"), move to dismiss this appeal on the grounds that the Trial Court's January 21, 2010 Order dismissing the Complaint of Appellant, U.S. Bank National Association ("U.S. Bank"), as Trustee for CMLTI 2007-WFHE2 (the "Trust"), for lack of standing pursuant to *Wells Fargo Bank, N.A. v. Jordan*, Eighth Dist. App. No. 91675, 2009-Ohio-1092, is not a final, appealable order pursuant to R.C. 2505.02 (the "Dismissal Order"). The Duvalls contend (for the first time) that dismissals without prejudice are not final orders, and that since the trial court added the words "without prejudice" to its entry, there is no final order in this case.

The Duvalls are incorrect because: (1) the trial court's dismissal of this case (and the Eighth District's affirmance) for lack of standing is a final order under R.C. 2505.02 because it grants a judgment to the defendant and prevents a judgment in favor of the plaintiff; and (2) even if the order did not prevent a judgment, it affects a substantial right and justice requires review.

The order in this case dismissed all of U.S. Bank's claims for lack of standing. A dismissal based on a lack of standing is a dismissal on the merits. If the law were otherwise, trial courts could perpetually dismiss court actions by imposing criteria for standing that are not the law, and a plaintiff would *never* have the right of review, either in this Court or in any other.

Even if a dismissal for lack of standing were not on the merits (and it plainly is), the order in this case falls into an exception: a non-final order may be reviewed when the circumstances of "justice" require it. Here, the Eighth District's standard in *Jordan* is in direct conflict with the Fifth, Seventh, and Tenth District Courts of Appeal, and is ripe for this Court's review. The Eighth District itself recognized this by certifying a conflict to this Court.

As a result of the *Jordan* decision, lenders and lawyers in Ohio are being sued in class actions across the state, the mere existence of which are causing damages that mount daily. The

lower courts are in conflict with borrowers, lenders and trial courts unclear on what Ohio law is. Even if a dismissal for lack of standing were not a final order, the circumstances of this case nonetheless make the matter ripe for this Court's review.

II. STATEMENT OF FACTS

On December 26, 2006, Mr. Duvall executed the Note in favor of Wells Fargo Bank, N.A. ("Wells Fargo") in connection with his purchase of real estate located at 13813 Diana Avenue, Cleveland, Ohio (the "Property"), and the Duvalls executed a mortgage on the Property to secure payment its payment. The Mortgage was recorded the next day with the Cuyahoga County Recorder, listing Wells Fargo as the mortgagee. Wells Fargo endorsed the Note in blank.

On March 1, 2007, U.S. Bank, and Wells Fargo entered into a Pooling and Servicing Agreement ("PSA") under which the Note was transferred to the Trust, for which U.S. Bank serves as Trustee. As servicer for U.S. Bank, Wells Fargo has physical possession of the Note.

On October 15, 2007, U.S. Bank commenced this action. The Complaint expressly alleged that U.S. Bank was the "holder and owner" of the Note and Mortgage, and sought the balance due on the Note (\$89,756.85, plus interest, court costs and other charges) and to foreclose the Mortgage.

On October 30, 2007, the Duvalls filed an Answer. The Answer asserted as an affirmative defense that U.S. Bank was not a real party in interest.

On February 5, 2008, Wells Fargo executed an Assignment of Mortgage ("Assignment"), which provided notice that the Mortgage had been assigned; on February 14, 2008, the Assignment was recorded with the Cuyahoga County Recorder.

On October 24, 2008, U.S. Bank filed a motion for summary judgment. The Duvalls opposed by arguing the "Complaint must be dismissed irrespective of whether [U.S. Bank] it subsequently acquired the interest upon which it brought suit" and "request[ed] that the instant

action be dismissed pursuant to Rule 17.” The Trial Court deferred consideration of the motion to allow mediation; the Duvalls failed to appear and the case was returned to the active docket.

On October 13, 2009, U.S. Bank renewed its motion for summary judgment. On November 10, 2009, the Duvalls opposed and filed a cross motion requesting dismissal for lack of standing under *Jordan, supra*. On December 8, 2009, the Trial Court ordered U.S. Bank “to supplement the [summary judgment] affidavit of real party in interest with some definitive proof of the acquisition date of the subject note and mortgage... Failure to do so shall result in dismissal.”

On December 28, 2009, U.S. Bank filed another affidavit. On January 21, 2010, the Trial Court entered an order (“Dismissal Order”), holding “As plaintiff has failed to show standing pursuant to [*Jordan*] this case is dismissed in its entirety. Court costs assessed to the plaintiff(s).” The Dismissal Order says “87 DIS W/O PREJ-FINAL.”

U.S. Bank appealed. In the Eighth District, the Duvalls never argued that the Dismissal Order was not a final, appealable order, but only that the Dismissal Order should be affirmed.

The Eighth District found that U.S. Bank was the holder of the Note prior to the filing of the Complaint, but concluded that this did not matter because U.S. Bank was required to prove “that it owned the note *and the mortgage* on the date the complaint was filed.” Opinion, n.1 and ¶ 5, citing *Jordan, supra* (emphasis in original). The Eighth District affirmed the dismissal of *both* the claim to recover the balance due on the Note *and* the claim to foreclose the Mortgage.

On January 10, 2011, U.S. Bank filed a Motion to Certify a Conflict with the decisions of the Fifth District in *U.S. Bank, N.A. v. Bayless* (5th Dist. 2009), Delaware App. No. 09 CAE 01 004, 2009-Ohio-6115; the Seventh District in *U.S. Bank, N.A. v. Marcino* (7th Dist. 2009), 181 Ohio App. 3d 328, 2009-Ohio-1178, 908 N.E.2d 1032; and the Tenth District in *Countrywide*

Home Loan Servicing, L.P. v. Thomas (10th Dist. 2010), Franklin App. No. 09AP-819, 2010-Ohio-3018. The Duvalls opposed the Motion to Certify, but again did not raise the issue of a final order. On January 31, 2011, the Eighth District certified the Conflict to this Court.

The consequences of the *Jordan* standard being used in the Eighth District (and First District) are far reaching. As a result of the dismissal of the foreclosure actions, borrowers have filed class actions against lenders and their lawyers claiming that the commencement of the foreclosure actions without standing is a violation of the Consumer Sales Practices Act, R.C. 1345.01, *et seq.*, as well as the Fair Debt Collection Practices Act, 15 U.S.C. §1692, *et seq.* *Turner v. Lerner Sampson and Rothfuss*, U.S. District Court, N.D. Ohio, Case Number 1:11-CV-00056; *Kline v. Mortgage Electronic Security Systems*, U.S. District Court, S.D. Ohio, Case Number 3:08-CV-0408. Meanwhile, the lower courts, borrowers and lenders struggle as the different courts are applying inconsistent standards on what does it take to have standing to sue on a note secured by a mortgage, and when standing must be proven.

III. LAW AND ANALYSIS

The Duvalls argue that this appeal falls under the general rule that a “trial court’s dismissal without prejudice is not a final order under R.C. 2505.02.” Motion to Dismiss, at 1. That is a gross misstatement of the general rule, and fails to address its recognized exceptions.

U.S. Bank filed the Complaint because its status as the holder of the Note gave it standing to recover not only the balance due but to foreclose the Mortgage, and that if there were any need to file a notice of Assignment of Mortgage, it could be supplied before judgment, just as the majority of Appellate Districts hold. The trial court dismissed the complaint (with the dismissal affirmed on appeal) on the grounds that not being the mortgagee of record at the time of the complaint precludes recovery under *either* the Note or Mortgage. The Eighth District recognized that holding is in conflict with the other districts.

With this Motion, the Duvalls now contend that no party that is dismissed on the basis of a lack of standing is entitled to appeal whether the lower court applied the correct standard. That is wrong as a matter of law. The Motion should be denied.

A. An order dismissing a case for lack of standing is a final, appealable Order under R.C. 2505.02(B)(1).

“An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met.” *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002 Ohio 5315, 776 N.E.2d 101, ¶ 5.

R.C. 2505.02(B)(1) creates a three part test for a final appealable order: “[a]n order is a final order that may be reviewed ...when it is...[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment.” A “substantial right” is “a right that the United States Constitution, the Ohio Constitution, a statute, a common law, or a rule of procedure entitles a person to enforce or protect.” R.C. 2505.02(A)(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. “For an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.” *Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St. 3d 147, 153, 545 N.E.2d 1260. All three elements are satisfied.

1. The right to sue on a Note and foreclose on a Mortgage is a “substantial right.”

Here, the rights to enforce a note and to foreclose on a mortgage are obviously “substantial rights.” Ohio law is clear that breach of contract claims are substantial rights.

Farmers Mkt. Drive-In Shopping Ctrs., Inc. v. Magana, 2007-Ohio-2653 (Ohio Ct. App., Franklin County May 31, 2007); *Marbella Assoc. v. Morris* (May 30, 1995), Warren App. No. CA94-12-104, 1995 Ohio App. LEXIS 2216 (finding that breach of contract affected a “substantial right” under R.C. 2505.02); *Bell Drilling & Producing Co. v. Kilbarger Constr. Inc.* (June 26, 1997), Hocking App. No. 96CA23, 1997 Ohio App. LEXIS 2963. Similarly, orders regarding foreclosure address a substantial right. *Third Natl. Bank of Circleville v. Speakman* (1985), 18 Ohio St. 3d 119, 120, 18 Ohio B. 150, 480 N.E.2d 411; *Oberlin Sav. Bank Co. v. Fairchild* (1963), 175 Ohio St. 311, 312-13, 194 N.E.2d 580. Accordingly, this case satisfies the first element of a final appealable order under R.C. 2505.02(B)(1).

2. The court’s order affects a substantial right, as there will be no appeal available on when standing must be proven.

The second requirement is that the order “affects a substantial right.” As noted above, as an order that forecloses appropriate relief if it is not immediately appealable satisfied this standard. *MB West Chester, LLC, supra*.

The dismissal of the case affects substantial rights because it precludes any relief in this case. The Dismissal Order grants a judgment in favor of the Duvalls and prevents a judgment in favor of U.S. Bank. The Dismissal Order determined *all* of the claims of *all* of the parties.

The Duvalls nonetheless argue that under *Jordan*, U.S. Bank can re-file the case and therefore there has been no decision “on the merits” from which an appeal will lie. Motion, 3, citing *Nat’l City Commer. Capital Corp. v. AAAA at Your Serv., Inc.* (2007), 114 Ohio St. 3d 82, 83, 2007-Ohio-2942, 868 N.E.2d 663 (“Ordinarily, a dismissal ‘otherwise than on the merits’ does not prevent a party from refileing and, therefore, ordinarily, such a dismissal is not a final, appealable order.”) That language has no application when the dismissal is based on the trial court’s unlawful imposition of requirements to maintain the action in the first instance.

A determination by a trial court that the plaintiff is precluded from bringing the action on the grounds that it lacks standing is a decision on that issue “on the merits.” A plaintiff who is deemed to lack standing has no ability to seek further redress in the case. Such a dismissal precludes further relief under the circumstances of that case, and is a final order.

This Court has frequently taken cases that were dismissed for lack of standing, and then reached the merits to set the requirements for standing in Ohio. *E.g., In re Guardianship of Santrucek* (2008), 120 Ohio St.3d 67 and *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.* (2010), 124 Ohio St.3d 390. In each of these cases, this Court accepted appeals of complaints which had been dismissed for lack of standing, ultimately affirming the judgments. The Court accepted these appeals (and did not immediately dismiss them) because a dismissal for lack of standing is a final, appealable order. This is true even if this Court ultimately determines that the lower courts were correct in finding a lack of standing.

The same occurred in this Court’s recent decision of this Court in *Kincaid v. Erie Ins. Co.*, Slip Opinion No. 2010-Ohio-6036. In *Kincaid*, the trial court found that a plaintiff who had not made a demand of an insurer lacked standing to bring an action for breach of the insurance policy. The appellate court disagreed and reversed, reinstating the action. This Court then accepted jurisdiction and reached the merits, ultimately concluding that the plaintiff actually did lack standing.

Kincaid itself shows that the Duvalls are wrong. If the law were as the Duvalls maintain, then the Court would not have reached the merits at all, and would have instead immediately dismissed the appeal for lack of a final order. *Kincaid* did not do so because a dismissal for lack of standing is an appealable order.

Common sense dictates this conclusion. If the law were otherwise, then this Court would *never* be able to set standards for standing in Ohio. Instead, every order where the lower court (either at the trial or intermediate appellate level) ordered dismissal for a lack of standing would forever evade review. Lower courts would be able to make facially incorrect rulings on what the requirements are for standing (such as here, where the court dismissed the claim on the note because the assignment of mortgage had not been filed prior to the commencement of the action), and there would be no review.

Plaintiffs could be forced to engage in the Sisyphean exercise of re-filing the same complaint over and over again, with the lower courts dismissing for lack of standing, over and over again, all without appellate review. Lower courts could arbitrarily create hurdles on their own policy whims, never permitting this Court to say what Ohio law truly is. This would be the result even where—as in this case—the appellate court has designated its ruling as in conflict with its sister courts. That is not the law.

By dismissing U.S. Bank's Complaint in its entirety, the Trial Court determined that U.S. Bank could not prove an essential element of its claim to enforce the Note or to foreclose the Mortgage. The Dismissal Order prevented U.S. Bank, as the holder of the Note, from obtaining a judgment. U.S. Bank would *never* be able obtain appropriate relief—*i.e.*, a determination that a recorded assignment of mortgage is not necessary—unless it is able to appeal the Dismissal Order based on the issue of standing. *See George v. State*, Tenth Dist. App. Nos. 10AP-4, 10AP-97, 2010-Ohio-5262 (noting “Nor, even if the case could be refiled, does a dismissal without prejudice permit subsequent appellate review of some aspects of the case”). If U.S. Bank were to file a new Complaint meeting the requirements of *Jordan*, the lower courts would never reach the issue of whether the *Jordan* requirements are proper, and the issue would never be reviewed.

The Dismissal Order clearly affects a substantial right, as it forecloses relief on a specific factual scenario as a matter of law without the opportunity to appeal.

3. The Dismissal Entry clearly determines the action and prevents a judgment.

The final requirement is that the order being appealed determine the action and prevent a judgment. U.S. Bank believes that, to obtain judgment on a note and foreclose on a mortgage, it need not be the recorded mortgagee at the time the complaint is filed. That is the law in many appellate districts. The Dismissal Entry (and the Eighth District) held the opposite. The Dismissal Entry is clear and unequivocal, and there remains nothing to be determined.

The Duvalls nonetheless contend that because the Trial Court added the words “without prejudice,” that renders the Dismissal Order non-appealable. This too is incorrect. Courts recognize that a dismissal, even if it is “without prejudice,” constitutes a final appealable order when the complaint, refiled under the same circumstances, would result in the same dismissal. *Ward v. Summa Health Sys.* (2009), 184 Ohio App. 3d 254, 260. 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* appropriately rejected that notion. *Ward* noted that the dismissal “effectively prevented a judgment” because the plaintiffs would suffer the same defect if they refiled the action without the affidavit. Because plaintiffs were challenging the propriety of

whether the lower court properly denied them discovery in the first instance, the fact that there was a “without prejudice” dismissal was irrelevant.

Here, the fact that the Trial Court added the phrase “W/O PREJ.” to the Dismissal Order does not somehow make the Dismissal Order non-final. Like *Ward*, the very issue in the appeal is whether the requirements that are being imposed below are lawful in the first instance. The Dismissal Order prevents U.S. Bank from obtaining a judgment without first filing a notice of Assignment of Mortgage, and this appeal challenges whether that is a lawful requirement. The Dismissal Entry constitutes an adjudication, on the merits, of whether the filing of a notice of Assignment of Mortgage is a prerequisite for relief.

Because the Dismissal Order (1) affects U.S. Bank’s substantial rights, as the holder of the Note, to enforce the Note and foreclose on the Mortgage, (2) forecloses appropriate review in the future, and (3) left nothing for the Trial Court to determine, the Dismissal Order is a final, appealable order under R.C. 2505.02(B)(1). The Court should deny the Motion to Dismiss.

B. This Case Presents Exceptional Circumstances That Render the Dismissal Entry a Final, Appealable Order.

Even if the Duvalls were correct that the Dismissal Entry is a dismissal “otherwise than on the merits” such that it is not a final order, this Court should still deny the Motion to Dismiss.

“There are unusual instances when orders which standing alone are not considered final appealable orders become appealable by virtue of the exceptional circumstances under which they are rendered.” *State v. Eberhardt* (8th Dist. 1978), 56 Ohio App. 2d 193, 198, 381 N.E.2d 1357; *Lakewood v. Pfeifer* (8th Dist. 1992), 83 Ohio App. 3d 47, 613 N.E.2d 1079. As this Court stated in *Nat’l City*, “[a]lthough it is not common for us to review cases that have been dismissed other than on the merits, we have done so when...justice so requires.” *Nat’l City*, 114 Ohio St. 3d at 84.

Here, justice requires that this Court retain jurisdiction and review the substantive merits of the Dismissal Order. First, this Court has not previously considered real party in interest standing to be a jurisdictional defect under Ohio law. *State ex rel. Jones v. Suster* (1998), 84 Ohio St. 3d 70, 77, 1998-Ohio-275, 701 N.E.2d 1002 (“Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.”). Nonetheless, the Eighth District has equated a lack of real party in interest standing in a foreclosure case to a lack of subject-matter jurisdiction. *See, e.g., Citimortgage, Inc. v. Slack* (8th Dist. 2011), Cuyahoga App. No. 94899, 2011-Ohio-613, ¶10 (“in order to establish standing to invoke the jurisdiction of a court in a foreclosure action, a plaintiff must show it owned the note and mortgage when the complaint was filed”). The proprieties of the Eighth District’s ruling are precisely the questions before the Court. *See* U.S. Bank’s Memorandum in Support of Jurisdiction, Proposition of Law Nos. I and II (“The holder of a promissory note has standing to enforce a mortgage which secures its payment” and “Standing need only be proven prior to the entry of judgment.”).

Second, “[i]t is not logical to allow a party that believes a court wrongly asserted jurisdiction to appeal but to prevent a party that believes a court wrongly did not assert jurisdiction from appealing.” *See Nat’l City*, 114 Ohio St. 3d at 84. If U.S. Bank is not entitled to appeal the Dismissal Entry, then no plaintiff in a mortgage foreclosure case can ever appeal a dismissal of its complaint for lack of standing under *Jordan*, even though a foreclosure defendant can *always* challenge the plaintiff’s standing on appeal from a judgment of foreclosure. That illogic is precisely the reason for the exceptional circumstances exception.

Third, *Jordan* imposes requirements upon mortgage foreclosure plaintiffs that do not exist in many Ohio counties. If the Duvalls were correct, and U.S. Bank must file a new Complaint meeting the requirements of *Jordan*, the issue of whether those requirements are

correct under Ohio law will never be reviewed by this Court, because once U.S. Bank files a complaint conforming to those requirements, the issue would be moot, and therefore not proper for appeal. *George, supra*.

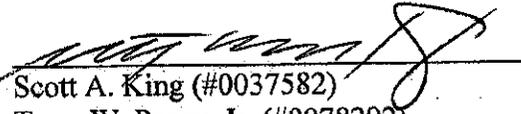
Fourth, the determination of what requirements for standing Ohio courts should utilize in foreclosure actions affects hundreds of thousands of homeowners, and every common pleas judge in the state. Because conduct that is proper in the Fifth, Seventh, Ninth and Tenth Appellate Districts is considered improper in the First and Eighth Districts, lenders and their lawyers are currently being sued. Not only are lenders precluded from obtaining judgments because of the conflict in the districts, they are being subjected to potential liability for conduct in one district that is perfectly legal in others.

In short, even if the Duvalls were correct in their analysis (and they are not), the exceptional circumstances presented by this case make the Dismissal Entry subject to review. *Nat'l City*, 114 Ohio St. 3d at 84. The Court should deny the Motion to Dismiss.

IV. CONCLUSION

The Duvalls never raised the issue of whether the Dismissal Entry was a final, appealable order before the Eighth District, instead waiting until the Eighth District certified a conflict to this Court. The Motion to Dismiss is premised on an incorrect analysis of R.C. 2505.02, and would preclude this Court from ever setting the standards for standing that are embroiling trial courts and the appellate districts across the state. The Dismissal Entry, which was based upon U.S. Bank's supposed lack of standing under *Jordan*, is a dismissal on the merits with respect to that issue. Even if it were not, this case presents exceptional circumstances which this Court has recognized. The Motion to Dismiss should be overruled.

Respectfully submitted,



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Scott A. King *per authority*

IN THE SUPREME COURT OF OHIO

U.S. BANK, NATIONAL ASSOCIATION,)	CASE NO. 2011-0218
)	
Plaintiff-Appellant,)	On Appeal from Cuyahoga County Court of
)	Appeals, Eighth Appellate District
vs.)	
)	Court of Appeals
ANTOINE DUVALL, et al.,)	Case No. CA-10-094714
)	
Defendants-Appellees.)	
)	

**MEMORANDUM REGARDING NOTICE OF
SUGGESTION OF MOOTNESS**

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FILED
AUG 12 2011
CLERK OF COURT
SUPREME COURT OF OHIO

I. INTRODUCTION

On August 4, 2011, appellees, Antoine Duvall and Madinah S. Samad (the "Duvalls"), filed a "Notice of Suggestion of Mootness," bringing to the Court's attention the fact that U.S. Bank National Association ("U.S. Bank"), as Trustee for CMLTI 2007-WFHE2, released the mortgage securing the property in this case. The Duvalls suggest that as to them, this release moots the issues in this case and, without a justiciable issue, this Court should dismiss the action.

The Duvalls are correct that U.S. Bank released the mortgage, and that this dispute between the parties is presently moot. Given the importance of the questions presented, that does not end the analysis.

In certified conflicts cases, the Court may proceed to resolve the conflict, even if the case from which certification has been granted is itself moot. Therefore, the Court can proceed to decide this case on its merits.

Alternatively, the Court has already accepted jurisdiction and stayed briefing in another case which presents the identical issues here, *U.S. Bank v. Perry*, Case No. 11-0170. Accordingly, the Court could dismiss this case and activate briefing in *Perry*.

In addition, in *Federal Home Loan Mortgage Corp. v. Schwartzwald*, Case Nos. 11-1201 and 11-1362, the Second District has certified to this Court a virtually identical question to that certified by the Eighth District. *Schwartzwald* is awaiting this Court's determination on jurisdiction and whether to accept the certified conflict.¹ The Court could therefore dismiss this certified conflict and address the same issue in *Schwartzwald*.

¹ Counsel for U.S. Bank in this case also represents U.S. Bank in the *Perry* case and Federal Home Loan Mortgage Corporation is the *Schwartzwald* case.

II. DISCUSSION

This case is before the Court on a certified conflict concerning 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?” Entry, April 6, 2011. On June 8, 2011, U.S. Bank filed a certificate of release of the mortgage securing the Duvalls’ property, reflecting that it has been paid and discharged, thus mooting this question in this case.

Contrary to the Notice of Suggestion of Mootness, that does not necessarily resolve this case. Even when a certified conflict case is rendered moot by subsequent action, if “a matter of great general interest remains” and other cases are held in abeyance pending the original case, the Court “may proceed to resolve the issue in this case.” *State v. Massien*, 125 Ohio St.3d 204, 2010-Ohio-1864, 926 N.E.2d 1282, ¶ 4; citing *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, 31, 505 N.E.2d 966.

That is precisely the scenario here. The question certified by the Eighth District presents itself again in *Perry*. The Court has stayed *Perry* pending its decision in this case. The Court could therefore reach the merits of the certified conflict in this case. *Massien, supra*.

Alternatively, the Court has already accepted jurisdiction in *Perry*. The Court could simply decide the issue in that case.

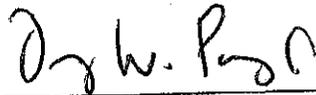
Finally, the importance of this question (and the propriety of the certification of the question in this case) is reflected by *Schwartzwald*. The Second District recognized the split on these issues, and has again certified its decision as in conflict with *Duvall*.

~~Accordingly, there are three separate paths in which the Court may clarify Ohio law on~~
these important issues.

III. CONCLUSION

This specific case is presently moot. However, the issues in this case remain pending in another case already accepted by the Court, and with another certified conflict case awaiting this Court's review. The Court is by no means required to dismiss this case, but if it chooses to do so, it may confront these important issues in either *Perry* or *Schwartzwald*.

Respectfully submitted,



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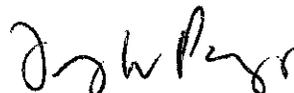
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