

IN THE SUPREME COURT OF OHIO

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Plaintiff-Appellee,

v.

DUANE SCHWARTZWALD, et al.,

Defendants-Appellants.

Case No. 2011-1201 and 2011-1362

On Appeal From Greene County Court of Appeals, Second Appellate District

Court of Appeals  
Case No. 2010 CA 0041

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## I. INTRODUCTION.

This case is before the Court pursuant to Article 4, Section 3(B)(4) and Article 4, Section 2(B)(2)(f) of the Ohio Constitution to resolve the conflicts among the First, Second, and Eighth District Courts of Appeal on the requirements to maintain a foreclosure action. This Court has accepted certification from the Second District<sup>1</sup> to answer the following question: “In a mortgage foreclosure action, [can] the lack of standing or a real party in interest defect [] be cured by assignment of the mortgage prior to judgment”?<sup>2</sup>

Defendants-Appellants Duane and Julie Schwartzwald also filed a discretionary appeal, raising three propositions of law:

1. In order to invoke the subject matter jurisdiction of the common pleas court, a plaintiff must have standing at the time the complaint is filed.
2. A lack of standing may not be cured or ratified pursuant to Civil Rule 17, nor can the defense of lack of standing be waived.
3. In order to have standing to prosecute a foreclosure claim, the foreclosing party must be entitled to enforce the note when the complaint is filed.<sup>3</sup>

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<sup>1</sup> The Court has also accepted certification of a case from the Twelfth District, *Washington Mutual Bank, FA v. Betty Wallace, et al.*, Case No. 2011-1694 and a direct appeal from the Eighth District, *U.S. Bank v. Perry*, Case No. 2011-0170, involving these same issues, both of which are being held pending disposition of this case.

<sup>2</sup> The Second District actually posed its question as a proposition of law for this Court’s consideration: “In a mortgage foreclosure action, the lack of standing or a real party in interest defect can be cured by assignment of the mortgage prior to judgment.” The Twelfth District in *Wallace* framed its question this way: “Can a bank that was not the mortgagee when it filed a foreclosure suit cure its lack of standing to bring the suit by subsequently obtaining an interest in the note and mortgage?”

<sup>3</sup> The Schwartzwalds have added a proposition of law in their brief which was not part of their Memorandum in Support of Jurisdiction. While that is not consistent with this Court’s Rules of Practice, the arguments made by the Schwartzwalds are subsumed with the discussion of the certified question.

Merit briefs have also been filed by Amici representing all of Ohio's "civil legal services programs" ("CLSPs"),<sup>4</sup> and Amici purporting to represent "homeowners of the state of Ohio and ohiofraudclosure.blogspot.com" ("Ohiofraudclosure").<sup>5</sup>

This Court is in the unique position of clarifying this important area of Ohio law. The Court should answer the certified question affirmatively, and, in doing so, should adopt these propositions of law:

- (a) To enforce a promissory note, the plaintiff must be a "person entitled to enforce the note" under R.C. 1303.31;
- (b) To foreclose a mortgage, the plaintiff must be a person entitled to enforce the note whose payment the mortgage secures;
- (c) The recording of a mortgage or an assignment of mortgage is not necessary to have standing to sue on the note or to foreclose the mortgage; and
- (d) Under Civ.R. 17(A), any defects in the plaintiff being the real party in interest can be cured prior to the entry of judgment.

## **II. STATEMENT OF FACTS.**

On November 27, 2006, the Schwartzwalds executed a Note in the principal amount of \$251,250.00 in favor of Legacy Mortgage. Affidavit of John Herman Kennerty, filed February 4, 2010 ("Kennerty Aff."), R. 49, Ex. A. On the same day, to secure payment of the Note, the

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<sup>4</sup> Advocates for Basic Legal Equality, Inc, Legal Aid Society of Cleveland, Community Legal Aid Services, Inc., Legal Aid Society of Columbus, Legal Aid Society of Southwest Ohio, LLC, Southeastern Ohio Legal Services, Pro Seniors, Inc., Legal Aid of Western Ohio, and the Ohio Poverty Law Center, LLC.

<sup>5</sup> The web site "Ohiofraudclosure.blogspot.com" does not appear to be a legal entity and it is unclear how counsel for it can claim to represent "all Ohio homeowners."

Schwartzwalds executed the Mortgage against the property located 2202 E. Spring Valley Pantersville Road, Xenia, Ohio (“Property”). *Id.* at Ex. B.

On April 15, 2009, Appellee Federal Home Loan Mortgage Corporation (“Freddie Mac”) filed a Complaint for Foreclosure against the Schwartzwalds seeking judgment on the Note in the amount of \$245,085.18, plus interest at 6.2500% from December 1, 2008, and to foreclose the Mortgage on the Property (R. 1).

The Complaint did not attach a copy of the Note as an Exhibit. (R. 1). However, on April 24, 2009, Freddie Mac filed a “Notice of Filing of Note.” (R. 13). The Note contained two indorsements, both appearing on its last page. The first indorsement was from Legacy Mortgage to Wells Fargo Bank, N.A. (“Wells Fargo”), and the other was by Wells Fargo, endorsing the Note in blank. *Id.* The Notice of Filing of Note was not verified.

On November 27, 2006, Legacy Mortgage executed an Assignment of Mortgage. Notice of Filing Assignment of Mortgage Chain, Ex. A (R. 43). On December 4, 2006, this Assignment of Mortgage was recorded with the Greene County Recorder. *Id.* On May 15, 2009, Wells Fargo executed an Assignment of Mortgage. Ex. B; Kennerty Aff., Ex. C. On May 27, 2009, the Assignment of Mortgage was filed with the Greene County Recorder. *Id.*

The Note and Mortgage each cross-reference the other. The Note states in Section 10, entitled Uniform Secured Note:

In addition to the protections given to the Note Holder under this Note, a Mortgage Deed of Trust, or Security Deed (the “Security Instrument”), dated the same day as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under the Note.

Ex. A, p. 3. The Mortgage states:

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's conveyance under the Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender the following described property.

Ex. B, p. 3.

By December 1, 2008, the Schwartzwalds had failed to make payments under the Note. *Id.*, ¶ 4. The failure to make payments constituted a default under the Note and Mortgage, and Freddie Mac accelerated the entire balance due. *Id.*, ¶ 4.

On February 4, 2010, Freddie Mac filed a Motion for Summary Judgment and the Kennerty Aff., which described Freddie Mac's ownership of the Note and Mortgage, as well as the Schwartzwalds' default. Kennerty Aff., ¶¶ 2-3. The Kennerty Aff. specifically avers that Freddie Mac was the owner and holder of the note, and set forth the balance due. *Id.* at ¶ 2. The Kennerty Aff. attached as an Exhibit the Assignment from Wells Fargo to Freddie Mac. Kennerty Aff., Exh. C. However, the version of the Note attached to the Kennerty Aff. did *not* contain the page with the indorsements from Legacy to Wells Fargo or Wells Fargo's indorsement in blank.

The Schwartzwalds did not contend that Freddie Mac *was not* the current holder of the Note or the owner of the Mortgage, that they had not defaulted, or that Freddie Mac had not accurately set forth the balance due. (R. 50). Rather, citing opinions from the First and Eighth District,<sup>6</sup> the Schwartzwalds opposed the Motion for Summary Judgment by asserting that the Kennerty Aff. was insufficient to establish Freddie Mac's right to enforce the Note and Mortgage or the amount due under the Note and Mortgage **at the time the Complaint was filed**, that

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<sup>6</sup> *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (1st. Dist.) and *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, discussed *infra*.

Freddie Mac did not have standing, and, therefore, that the Schwartzwalds—and not Freddie Mac—was entitled to judgment.

Freddie Mac responded by filing the affidavit of Jennifer Payne, which included the detailed payment history and confirming the Schwartzwalds were in default. (R. 55). Freddie Mac also pointed out that the Kennerty affidavit, the assignment of Mortgage from Legacy Mortgage to Wells Fargo, the Assignment the Mortgage and Note from Wells Fargo to Freddie Mac and the filed copy of the Note including the indorsement from Legacy Mortgage to Wells Fargo and a blank indorsement by Wells Fargo all established that it was the holder of the Note and the person entitled to enforce the Mortgage (R. 54).

The Trial Court concluded that Freddie Mac was entitled to summary judgment and that the Schwartzwalds were not. On June 1, 2010, the trial court entered judgment in favor of Freddie Mac in the amount of \$245,085.18, plus interest at 6.25% from and after December 1, 2008 and issuing a Decree of Foreclosure. (R. 63).

The Schwartzwalds appealed to the Second District Court of Appeals, raising one assignment of error: The trial court erred in granting Freddie Mac's Motion for Summary Judgment and denying the Motion filed by the Schwartzwalds. The Second District affirmed the entry of summary judgment in favor of Freddie Mac.

The Schwartzwalds moved the Second District to certify that its decision was in conflict with the standards for mortgagee standing being used by other districts. The Second District agreed, and certified a conflict between its decision and those of the First District Court of Appeals in *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (1st Dist.) and *Bank of N.Y. v. Gindele*, 1st Dist. No. C-090251, 2010-Ohio-542, as well as

the Eighth District Court of Appeals in *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092.

### **III. ARGUMENT.**

#### **The Certified Conflict Question**

In a mortgage foreclosure action, [can] the lack of standing or a real party in interest defect [] be cured by assignment of the mortgage prior to judgment[?]

#### **Appellants' Propositions of Law**

1. In order to invoke the subject matter jurisdiction of the common pleas court, a plaintiff must have standing at the time the complaint is filed.
2. A lack of standing may not be cured or ratified pursuant to Civil Rule 17, nor can the defense of lack of standing be waived.
3. In order to have standing to prosecute a foreclosure claim, the foreclosing party must be entitled to enforce the note when the complaint is filed.

#### **A. The contours of the analysis.**

The overwhelming majority of mortgage foreclosure actions in Ohio involve two claims: the first to collect the balance due on a promissory note, and the second to foreclose the mortgage securing its payment. The certified conflict involves the issue of timing for the proof of standing and the relationship of the recording of the assignment of mortgage. Finally, the Schwartzwalds' brief raises the distinction between "standing" and "real party in interest." To aid this Court in answering the certified question (and to address the propositions of law), this Brief will address the following legal issues:

- (1) What must a plaintiff show to be entitled to enforce a promissory note?
- (2) What must a plaintiff show to be entitled to enforce a mortgage?
- (3) To have standing to foreclose a mortgage securing payment of a promissory note, must a plaintiff record an assignment of mortgage prior to filing the complaint?
- (4) Must the plaintiff be a real party in interest when a complaint is filed?

**B. To enforce a promissory note, the plaintiff must be a “person entitled to enforce the note” under R.C. 1303.31.**

As is typical in most mortgage foreclosure cases, the Note in this case is an unconditional promise to pay money by a date certain, *i.e.*, it is a negotiable “instrument” governed by the Uniform Commercial Code (“U.C.C.”), R.C. Chapters 1301 and 1303, *et seq.* R.C. 1303.03 (U.C.C. § 3-104). Accordingly, analysis of the right to enforce a promissory note begins with the U.C.C.

The U.C.C. does not define who the proper plaintiff is in terms of who “owns” a promissory note, but rather it does so by looking at whether one is entitled to “enforce” the instrument: “The right to enforce an instrument and ownership of the instrument are two different concepts.” R.C. 1303.22 (U.C.C. § 3-203), Official Comment 1. “[A] person who has an ownership right in an instrument might not be a person entitled to enforce the instrument.” *Id.* In some circumstances, even a “thief” can be person entitled to enforce a note. R.C. 1303.22 (U.C.C. § 3-203), Official Comment 2. As White and Summers explain:

This fine tuning by the drafters of the 1990 revisions makes clear that the party “entitled to enforce the instrument”—the one who should be paid and whose payment will discharge the instrument—may not be a holder. This would be true, for example, in the case of a payee from whom the instrument is stolen.

White & Summers, 2 Uniform Commercial Code, Sections 16-12, 145 (5th Ed. 2008).

Rather than focusing on ownership, the U.C.C. provides for three categories of persons who are eligible to enforce an instrument:

- (1) A “holder” of the instrument;
- (2) A “nonholder” in possession of the instrument who has the rights of a holder;
- (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 1303.38.

R.C. 1303.31 (U.C.C. § 3-301). Each category is described below.

1.  Holders of promissory notes.

A “holder” of a negotiable instrument is a term of art, and means:

- (a) If the instrument is payable to bearer, a person who is in possession of the instrument;
- (b) If the instrument is payable to an identified person, the identified person when in possession of the instrument.

R.C. 1301.201(B)(21). “Holders” are thus either persons in possession of “bearer paper,”<sup>7</sup> or persons who are in possession of the note and who are its specified payee. Either can enforce.

R.C. 1303.31(A)(1).

Both types of “holders” can either acquire or transfer the instrument by “negotiation.” “‘Negotiation’ means a voluntary or involuntary transfer of possession of an instrument by a person other than the issuer to a person who by the transfer becomes the holder of the instrument.” R.C. 1303.21(B) (U.C.C. § 3-201). For instruments which are payable to a specific person, negotiation “requires transfer of possession of the instrument *and its indorsement* by the holder.” *Id.* (emphasis added). On the other hand, bearer paper “may be negotiated by transfer of possession alone.” *Id.*

Ohio courts have applied these principles. As a general rule, “[t]he current holder of the note and mortgage is the real party in interest in a foreclosure action.” *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. No. 91802, 2010-Ohio-236, ¶ 15; citing *Chase Manhattan Mortg. Corp. v. Smith*, 1st Dist. No. C061069, 2007-Ohio-5874; *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d

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<sup>7</sup> “Bearer paper” is an instrument “payable to the bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment,” “does not state a payee,” or is “payable to ‘cash.’” R.C. 1303.10(A) (U.C.C. § 3-109). “An instrument payable to an identified person may become payable to the bearer if it is indorsed in blank.” R.C. 1303.10(D).

328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶¶ 47-54 (7th Dist.). The U.C.C., however, provides additional categories of persons who may enforce a note.

2. Nonholders in possession of the instrument who have the rights of a holder.

The second category of persons entitled to enforce a note is comprised of “nonholders” in possession of the instrument who have “the rights of a holder.” R.C. 1303.31(A)(2). These are persons who did not acquire the note through “negotiation” but nonetheless rightfully have it. In its simplest terms, a “nonholder” is someone who possesses an instrument that is payable to someone else. The U.C.C. also gives “nonholders” the right to enforce. R.C. 1303.31(A)(2).

There is, however, an important difference between holders and nonholders. While “holders” are entitled to enforce *merely* by having possession, a nonholder must show that, in addition to possessing the note, a person who transferred the note was itself a “holder”:

If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection [R.C. 1303.22(B)] the transferee obtained the rights of the transferor as holder. Because the transferee’s rights are derivative of the transferor’s rights, those rights must be proved.

R.C. 1303.22 (U.C.C. § 3-203), Official Comment 2.

Like holders, nonholders must have possession. However, unlike holders (who need to *only* have possession), nonholders must also have independent evidence of transfer of the instrument by someone who had the right to transfer it. For ease of reference, nonholders must have evidence of “possession plus.” The Permanent Editorial Board of the Uniform Commercial Code (“PEB”) explains:

How can a person who is not the holder of a note have the rights of a holder? This can occur by operation of law outside the UCC, such as the law of subrogation or estate administration, by which one person is the successor to or acquires another person’s rights. It can also occur if the delivery of the note to

that person constitutes a “transfer” (as that term is defined in UCC Article 3 . . . ) because transfer of a note “vests in the transferee any right of the transferor to enforce the instrument.” Thus, if a holder (who . . . is a person entitled to enforce a note) transfers the note to another person, that other person (the transferee) obtains from the holder the right to enforce the note even if the transferee does not become the holder . . . . Similarly, a subsequent transfer will result in the subsequent transferee being a person entitled to enforce the note.

Report of the Permanent Editorial Board for the Uniform Commercial Code: Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes, 5-6 (November 14, 2011), available at <http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf> (“PEB Report”) (footnotes omitted).

Cases from the lower courts offer examples of nonholders entitled to enforce. In *Deutsche Bank Nat’l Trust Co. v. Gardner*, 8th Dist. No. 92916, 2010-Ohio-663, the note was payable to someone other than the plaintiff. *Gardner* held that the right to enforce the note and mortgage could be transferred via assignment pursuant to R.C. 1303.22 (U.C.C. § 3-203), but that additional extrinsic evidence was needed to establish the standing to sue. In *Gardner*, the evidence of servicing the mortgage loan, combined with the uncontroverted testimony that the plaintiff was in possession of the note and mortgage, was sufficient to demonstrate that the plaintiff possessed standing to bring the suit.

In *Midland Title Sec., Inc. v. Carlson*, 171 Ohio App.3d 678, 2007-Ohio-1980, 872 N.E.2d 968 (8th Dist. 2007), a title company closing the sale of a home mistakenly paid the homeowner instead of paying off the mortgage. Honoring its title policy, the title company paid the mortgagee. The mortgagee then sent the title company the note, along with a letter stating the mortgagee was transferring ownership, but failed to indorse the note. Even though the title company did not qualify as a “holder” (because the note remained payable to the mortgagee and

the mortgagee had not indorsed it), *Carlson* held that the title company's possession of the note, when combined with the letter, was sufficient to provide standing to enforce the note.

In *Bank of N.Y. v. Dobbs*, 5th Dist. No. 2009-CA-000002, 2009-Ohio-4742, the plaintiff was not the original creditor under the note, and there was no evidence that the note had been indorsed to the plaintiff. However, the record contained the note and an assignment of the mortgage to the plaintiff. The Fifth District found that this was sufficient to establish that the assignee of the mortgage was *also* the assignee of the note with standing to sue. *Id.*, ¶ 37. Citing to the Restatement of the Law 3d, Property (Mortgages), the *Dobbs* court concluded that transfer of the mortgage presumptively was accompanied by transfer of the note:

Section 5.4 of the Restatement III, Property (Mortgages) discusses transfers of the obligations secured by a mortgage and transfers of the mortgage itself by the original mortgagee to a successor, or a chain of successors. Such transfers occur in what is commonly termed the "secondary mortgage market", as distinct from the "primary mortgage market" in which the mortgage loans are originated by lenders and executed by borrowers.

The Restatement asserts as its essential premise is that it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same party. This is because in a practical sense separating the mortgage from the underlying obligation destroys the efficacy of the mortgage, and the note becomes unsecured. The Restatement concedes on rare occasions a mortgagee will disassociate the obligation from the mortgage, but courts should reach this result only upon evidence that the parties to the transfer agreed. Far more commonly, the intent is to keep the rights combined, and ideally the parties would do so explicitly. The Restatement suggests that with fair frequency mortgagees fail to document their transfers so carefully. Thus, the Restatement proposes that transfer of the obligation also transfers the mortgage and vice versa. Section 5.4 (b) suggests "Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise." Thus, the obligation follows the mortgage if the record indicates the parties so intended.

*Id.*, at ¶¶ 27-28. Because there was no evidence in the record to overcome the presumption that the transfer of the mortgage was accompanied by the transfer of the note, the plaintiff had

standing to enforce the note by virtue of having received the assignment of mortgage. *Id.* Put another way, the assignment of the mortgage, along with evidence that the plaintiff had physical possession of the note, was sufficient “possession plus” evidence of the right to enforce the note.

3. Lost or stolen instruments.

Although possession is a critical part of being a “holder” or “nonholder,” the U.C.C. creates a narrow class of persons who can enforce a promissory note without possession. R.C. 1303.38 (U.C.C. § 3-309). These claimants must prove “all of the following”:

- (1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.
- (2) The loss of possession was not the result of a transfer by the person or a lawful seizure.
- (3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

R.C. 1303.38(A) (U.C.C. § 3-309). In addition to these requirements (and as explained below), a person seeking to enforce a lost, destroyed, or stolen note must take special precautions to protect the obligor from someone who might later have possession of it.

4. The importance of possession.

Recent news reports have resulted in public concern as to whether mortgage foreclosure actions are being brought by the correct party. By enacting the U.C.C. (and as made clear in the PEB Report), the General Assembly has *already* passed legislation that ensures that only the correct party can enforce a note. Those protections focus on possession.

First, the U.C.C. requires that a person seeking to be paid on a note “present” the original note upon demand. R.C. 1303.61(B) (U.C.C. § 3-501). Upon payment, the obligor is entitled to the surrender of the original note. R.C. 1303.61(B)(2)(c). By limiting standing to either

“holders” or “nonholders” in possession, the General Assembly has ensured that payments are made only to the persons entitled to enforce them.

The U.C.C. provides further protection. Payment to a “person entitled to enforce” an instrument discharges the obligation. R.C. 1303.67 (U.C.C. § 3-602). This is true even if another person is making a claim to the instrument. *Id.*

As noted above, in limited circumstances the U.C.C. allows a person claiming a lost, destroyed or stolen instrument to enforce it. R.C. 1303.31(A)(3) (U.C.C. § 3-301) and R.C. 1303.38 (U.C.C. § 3-309). However, and again reflecting the importance of possession, in addition to the stringent requirements to enforce a lost, destroyed or stolen note, the U.C.C. requires the claimant to protect the obligor from someone who later turns up with the note:

The court may not enter judgment in favor of the person seeking enforcement [of a lost, destroyed or stolen note] unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection for the person required to pay the instrument may be provided by any reasonable means.

R.C. 1303.38(B).

Thus, the U.C.C. provides the answer to the first part of the analysis. The question of who is entitled to enforce a note is completely governed by the U.C.C. Under the U.C.C., a claimant “may be a ‘person entitled to enforce’ the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.” R.C. 1303.31(B) (U.C.C. § 3-301). Instead, the U.C.C. provides standing to a person in possession of the instrument who is a “holder” or “nonholder,” or has a lost, destroyed or stolen instrument but posts adequate security.

**C. To foreclose a mortgage, the plaintiff must be a person entitled to enforce the note whose payment the mortgage secures.**

The second issue is what must be shown to foreclose a mortgage securing payment of a promissory note. Ohio law is once again clear: To foreclose a mortgage, the plaintiff must be a person entitled to enforce the note whose payment the mortgage secures. Put simply, the mortgage follows the note.

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 (7th Dist.); citing *Edgar v. Haines*, 109 Ohio St. 159, 141 N.E. 837 (1923); see, also *Noland v. Wells Fargo Bank, N.A. (In re Williams)*, 395 B.R. 33 (Bankr. S.D. Ohio 2008); *Gemini Servs. v. Mortg. Elec. Registration Sys. (In re Gemini Servs.)*, 350 B.R. 74, 84 (Bankr. S.D. Ohio 2006). “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*, 100 N.E.2d 68, 75, 59 Ohio Law Abs. 400 (1950).

This Court’s decision in *Kernohan v. Manss*, 53 Ohio St. 118, 133, 41 N.E. 258 (1895), is an excellent illustration of these principles. In *Kernohan*, Martin executed notes and a mortgage in favor of McGill. McGill recorded the mortgage with the recorder. *Kernohan* at 133. McGill transferred the original mortgage to Kernohan, along with *forged* copies of the notes. *Id.* McGill then transferred the *original* notes to Manss. *Id.* Martin died, his estate sold the land through probate, with Kernohan (who had the original mortgage) and Manss (who had the original notes) each claiming the proceeds.

Even though Kernohan had possession of the original mortgage, and even though McGill was the recorded mortgagee, the Court held that Manss, as the holder of the original notes, had the right to the proceeds. “[A] transfer of the note by the owner so as to vest legal title in the

indorsee will carry with it equitable ownership of the mortgage.” *Kernohan* at 133. “Where a note secured by a mortgage is transferred, as by indorsement, so as to vest the legal title to the note in the transferee, such transfer operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.” *Kuck* at 75. Succinctly, security follows the debt, and, *as against the mortgagor*, the party entitled to enforce the note has the right to enforce the mortgage.

The U.C.C. reinforces the common law principles enunciated in *Kernohan* that the person entitled to enforce a promissory note is the party entitled to enforce the mortgage that secures its payment, and that transfer of the note automatically transfers the right to enforce a mortgage.

“[T]his chapter applies to the following: \* \* \* [a] sale of \* \* \* promissory notes;”);

1309.102(A)(72)(d) (“‘Secured party’ means: \* \* \* [a] person to whom \* \* \* promissory notes have been sold;”); and 1309.203(G) (“The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.”). *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶ 53 (7th Dist.).

Official Comment 9 to R.C. 1309.203 confirms that “[s]ubsection (G) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.” *Id.*

In response to the recent interest that the mortgage foreclosure crisis has generated, the PEB recently reaffirmed these principles:

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, such as execution of a recordable assignment of the mortgage? UCC Section 9-203(g) explicitly provides that, in such cases, the assignment of the interest of the seller or other grantor of a security interest in the

note automatically transfers a corresponding interest in the mortgage to the assignee \* \* \* .

PEB Report, at 12. 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.

These principles are also advocated by the American Law Institute. The Restatement of the Law 3d, Property, Mortgages, provides:

- (a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.
- (b) Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.
- (c) A mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation the mortgage secures.

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

Although not controlling, the majority of other states follow these principles. American Jurisprudence reflects the general rule:

Generally, the transfer or assignment of a negotiable promissory note carries with it, as an incident, a deed of trust or mortgage upon real estate or chattels that secure its payment. The mortgage follows the debt, in the sense that the assignment of the note evidencing the debt automatically carries with it the assignment of the mortgage. Absent an effective transfer of the debt, the assignment of a mortgage is a nullity.

55 American Jurisprudence 2d, Mortgages, § 927 (2011), (internal citations omitted). This rule is followed by a majority of jurisdictions.<sup>8</sup>

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<sup>8</sup> Federal - *Batesville Institute v. Kauffman*, 85 U.S. (18 Wall.) 151, 153, 21 L.Ed. 775, 776 (1873) (“no principle is better settled than this, that the assignment of a debt carries with it an assignment of a judgment or mortgage by which it is secured. If a part only of the debt is assigned, a pro tanto portion of the security follows it.”);

Alabama - *Armour Fertilizer Works v. Zills*, 235 Ala. 41, 43, 177 So. 136, 138 (1937) (“when the note is secured by a mortgage, such mortgage follows the note \* \* \* .”);

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Arizona - Ariz.Rev.Stat. Ann. 33-817 (“The transfer of any contract or contracts secured by a trust deed shall operate as a transfer of the security for such contract or contracts \* \* \* .”);

Arkansas - *Leach v. First Cmty. Bank*, No. CA 07-05, 2007 Ark. App. LEXIS 671, at \*3 (Ark. Cty. App. Oct. 3, 2007) (“Arkansas has long followed the rule that, in the absence of an agreement or a plain manifestation of a contrary intention, the security of the original mortgage follows the note or renewal thereof \* \* \* .”);

California - Cal.Civ.Code 2936 (“The assignment of a debt secured by mortgage carries with it the security.”); *In re Staff Mortg. & Inv. Corp.*, 625 F.2d 281, 284 (9th Cir. 1980) (in California, “[A] deed of trust is a mere incident of the debt it secures and \* \* \* an assignment of the debt carries with it the security.” (internal quotation omitted));

Colorado - *Carpenter v. Longan*, 83 U.S. 271, 275 (1873) (in an appeal from the Supreme Court of Colorado Territory, the United States Supreme Court stated: “The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.”);

Connecticut - Conn.Gen.Stat. Ann., Title 49-17 (“When any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed, provided the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the land records in the town in which the land lies.”); *In re AMSCO, Inc.*, 26 B.R. 358, 361 (Bankr. D. Conn. 1982) (“An assignment of the note carries the mortgage with it \* \* \* .”);

District of Columbia - *Hill v. Hawes*, 144 F.2d 511, 513 (D.C. Cir. 1944) (after mortgage note has been cancelled, cancellation of any “mortgage follows as a matter of course and does not require a separate action \* \* \* .”);

Florida - *Capital Investors Co. v. Ex'rs of Estate of Morrison*, 484 F.2d 1157, 1163 n.12 (4th Cir. 1973) (“That the mortgage follows the note it secures and derives negotiability, if any, from the note is the rule in Florida where the land under mortgage in this case was located \* \* \* .”);

Illinois - *Fannie Mae v. Kuipers*, 314 Ill. App.3d 631, 635, 732 N.E.2d 723, 727 (2000) (“The assignment of a mortgage note carries with it an equitable assignment of the mortgage by which it was secured \* \* \* The assignee stands in the shoes of the assignor-mortgagee with regard to the rights and interests under the note and mortgage \* \* \* in Illinois, the assignment of the mortgage note is sufficient to transfer the underlying mortgage.”);

Indiana - *Lagow v. Badollet*, 1 Blackf. 416, 419, 1826 Ind. LEXIS 1, at \*7 (Ind. 1826) (“a mortgage \* \* \* follows the debt into whose hands soever it may pass.”);

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Iowa - *Bremer County Bank v. Eastman*, 34 Iowa 392, 394 (1872) (“The transfer of the note, secured by the mortgage, carried the mortgage with it as an incident to the debt, and the indorsee of the note could maintain an action in his own name, to foreclose the mortgage without any assignment thereon whatever.”);

Kansas - Kan.Stat. Ann. § 58-2323 (“The assignment of any mortgage as herein provided shall carry with it the debt thereby secured.”); *Bank W. v. Henderson*, 255 Kan. 343, 354, 874 P.2d 632, 640 (1994) (“[T]he mortgage follows the note. A perfected claim to the note is equally perfected as to the mortgage.”);

Maryland - *In re Bird*, No. 03-52010-JS, 2007 WL 2684265, at \*2-4 (Bankr. D. Md. Sept. 7, 2007) (“The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it \* \* \* .”);

Michigan - *Prime Fin. Servs. LLC v. Vinton*, 279 Mich. App. 245, 257, 761 N.W.2d 694, 703 (2008) (“[T]he transfer of a note necessarily includes a transfer of the mortgage with it.”);

Mississippi - *Holmes v. McGinty*, 44 Miss. 94, 99, 1870 Miss. LEXIS 88, at \*9 (1870) (“[T]he mortgage \* \* \* follows the debt as an incident, and is a security for whomsoever may be the beneficial owner of it.”);

Missouri - *George v. Surkamp*, 76 S.W.2d 368, 371 (Mo. 1934) (when the holder of the promissory note assigns or transfers the note, the deed of trust is also transferred);

Montana - *First Nat'l Bank v. Vagg*, 65 Mont. 34, 39, 212 P. 509, 511 (1922) (“The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while the assignment of the latter alone is a nullity. The mortgage can have no separate existence.”);

Nebraska - *In re Union Packing Co.*, 62 B.R. 96, 100 (Bankr. D. Neb. 1986) (with or without the assignment of the mortgage, the assignee of the promissory note has the right to enforce the mortgage securing the note);

New Hampshire - *Southerin v. Mendum*, 5 N.H. 420, 430, 1831 WL 1104, at \*7 (1831) (“When a mortgagee transfers to another person, the debt which is secured by the mortgage, he ceases to have any control over the mortgage \* \* \* And we are of the opinion, that the interest of the mortgagee passes in all cases with the debt, and that it is not within the statute of frauds, because it is a mere incident to the debt, has no value independent of the debt, and cannot be separated from the debt.”);

New Jersey - *In re Kennedy Mortg. Co.*, 17 B.R. 957, 965 (Bankr. D.N.J. 1982) (“Anyone interested in acquiring an interest in the mortgage would be obliged to obtain an interest in the debt.”);

Admittedly, a small minority of jurisdictions do not follow this rule. In *United States Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 638, 941 N.E.2d 40 (2011), the Massachusetts Supreme Court upheld a ruling vacating a foreclosure sale because the assignments of the

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New York - *Mortgage Elec. Registration Sys., Inc. v. Coakley*, 41 A.D.3d 674, 838 N.Y.S.2d 622, 623 (N.Y. App. Div. 2d Dep't 2007) (“[A]t the time of the commencement of this action, MERS was the lawful holder of the promissory note (see U.C.C. § 3-204; *Franzese v. Fidelity N.Y. FSB*, 214 A.D.2d 646, 625 N.Y.S.2d 275 (1995)), and of the mortgage, which passed as an incident to the promissory note (see *Payne v. Wilson*, 74 N.Y. 348, 354-355 (1878); see also *Weaver Hardware Co. v. Solomovitz*, 235 N.Y. 321, 139 N.E. 353 (1923); *Matter of Falls*, 31 Misc. 658, 660, 66 N.Y.S. 47, 1 Mills 558 (1900), *aff'd*, 66 App. Div. 616, 73 N.Y.S. 1134 (1901).”)

North Carolina - *Dixie Grocery Co. v. Hoyle*, 204 N.C. 109, 113, 167 S.E. 469, 471 (1933) (“The mortgage follows the debt.”);

Oklahoma - *Zorn v. Van Buskirk*, 111 Okla. 211, 212, 239 P. 151, 153 (1925) (“[T]he mortgage follows the note.”); *Deutsche Bank National Trust Company v. Byrams*, 2012 OK 4 (2012) (“a foreclosing entity has the burden of proving it is a ‘person entitled to enforce an instrument’ [under the UCC] \* \* \* .”); *Deutsche Bank National Trust v. Brumbaugh*, 2012 OK 3 (2012) (same);

Pennsylvania - *In re Miller*, No. 99-25616 JAD, 2007 WL 81052, at \*6 & n.7 (Bankr. W.D. Pa. Jan. 9, 2007); citing and quoting with approval “Gray, *Mortgages in Pennsylvania* at § 1-3 (1985) (‘the mortgage follows the note’) \* \* \* .”);

South Carolina - *Midfirst Bank v. C.W. Haynes & Co.*, 893 F.Supp. 1304, 1318 (D.S.C. 1994) (“South Carolina recognizes the ‘familiar and uncontroverted proposition’ that ‘the assignment of a note secured by a mortgage carries with it an assignment of the mortgage.’ *Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (1930); *Ballou v. Young*, 42 S.C. 170, 20 S.E. 84 (1894).”);

Texas - *Kirby Lumber Corp. v. Williams*, 230 F.2d 330, 333 (5th Cir. Tex. 1956) (applying Texas law) (“The rule is fully recognized \* \* \* that a mortgage to secure a negotiable promissory note is merely an incident to the debt, and passes by assignment or transfer of the note.”);

Utah - *Smith v. Jarman*, 61 Utah 125, 137, 211 P. 962, 967 (1922) (“The modern doctrine that the mortgage follows the note as an incident was thus long ago recognized by this court \* \* \* .”);

Virginia - *Yerby v. Lynch*, 3 Gratt. 460, 44 Va. 460, 489, 1847 WL 2384, at \*8-10 (1847) (“[T]he mortgage follows the debt.”); and

Washington - *Nance v. Woods*, 79 Wash. 188, 189, 140 P. 323, 323 (1914) (“[T]he mortgage follows the note.”).

mortgages at issue were not recorded until the foreclosure sale had already occurred. In response to the mortgagees' arguments that they possessed the right to enforce the notes, the Massachusetts Supreme Court acknowledged that other jurisdictions have held that security follows the debt (*Id.* at 652), but concluded that under Massachusetts law, the party seeking to foreclose must be the "holder" of the mortgage at the time they effectuate foreclosure. *Id.* at 655.<sup>9</sup>

The *Ibanez* decision was criticized by the PEB because the court "did not address the effect of Massachusetts's subsequent enactment of UCC § 9-203(g) on [previous common law] precedents." PEB Report, p. 12, fn. 43. As discussed above, U.C.C. § 9-203(g) expressly provides that evidence of the assignment of an obligation secured by a mortgage is sufficient to assign the security as well.

The better reasoned rule, and the one that is consistent with the U.C.C., the American Law Institute, the overwhelming majority of jurisdictions and this Court's precedent is that "security follows the debt," with the result that whoever is entitled to enforce the debt is automatically entitled to foreclose a mortgage securing its payment. The entire purpose of a mortgage is to ensure that collateral is available for payment of the debt. If the debt is satisfied, the mortgage no longer has any purpose. If the debt is transferred, then the ability to obtain its payment through the foreclosure sale of the collateral belongs to the obligee. Under the U.C.C., if the obligor makes payment to a person entitled to enforce the instrument, the debt is discharged, even if that person is not the recorded mortgagee.

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<sup>9</sup> The *Ibanez* court did not mention the decision in *In re Ivy Properties, Inc.*, 109 B.R. 10, 14 (Bankr. D. Mass. 1989), in which a bankruptcy judge analyzed Massachusetts law and concluded that the holder of the obligation did possess the right to enforce the mortgage securing the debt.

Thus, the answer to the question of “who is entitled to enforce a mortgage securing payment of a promissory note?” is the same as the answer to the first question: the person entitled to enforce the note. That is the answer provided by *Kernohan*, the U.C.C., the American Law Institute and the overwhelming majority of jurisdictions. The person entitled to enforce the note is entitled to enforce the mortgage, even if someone else is the recorded mortgagee, and even if someone else has possession of the original mortgage. *Kernohan, supra*.

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

Lower courts have struggled with the role of a recorded assignment of mortgage. In *Byrd* and *Jordan*, the First and Eighth Districts dismissed actions seeking to collect payment of the promissory note and to foreclose a mortgage because the plaintiff was not the recorded mortgagee at the time of filing. In this case, the Second District’s certified question is premised on the notion that “standing” to foreclose a mortgage can be “cured” by the recording of an assignment. Accordingly, in resolving the certified question, the Court should also address the role of recording, and clarify its relationship (or lack of relationship) to the issues at hand.

1. The effect of recording a mortgage is only for third parties.

The purpose of the recording statutes is to “protect innocent, subsequent bona fide purchasers of land who have no knowledge of any encumbrances.” *Wead v. Kutz*, 161 Ohio App.3d 580, 2005-Ohio-2921, 831 N.E.2d 482, ¶ 24 (12th Dist.); *see also HSBC Mortg. Servs. v. McGuire*, 7th Dist. No. 07 CO 44, 2008-Ohio-6586, ¶ 18 (“The purpose of the recording statutes is to put other lien holders on notice and to prioritize the liens.”); 66 American Jurisprudence 2d, Records and Recording Laws, Section § 40 (2011) (“Simply stated, the purpose of a recording statute is to provide protection to subsequent purchasers, lessees, and mortgagees.”).

Thus, Ohio’s system for recording of mortgages and assignments of mortgage governs the priority of disputes between claimants competing to be the (normally first) mortgagee—not disputes between the mortgagor and mortgagee. *Wead v. Kutz*, 2005-Ohio-2921, at ¶¶ 23-24. “[R]ecording 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, Mortgages and Deeds of Trust, Section 129 (2010).<sup>10</sup>

This Court has long noted that, consistent with the express language, history, and purpose of the recording statutes, recording is only “required” if the mortgagee desires to obtain the protections provided by the statutes against subsequent bona fide purchasers lacking knowledge of the interest. *Stewart v. Hopkins*, 30 Ohio St. 502, 526–27 (1876), *aff’d sub nom., Libby v. Hopkins*, 104 U.S. 303 (1881) (“If the mortgagees were satisfied with the security afforded by the mortgages unrecorded,” the court held, “there was no necessity for recording them. The record was only necessary to give them effect against those not parties thereto.”).

Recording of mortgages is governed by R.C. 5301.25, which states in relevant part:

(A) All deeds, land contracts referred to in division (A)(2)(b) of section 317.08 of the Revised Code, and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in division (C) of this section and section 5301.23 of the Revised Code, shall be recorded in the office of the county recorder of the county in which the premises are situated. *Until so recorded or filed for record, they 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 (emphasis added).

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<sup>10</sup> In *Fannie Mae v. Kuipers*, 314 Ill. App.3d 631, 635, 732 N.E.2d 723, 727 (2000), the court also discusses that the purpose of the recording act “is to protect subsequent purchasers against unrecorded prior instruments.”

To be recorded, R.C. 5301.25(A) requires that mortgages be “properly executed.” Proper execution is defined in R.C. 5301.01(A), and requires, among other things, acknowledgement before a notary. If a mortgage is not correctly notarized, then it is not properly recorded, and, therefore loses priority against a bankruptcy trustee or other creditors. *Mortg. Elec. Registration Sys. v. Odita*, 159 Ohio App.3d 1, 2004-Ohio-5546, 822 N.E.2d 821, ¶¶ 10-11 (10th Dist.); citing *Citizens Nat’l Bank v. Denison*, 165 Ohio St. 89, 133 N.E.2d 329 (1956), syllabus, paragraph 2; and 69 Ohio Jurisprudence 3d, Mortgages and Deeds of Trust, Section 103 (2010).

But if a mortgage is not properly recorded, or even if it is not recorded at all, **as between the mortgagor and mortgagee**, the mortgage is enforceable. *Wood v. Smith*, 38 Ohio Law Abs. 556, 50 N.E.2d 793 (Hamilton App. 1943); 69 Ohio Jurisprudence 3d, Mortgages and Deeds of Trust, Section 129 (2010). “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 (6th Dist.), (quoting *Citizens Nat’l Bank v. Denison*, 165 Ohio St. 89, 95, 133 N.E.2d 329 (1956), superseded by statute as stated in *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, ¶ 11).

Consistent with the principle that recording is not necessary for a mortgage to be effective against the mortgagor, assignments of mortgage also do not need to be recorded to be effective against the mortgagor:

[T]he issue of when the mortgage assignment was recorded becomes relevant only 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*, 161 Ohio App.3d 580, 2005-Ohio-2921, 831 N.E.2d 482, at ¶ 16.

The American Law Institute agrees: “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, Section 5.4, at Comment b (1997).

Because the recording of mortgages and their assignment only govern the priority between competing creditors, a mortgagor does not have standing to challenge the validity of the assignment. “Even if the Debtor could show that [the individual who executed the assignment] did not have authority to assign the mortgage, the Court does not need a valid written assignment where the Defendant has possession of the original note and mortgage.” *Feinberg v. Bank of N.Y. (In re Feinberg)*, 442 B.R. 215, 224 (Bankr. S.D.N.Y. 2010); *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*, 399 Fed.Appx. 97, 102, 2010 U.S. App. LEXIS 22764, at \*10 (6th Cir. 2010), *cert. denied*, 131 S.Ct. 1696 (2011) (citations omitted); *Yuille v. Am. Home Mortg. Servicing, Inc.*, No. 09-11203, 2010 U.S. Dist. LEXIS 113300, at \*20 (E.D. Mich. Sept. 22, 2010) (finding that the mortgagor is without standing to challenge an assignment’s validity); *Chase Home Fin., LLC v. Fequiere*, 119 Conn. App. 570, 989 A.2d 606, 610 (2010).

In *Noland v. Wells Fargo Bank N.A. (In re Williams)*, 395 B.R. 33 (Bankr. S.D. Ohio 2008), a bankruptcy trustee tried to invalidate a mortgage because a notice of its assignment had not been recorded prior to the bankruptcy. The court dismissed the complaint, holding that vis-à-vis the mortgagor (and therefore the mortgagor’s bankruptcy trustee), the notice of assignment was irrelevant:

For purposes of mortgage avoidance, it is irrelevant whether Wells Fargo or a third party holds the Note. The Mortgage was properly recorded in favor of MERS, as agent for UWM, its successors and assigns. MERS holds the legal interest in the Mortgage, as agent for the Note holder, whomever it may be, who, under Ohio law, because security follows the debt, holds the equitable title thereto.

In summary, the failure of Wells Fargo—or any other holder of the Note—to record an assignment of the Mortgage does not affect the validity of the Mortgage granted by the Debtors to UWM on May 2, 2005 and recorded on May 18, 2005 and of which the Trustee had constructive notice. It follows that the Trustee cannot avoid the Mortgage. Consequently, because the Trustee cannot avoid the Mortgage, he cannot recover the Property for the benefit of the estate.

*Noland*, 395 B.R. at 47; citing *Gemini Servs. v. Mortg. Elec. Registration Sys. (In re Gemini Servs.)*, 350 B.R. 74 (Bankr. S.D. Ohio 2006).

This same point was reinforced in *Bridge v. Aames Capital Corp.*, No. 1:09 CV 2947, 2010 U.S. Dist. LEXIS 103154 (N.D. Ohio Sept. 28, 2010). There the mortgagors sued to invalidate the notice of assignment. In dismissing the complaint, Judge Solomon reasoned:

Courts have routinely found that a debtor may not challenge an assignment between an assignor and assignee. See, e.g., *Livonia Property Holdings v. Farmington Road Holdings*, [supra] (holding that the plaintiff borrower did not have standing to dispute the validity of an assignment between assignor and assignee because plaintiff was “a non-party to those documents.”); *Ifert v. Miller*, 138 B.R. 159 (Bankr. E.D. Pa. 1992). In *Ifert*, the court explained that a debtor lacks standing to challenge an assignment under Texas law because:

[The underlying contract] is between [Debtor] and [Assignor]. [Assignor’s assignment contract is between [Assignor] and [Assignee]. The two contracts are completely separate from one another. As a result of the assignment of the contract, [Debtor’s] rights and duties under the [underlying] contract remain the same: The only change is to *whom* those duties are owed....[Debtor] was not a party to [the assignment], nor has a cognizable interest in it. Therefore, [Debtor] has no right to step into [Assignor’s] shoes to raise [its] contract rights against [Assignee]. [Debtor] has no more right than a complete stranger to raise [Assignor’s] rights under the assignment contract. *Id.* at 166 n. 13.

The Sixth Circuit reached a similar conclusion in *Rogan v. Bank One*, 457 F.3d 561 (6th Cir. 2006), where the plaintiff, acting as trustee for a bankruptcy estate, challenged the assignment of the original creditor’s interest in the mortgage to another bank. The Sixth Circuit agreed with the bankruptcy court that found the assignment to be immaterial “because neither the debtors nor the Trustee [were] parties to the [assignment] . . . . They lack standing to enforce it; they cannot claim to have relied on it.” *Id.* at 567; See also; *Liu v. T&H Mach., Inc.* 191 F.3d 790, 797 (7th Cir. 1999) (party to underlying contract lacks standing to “attack any problems with the reassignment” of that contract); *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90, 91 (8th Cir. 1900) (“As long as no creditor of the

assignor questions the validity of the assignment, a debtor of the assignor cannot do so.”); Richard A. Lord, 29 Williston on Contracts § 74:50 (4th Ed.) (“[T]he

debtor has no legal defense [based on invalidity of the assignment] . . . for it cannot be assumed that the assignee is desirous of avoiding the assignment.”)

*Id.* at \*8-11.

2. Lis pendens provides notice of the assignment of mortgage.

Finally, because the purpose of recording a mortgage is to give notice to third parties of a creditor’s claims against property, requiring a plaintiff to record an assignment of mortgage as part of the filing of a foreclosure action is entirely superfluous. Under Ohio law, the filing of the *court action itself* gives notice of the plaintiff’s claim of rights. R.C. 2703.26 (“When a complaint is filed, the action is pending so as to charge a third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff’s title”). Because lis pendens is itself notice of the plaintiff’s claims, there is simply no point to be served by requiring a plaintiff in a foreclosure action to file an assignment of mortgage.

For a plaintiff to be a person entitled to foreclose a mortgage, there is no requirement for the plaintiff to have filed a notice of assignment of mortgage, or even that the mortgage itself is recorded. Rather, the right to foreclose a mortgage is determined by being a person entitled to enforce the promissory note whose payment it secures. Recording is simply irrelevant to the issue of enforcement.

**E. Under Civ.R. 17(A), any defects in the plaintiff being the real party in interest can be cured prior to the entry of judgment.**

The final component of the certified question, as well as all three of the Schwartzwalds’ propositions of law, is *when* must “standing” (or as demonstrated below, real party in interest

status) to enforce a note and mortgage be proven. The Schwartzwalds (and the CLSPs) equate standing with being a real party in interest, and assert both must exist at the time of the filing of the Complaint. In this case, the Second District correctly determined that a party need only show that it is the “correct plaintiff” prior to judgment, not at the time of filing. Before showing why the Second District was correct, some clarification of terms is important.

Courts use the term “standing” to denote three separate concepts. The first is where no one—not the named plaintiff nor any other individual—has suffered an injury. *Sierra Club v. Morton*, 405 U.S. 727 (1972); *State ex rel. Consumers League of Ohio v. Ratchford*, 8 Ohio App.3d 420, 457 N.E.2d 878 (10th Dist.1982); *Ohio Pyro, Inc. v. Ohio Dep’t of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27 (no fireworks manufacturer had standing to challenge a fireworks permit to a third party). If no one has suffered an injury, there is no standing:

“Standing” is defined at its most basic as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” Black’s Law Dictionary (8th Ed.2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 1994 Ohio 183, 643 N.E.2d 1088. “[T]he question of standing depends upon whether the party has alleged such a “personal stake in the outcome of the controversy” \* \* \* as to ensure that ‘the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.’” *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, 64 O.O.2d 103, 298 N.E.2d 515, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636 quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663, and *Flast v. Cohen* (1968), 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947.

*Ohio Pyro, Inc.*, 2007-Ohio-5024 at ¶ 27. In a foreclosure case, when there has been a default, someone has suffered a direct injury, so this form of standing is irrelevant.

The second context in which the phrase “standing” is used is where the named plaintiff is the one who has suffered an injury, but has not fulfilled procedural prerequisites to maintain the

action. In this context, the plaintiff is the “correct” plaintiff, and “standing” is used to connote that the plaintiff has failed to satisfy the procedural requirements. *See, e.g., Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207. The court has subject matter jurisdiction over the dispute, but the plaintiff cannot invoke it.

A third context in which courts use the phrase “standing” is where they are referring to whether the plaintiff meets the criteria for being the real party in interest. The classic case is *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998). The failure to be the real party in interest is not a defect in subject matter jurisdiction:

Although a court may have subject matter jurisdiction over an action, if a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. *The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter.* Civ. R. 17. Unlike lack of subject matter jurisdiction, other affirmative defenses can be waived. *Houser v. Ohio Historical Soc.* (1980), 62 Ohio St.2d 77, 16 Ohio Op. 3d 67, 403 N.E.2d 965. Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court. *State ex rel. Smith v. Smith* (1996), 75 Ohio St.3d 418, 420, 1996 Ohio 215, 662 N.E.2d 366, 369; *State ex rel. LTV Steel Co. v. Gwin* (1992), 64 Ohio St.3d 245, 251, 1992 Ohio 20, 594 N.E.2d 616, 621.

*Id.* at 77 (emphasis added).

Because this form of “standing” does not affect subject matter jurisdiction, any defect may be cured. *Kline v. Mortgage Elec. Sec. Sys.*, Case No. 3:08cv408, 2010 U.S. Dist. LEXIS 26666, at \*20 (S.D. Ohio Mar. 22, 2010) (“Thus, the Ohio Supreme Court has recognized that lack of standing to initiate a lawsuit can be cured by the substitution of the real party in interest for the named plaintiff. There is simply no reason to conclude that the Ohio Supreme Court would reach the opposite result, because the party initiating the lawsuit became the real party in interest, after the case had been filed.”); *Suster, supra*; *Robbins v. Warren*, 12th Dist. No. CA95-11-200, 1996 Ohio App. LEXIS 1815, at \*4-5 (May 6, 1996) (holding “[t]he requirement that a

suit be prosecuted by the real party in interest is procedural rather than jurisdictional”); *Kinder v. Zuzak*, 11th Dist. No. 2008-L-167, 2009-Ohio-3793 (when a tort claim is scheduled as an asset in plaintiff’s bankruptcy claim and defendant objects that plaintiff is not the real party in interest, plaintiff may obtain an after-acquired exemption from the trustee and cure the standing defect); *McLynas v. Karr*, 10th Dist. No. 03AP-1075, 2004-Ohio-3597 (similar—may obtain an after-acquired abandonment from trustee); *Johnson v. Cincinnati Gen. Hosp.*, 10th Dist. No. 80AP-480, 1980 Ohio App. LEXIS 13411 (Oct. 28, 1980) (may obtain an after-acquired appointment as administrator to cure standing defect).

These principles are perfectly consistent with Civ.R.17:

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.

Civ.R. 17(A) (emphasis added). “The purpose behind Civ.R. 17 is ‘to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party in interest on the same matter.’” *Bank of N.Y. v. Stuart*, 9th Dist. No. 06CA008953, 2007-Ohio-1483, ¶ 9 (quoting *Shealy v. Campbell*, 20 Ohio St.3d 23, 24, 485 N.E.2d 701 (1985)); *Schwartzwald*, 2011-Ohio-2681, ¶¶ 71-72.

Civ.R. 17 embodies the principal purpose of the Civil Rules—to get past unnecessary technicalities to enable courts to resolve the merits of disputes. “These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.” Civ.R. 1(B). This mandate carries

throughout the Rules. *See, e.g.,* Civ.R. 21; *Bill Gates Custom Towing, Inc. v. Branch Motor Express Co.*, 1 Ohio App.3d 149, 440 N.E.2d 61 (10th Dist.1981) (holding that it was appropriate for the trial court to grant a motion to amend the complaint and add new plaintiffs—**after the plaintiff had completed presenting its evidence at trial**—to include the proper owners of the motor vehicle involved in the accident at issue). There is simply no purpose in denying relief to a plaintiff who is presently entitled to it, who has given the defendant notice of the claims, and all of the correct parties are presently before the court.

Ohio courts have applied these rules in foreclosure actions. In *Stuart*, the borrower argued that the plaintiff was not entitled to foreclose the mortgage because the note was not assigned to the named plaintiff until five months after the foreclosure lawsuit was filed. *Stuart*, 2007-Ohio-1483 at ¶ 11. The court rejected this argument holding that “filing the assignment with the trial court **before judgment was entered** was sufficient to alert the court and [the borrowers] that [the named plaintiff] was the real party in interest.” *Id.* at ¶ 12 (emphasis added). Moreover, the borrowers failed to show that they were prejudiced by the assignment. *Id.* at ¶ 13. The Court affirmed summary judgment holding that the plaintiff was “a real party in interest for purposes of filing the foreclosure action.” *Id.*; *see also Wash. Mut. Bank, F.A. v. Green*, 156 Ohio App.3d 461, 2004-Ohio-1555, 806 N.E.2d 604, ¶ 17 (7th Dist.) (denying a motion to dismiss where the complaint alleged that the plaintiff was the holder of the note and mortgage; following Civ.R. 17, “the trial court correctly refused to grant the motion to dismiss at a time before the allegations of the complaint were required to be proven.”).

The court in *U.S. Bank Nat’l Ass’n v. Bayless*, 5th Dist. No. 09 CAE 01 004, 2009-Ohio-6115, addressed this issue as well, holding that Civ.R. 17 creates the standards for being the party entitled to *prosecute* the claim. This is because “[p]ursuant to Civ.R. 17(A), the real party

of interest shall “prosecute” the claim. The rule does not state ‘file’ the claim.” *Id.* at ¶ 22 (quoting *Wachovia Bank v. Cipriano*, 5th Dist. No. 09CA007, 2009-Ohio-5470, ¶ 38). In *Bayless*, summary judgment was proper so long as evidence of the right to enforce the note and mortgage was established prior to judgment. *Bayless* at ¶ 20-23. See, also *LaSalle Bank Nat’l Ass’n v. Street*, 5th Dist. No. 08 CA 60, 2009-Ohio-1855; *Stuart*, at ¶ 9-12.

This is the law in Sixth, Seventh, Ninth, Tenth and Twelfth Districts. *Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011-Ohio-2959; *U.S. Bank, N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032 (7th Dist.); *BAC Home Loans Servicing, L.P. v. Cromwell*, 9th Dist. No. 25755, 2011-Ohio-6413; *Countrywide Home Loan Servicing, L.P. v. Thomas*, 10th Dist. No. 09AP-819, 2010-Ohio-3018; *Wash. Mut. Bank, FA v. Wallace*, 194 Ohio App.3d 549, 2011-Ohio-4174, 957 N.E.2d 92 (12th Dist.).

Federal courts in Ohio have also recognized that: “[i]n Ohio \* \* \* standing is not jurisdictional but may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter.” *Whittiker v. Deutsche Bank Nat’l Trust Co.*, 605 F.Supp.2d 914, 929, n.18 (N.D. Ohio 2009); citing *Suster*, 84 Ohio St.3d at 77; *Stuart, supra*; see also *Kline*, 2010 U.S. Dist. LEXIS 26666, at \*20.

Because it does not affect the court’s jurisdiction, any defect in the plaintiff being the real party in interest may be waived. *Aurora Loan Servs., LLC v. Cart*, 11th Dist. No. 2009-A-0026, 2010-Ohio-1157. In *Cart*, the court entered a default judgment of foreclosure. The defendant later filed a motion to vacate, stating that the plaintiff failed to prove it was the holder of the note and owner of the mortgage at the time the complaint was filed. The trial court denied the motion. The Eleventh District affirmed:

“Because compliance with Civ.R. 17 is not necessary to invoke the jurisdiction of the court of common pleas, \* \* \* , the failure to name the real party in interest is

an objection or defense to a claim which is waived if not timely asserted.” *Washington Natl. Bank v. Novak*, 8th Dist. No. 88121, 2007-Ohio-996, at ¶16. See also *Freedom Mortgage Corp. v. Groom*, 10th Dist. Nos. 08AP-761 and 09AP-162, 2009-Ohio-4482, at ¶21 (“[a]lthough Freedom Mortgage may have lacked standing, that deficiency is not jurisdictional and, consequently, could not void the default judgment of foreclosure”); *Portfolio Recovery Associates, LLC v. Thacker*, 2nd Dist. No. 2008 CA 119, 2009-Ohio-4406, at ¶14 (“the issue of standing or the ‘real-party-in-interest’ defense is waived if not timely asserted”) (citation omitted); *First Union Natl. Bank v. Hufford*, 146 Ohio App. 3d 673, 677, 2001-Ohio-2271, 767 N.E.2d 1206 (“several courts have indicated that failure to name the real party in interest is an objection or defense to a claim which is waived if not timely asserted”) (citations omitted).

*Aurora Loan Servs.*, at ¶ 18.

The Second District reached the same conclusion in *JPMorgan Chase Bank Tr. v. Murphy*, 2d Dist. No. 23927, 2010-Ohio-5285:

“It is well understood \* \* \* that the lack of subject matter jurisdiction may be raised anytime.” *Hunt v. Hunt* (Oct. 28, 1994), Greene App. No. 93-CA-92. While [the homeowners] asserted that their motion to dismiss was a “jurisdictional motion,” we have previously held, “[b]ecause ‘[t]he issue of lack of standing ‘challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court,’ \* \* \* the issue of standing or the “real-party-in-interest” defense is waived if not timely asserted.” *Countrywide Home Loans v. Swayne*, Greene App. No. 2009 CA 65, 2010-Ohio-3903, ¶ 29. In other words, “standing is not an issue of subject matter jurisdiction.” *Portfolio Recovery Assoc., L.L.C. v. Thacker*, Clark App. No. 2008 CA 119, 2009-Ohio-4406, ¶ 14. As noted above, [the homeowners] did not timely challenge the standing of JPMorgan Chase to prosecute the foreclosure action, and [] accordingly waived this argument.

*Murphy*, at ¶ 19.

The primary cases for the position that being the real party in interest must exist at the initiation of the Complaint are the decisions of the First District in *Byrd* and *Gindele* and the Eighth District in *Jordan*.<sup>11</sup> *Jordan* based its holding on *Byrd*. In turn, *Byrd* based its conclusion

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<sup>11</sup> In January 2012, the Oklahoma Supreme Court released two decisions, *Byrams* and *Brumbaugh*, both cited in Footnote 8, *supra*, which hold that the standing to determine the real party in interest in a foreclosure action is governed by the party entitled to enforce the note under the U.C.C. (as argued by Freddie Mac), but hold that this interest must be proven to exist at the time of filing the complaint. Neither case addressed arguments similar to *Suster*.

on *United States use of Wulff v. CMA, Inc.*, 890 F.2d 1070, 1074-75 (9th Cir. 1989). See *Byrd* at ¶ 15.<sup>12</sup>

The first problem with both *Byrd* and *Jordan* is that neither bothers to distinguish (or even mention) this Court's decision in *Suster* or *Kernohan*, or discuss the U.C.C. In *Suster*, this court held that any defect in being the real party in interest may be cured. In *Kernohan*, the Court held that the person entitled to the monies due under a note is not the mortgagee but the holder of the obligation, a principle later adopted by the General Assembly in enacting the U.C.C.

The second problem with both *Byrd* and *Jordan* is that they ignore the variety of cases interpreting Ohio law outside of the mortgage context. *Robbins, Kinder, McLynas, Gates*, and *Johnson*, all *supra*, held that a defect in being the real party in interest is curable. This is now the view of a vast majority of Ohio and federal courts addressing this issue. *Bayless*, at ¶ 20-23; *Stuart*, at ¶ 11-13; see also *Kline*, 2010 U.S. Dist. LEXIS 26666, at \*20; *Whittiker*, 605 F. Supp.2d at 929, n.18.

The third problem with *Byrd* or *Jordan* (and as aptly stated by the Fifth District) is that Civ.R. 17(A) specifically provides that cases are to be *prosecuted*—not filed—in the name of the real party in interest. Civ.R. 17(A) also provides that no case is to be dismissed on the grounds that it was not brought by the real party in interest until a reasonable time has been allowed to cure the defect. If—as *Byrd* and *Jordan* seemed to believe—being the real party in interest standing was an incurable defect, then Civ.R. 17(A) would provide that every case that was not

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<sup>12</sup> While *Wulff* discussed Fed.R.Civ.P. 17(A), that discussion was dicta as the court had already found that the assigned claim was barred by the statute of limitations and could not relate back under Fed.R.Civ.P. 15.

brought by the real party in interest **shall be immediately dismissed**. If *Byrd* and *Jordan* were correct, then Civ.R. 17(A) would not read as it currently provides, but just the opposite.

The final problem with *Byrd* and *Jordan* is that they simply ignore the history of the Rule. Civ.R. 17 is based on Fed.R.Civ.P. 17. The Advisory Committee notes for the 1966 Amendments to Fed.R.Civ.P. 17(a) confirms that the rule allows assignees to sue in their own name:

In its origin the rule concerning the real party in interest was permissive in purpose: **it was designed to allow an assignee to sue in his own name**. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

(Emphasis added.)

As a result, “[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 instituted**, the assignee is the real party in interest and can maintain the action.” 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, Section 1545 (2d Ed. 2007 update) (emphasis added). *Byrd* and *Jordan* simply ignore that Civ.R. 17(A) was designed to allow an assignee to sue in his own name, and provide the appropriate documentation later.

Thus, the answer to the final component of the certified question, as well as all three of the propositions of law, is that to any defect in being the real party in interest standing is not fatal to jurisdiction, can be cured prior to judgment, and if not raised prior to judgment, is waived.

**F. An application of the law to this case.**

This record in this case presents undisputed facts. At the time of filing the Complaint, the original mortgagee, Legacy, had assigned the Mortgage to Wells Fargo. After commencement of this action, Wells Fargo executed an assignment transferring both the Note and Mortgage to

Freddie Mac, which was then recorded. A copy of the Note bearing indorsements from Legacy to Wells Fargo and by Wells Fargo in blank was filed in the trial court. The affidavit stated that Freddie Mac was the “holder” of the Note. There was no dispute that the mortgagors were in default. On this record, was Freddie Mac entitled to enforce the Note and Mortgage?

If the copy of the Note attached to the Notice of Filing of Note was sufficient for the purposes of Civ.R. 56(C), Freddie Mac would have qualified as a “holder” as the term is defined in R.C. 1301.201(B)(21). Legacy indorsed the Note to Wells Fargo, making Wells Fargo a named payee and thus a “holder” under R.C. 1301.201(B)(21)(a). Wells Fargo indorsed the Note in blank, making the Note bearer paper, enforceable by anyone who had possession. R.C. 1301.201(B)(21)(a); R.C. 1303.31(A)(1).

As a “holder,” Freddie Mac would have been a person entitled to enforce the Note and the Mortgage. R.C. 1303.31(A)(1). This point is true even though an Assignment of Mortgage had not been recorded. Ohio law automatically makes a person entitled to enforce the Note a person entitled to enforce the Mortgage, regardless of whether an Assignment had been recorded. R.C. 1309.203(G); *Kernohan, supra*. The filing of the foreclosure action itself gave notice to the world that Freddie Mac claimed an interest in the Property. R.C. 2703.26.

However, the copy of the Note attached to the Notice of Filing of Note was not authenticated, and, therefore, was not proper summary judgment evidence. The Second District agreed, and analyzed the next issue—was Freddie Mac a person entitled to enforce the Note under R.C. 1303.31(A)(2), a person in possession with the rights of a holder?

The Affidavit stated that Freddie Mac was a “holder” of the Note. While that was not sufficient to establish the legal connotation of that term (*i.e.*, one in possession of an instrument and is either its payee or the instrument is bearer paper), it was sufficient to establish its lay

connotation—that Freddie Mac had “a hold of” the Note. At a minimum, the Affidavit established that Freddie Mac had possession of the Note.

But R.C. 1303.31(A)(2) requires more than just evidence of possession. That statute requires evidence of possession “plus” evidence that a holder had transferred the Note. There was such evidence.

The Assignment from Wells Fargo to Freddie Mac stated that it transferred both the Note and the Mortgage. Kennerty Aff., Exh. C. Therefore, as long as Wells Fargo was itself a “holder,” then Freddie Mac met the requirements of R.C. 1303.31(A)(2).

And again, there was such evidence. Legacy itself was a “holder” because it was the original payee. The Assignment from Legacy to Wells Fargo transferred the Mortgage (but not the Note) to Wells Fargo. Nonetheless, as in *Dobbs*, the Note and the Mortgage each cross reference each other. As *Dobbs* noted, under the Restatement of Law 3d, Property, Mortgages, Section 5.4 (1997), “Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.” *Dobbs* at ¶ 28.

The Schwartzwalds produced no evidence to the contrary. Therefore, the transfer of the Mortgage by Legacy to Wells Fargo was itself sufficient evidence of a transfer of the Note to Wells Fargo. The combination of the Assignments by Legacy and by Wells Fargo, accompanied by Freddie Mac’s possession of the Note, made Freddie Mac a person in possession with the rights of a holder, thus qualifying under R.C. 1303.31(A)(2) as a party with the rights to enforce the Note. By being a party entitled to enforce the Note, Freddie Mac automatically became the person entitled to enforce the Mortgage, regardless of whether any of the Assignments had been recorded.

That leads to the final question—the issue of timing. The Assignment from Wells Fargo to Freddie Mac was not executed until after this action had been filed. While the record in this case does not establish whether Freddie Mac was a person entitled to enforce the Note as of the date the Complaint was filed, Freddie Mac, nonetheless, proved that it was such a person prior to judgment. On the date of judgment, the only person that the Schwartzwalds could have paid to discharge their liability under the Note was Freddie Mac. Upon payment, the only person who could have provided the Schwartzwalds with the original Note was Freddie Mac.

Ohio courts have long held that assignments acquired after the commencement of the action are sufficient. *Kinder, McLynas, and Johnson.*, all *supra*. That is the law in federal courts. *Wright and Miller, supra*. Finally, that is the law embodied within Civ.R. 17. The rule followed in the Second, Fifth, Sixth and Twelfth Districts is the correct one: standing need only be proven prior to the entry of judgment. The Second District’s decision in the direct appeal of this case should be affirmed.

**G. The contrary arguments have no merit.**

Finally, Freddie Mac will address the various other arguments in the briefs of the Schwartzwalds and the CLSPs.

1. The standing arguments.

The Schwartzwalds’ Brief asserts that a court has no jurisdiction if a plaintiff does not have “standing” at the time of filing the complaint, that the measurement of “standing” is provided in R.C. 1303.31, Freddie Mac did not prove that it met the requirements of R.C. 1303.31 at the time that it filed the Complaint, and since it did not have “standing” to commence this action (even if it later acquired it), therefore, the action should have been dismissed. Brief, 11. The CLSPs argue that Ohio law has long held that standing is a jurisdictional prerequisite,

that standing must be proven at the time of the filing of the complaint, that if the plaintiff did not have standing at the time of the commencement of the action, there is no jurisdiction, and that this is a defect that cannot be waived. CLSP Brief, 4-7. None have merit.

*a. Federal versus Ohio Constitutions.*

The Schwartzwalds cite six cases for the proposition that “standing is determined as of the time the action is brought.” Brief, 16, citing *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005) (citing *Smith v. Sperling*, 354 U.S. 91, 93 n. 1, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957)); see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (“we have an obligation to assure ourselves that [plaintiff] had Article III standing at the outset of the litigation”); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003) (“Article III standing must be determined as of the time at which the plaintiff’s complaint is filed”); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991) (“As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint”). However, each of these cases interprets the standing limitations imposed by Article III of the U.S. Constitution. That is no minor nuance.

Article III is a limited grant of jurisdiction to federal courts. Federal courts only have jurisdiction over those matters specifically designated by the U.S. Constitution. U.S. Const., Art. III, § 2. Because of this limitation, federal courts narrowly define their jurisdiction. *New Jersey, Dep’t of Envtl. Protection & Energy v. Heldor Indus.*, 989 F.2d 702, 706 (3d Cir. 1993); 15 James Wm. Moore, et al., *Issues of Justiciability*, Section 101.02 (3d Ed. 2011).

In contrast, this Court has held that “the court of common pleas is a court of general jurisdiction. It embraces all matters at law and in equity that are not denied to it.” *Schucker v.*

*Metcalf*, 22 Ohio St.3d 33, 34, 488 N.E.2d 210 (1986) (quoting *Saxton v. Seiberling*, 48 Ohio St. 554, 558-559, 29 N.E. 179 (1891); *Dumas v. Estate of Dumas*, 68 Ohio St.3d 405, 408, 627 N.E.2d 978, 980 (1994)). Put simply, federal courts only have jurisdiction, which the U.S. Constitution provides; common pleas courts have jurisdiction over all matters unless the Ohio Constitution specifically denies it. The mode of analysis is thus entirely different.

That leads to the next problem. State courts are **not** bound by the requirements for Article III standing. *Virginia v. Hicks*, 539 U.S. 113, 120, 123 S.Ct. 2191, 156 L.Ed. 2d 148 (2003); 15 James Wm. Moore, et al., *Issues of Justiciability*, Section 101.20 (3d Ed. 2011). This issue is not resolved by determining what the standard is under Article III of the U.S. Constitution, but rather what does the Ohio Constitution provide.

On that note, Ohio Constitution, Article IV, Section 4(B) provides that common pleas courts have “original jurisdiction over all justiciable matters.” Whether a borrower has defaulted under a promissory note and whether that default amounts to a breach of mortgage is a “justiciable matter” over which the common pleas courts have jurisdiction. Whether the named plaintiff is the “correct” plaintiff to enforce note and mortgage is also justiciable. Because the Ohio Constitution bestows general (and not limited) jurisdiction on common pleas courts, common pleas courts have “jurisdiction” to hear disputes, even if the named plaintiff was not the correct person to invoke it. As Judge Froelich put it in his concurring opinion in *Murphy, supra*:

The homeowners contend judgment against them was in error because, they allege, the assignment of the mortgage to JPMorgan (the plaintiff in the foreclosure complaint) was not recorded until sometime after the Complaint was filed. This alleged fact, the homeowners contend, means that JPMorgan did not have standing to bring the foreclosure, and that the trial court thus did not have subject matter jurisdiction to render judgment in favor of JPMorgan; the homeowners conclude that the foreclosure judgment is void since it was granted by a court that did not have subject matter jurisdiction.

But this is not a situation where a municipal court grants a real estate foreclosure. Rather, the foreclosure was rendered by the General Division of the Common Pleas Court which has the power and authority (i.e., the subject matter jurisdiction) to grant foreclosure judgments.

It is a totally different matter to assert, as do the Appellants, that the Common Pleas Court should have been aware that one of the parties to the litigation - over which the court had subject matter jurisdiction - was not a real party in interest and lacked standing to participate in the litigation. If that were the situation, such contention should have been brought to the attention of the trial court and would have been addressed. Appellant did not do this and thereby gave up, or waived, the right to argue the issue in this court.

*JPMorgan Chase Bank Tr. v. Murphy*, 2d Dist. No. 23927, 2010-Ohio-5285, ¶¶22-24 (Froelich, J., concurring). The Schwartzwalds' standing arguments are simply based on the wrong standard.

b. *Standing under the United States Constitution.*

Even if Article III requirements for standing were applied to Ohio Constitution, Article IV, Section 4(B), it would do the Schwartzwalds no good. To have standing in federal court, a plaintiff must satisfy three criteria: (1) the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between that injury and the challenged action of the defendant; and (3) it must be likely, not merely speculative, that a favorable judgment will redress the plaintiff's injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992).

In *Lujan*, the U.S. Supreme Court noted that the analysis of standing differs depending whether it occurs in the context of a motion to dismiss or in the summary judgment or trial context. *Lujan*, 504 U.S. at 589; *Bennett v. Spear*, 520 U.S. 154, 168, 117 S.Ct. 1154, 137 L.Ed. 2d 281 (1997); *Pennell v. San Jose*, 485 U.S. 1, 7, 108 S.Ct. 849, 99 L.Ed. 2d 1 (1988). At the motion to dismiss stage, the allegations of the complaint that the plaintiff has standing are

sufficient to create the “case or controversy” necessary for adjudication of the dispute at that point. At the summary judgment or trial phase, a plaintiff who may not possess the requisite proof of standing at the initiation of the complaint may still maintain the action as long as it is proven prior to judgment, because as discussed above “there 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 instituted, the assignee is the real party in interest and can maintain the action.” 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, Section 1545, (2d Ed. 2007 update); *cf.*, *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 289, 128 S.Ct. 2531, 171 L.Ed. 2d 424 (2008).

That same result would follow under Ohio Constitution, Article IV, Section 4(B). Under that Section, the allegations of the complaint that the plaintiff has standing are sufficient to present a justiciable controversy over which a common pleas court has jurisdiction. The matter remains justiciable as long as the plaintiff proves its interest prior to judgment. There is no requirement that the proof of standing “relate back” to the time of the filing of the complaint.

That is, of course, not to say that a common pleas court has jurisdiction to render a judgment when the plaintiff *never* had any interest to enforce the claim. As the cases cited by the Schwartzwalds and the CLSPs note, if the plaintiff *never* has an interest, then there is not a justiciable matter upon which a court could enter judgment. Brief, 13-14, citing *Hirsch v. TRW Inc.*, 8th Dist. No. 04-LW-0861, 2004-Ohio-1125; *Rickard v. Trumbull Twp. Bd. of Appeals*, 11th Dist. No. 2008-A-0024, 2009-Ohio-2619, ¶ 35; *Woods v. Oak Hill Community Med. Ctr.*, 134 Ohio App.3d 261, 271, 730 N.E.2d 1037 (4th Dist.1999); *Helms v. Koncelik*, 10th Dist. No. 08AP-323, 2008-Ohio-5073, ¶ 22; *Northland Ins. Co. v. Illuminating Co.*, 11th Dist. No. 2002-A-0058, 2004-Ohio-1529, ¶ 17; *First Nat’l Bank v. Randal Homes Corp.*, 4th Dist. No.

05CA739, 2005-Ohio-6129, ¶ 11; *County Treasurer v. Battersby (In re Foreclosure of Liens & Forfeiture of Prop.)*, 11th Dist. No. 2007-L-02, 2007-Ohio-4377, ¶ 11; CLSP Brief, 7, citing *Kirk v. Kirk*, 172 Ohio App.3d 404, 2007-Ohio-3140, 875 N.E.2d 125 (3d Dist.), *Stewart v. Stewart*, 134 Ohio App.3d 556, 558-559, 731 N.E.2d 743 (4th Dist.1999); *State ex rel. Keller v. Columbus*, 164 Ohio App.3d 648, 2005-Ohio-6500, 843 N.E.2d 838 (10th Dist.). While the justiciability requirement of Ohio Constitution, Article IV, Section 4(B) precludes a common pleas court from *entering judgment* if the plaintiff does not have an interest, it does not preclude the court from hearing the dispute in the first instance.

*c. Standing versus real party in interest.*

The final (and most fatal) analytical problem with the arguments of the Schwartzwalds and the CLSPs (or for that matter with the decisions of the First and Eighth Districts) is that they “conflate” the criteria for determining whether the plaintiff is the real party in interest with those to determine whether the plaintiff has standing. The Schwartzwalds cite R.C. 1303.31 as setting forth the minimum requirements for standing. The First and Eighth Districts applied their (misguided) requirement that there be a recorded assignment of mortgage as the measurement for “standing.” They are all applying the wrong standards.

Standing requires the plaintiff to have *an* interest in the litigation; real party in interest analysis looks to ensure that the named plaintiff is the entity on whom the law **confers the rights to bring the claim**. The tests to determine whether one has suffered an injury (or has “standing”) is different from the test used to determine whether one is the real party in interest. Some examples should suffice to highlight the differences.

When the defendant injures property owned by a trust, a beneficiary of that trust experiences a loss, and has an “interest” in litigation, which seeks compensation for that injury.

But, while the beneficiary may have an interest that would suffice to satisfy the limited thresholds for “standing,” the beneficiary is not the real party in interest under Civ.R. 17(A). This situation occurs because the requirements for “standing” are different from the requirements to be the real party in interest.

The Schwartzwalds give another example. A person injured in an automobile accident, who files for bankruptcy has an interest in the litigation against the tortfeasor. However, the bankruptcy trustee, and not the injured person, is the real party in interest. Brief, 9. The injured party may have “standing” but does not qualify under Civ.R. 17.

In the foreclosure context, there are at least three situations where a plaintiff may have an interest in a promissory note that would give the plaintiff “standing,” but would not qualify the plaintiff as a “real party in interest” under Civ.R. 17(A) and R.C. 1303.31.

The first is where the plaintiff is the “owner” of a promissory note (or its payment stream) but someone else has possession of the note. The “owner” has an interest in the litigation seeking the balance due on the note, but ownership alone does not make one a person entitled to enforce the note under R.C. 1303.31. R.C. 1303.22 (U.C.C. § 3-203), Official Comment 1 (“a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument”). The “owner” has “standing” in the sense that it has a direct interest in the collection of the payments, but it is not the real party in interest for the purposes of Civ.R. 17 and R.C. 1303.31.

A second situation in which one has standing but does not qualify as a real party in interest is where the named plaintiff has possession of the original promissory note that it has purchased, but the note is payable to someone else (and not to “bearer”). While a plaintiff who has purchased a promissory note has an interest in the litigation for the collection of the balance

due, merely having possession of a note made payable to someone else does not make one a person entitled to enforce the note under R.C. 1303.31. Instead, to qualify as a real party in interest, the plaintiff must have “possession plus” other evidence of transfer.

A final example in the foreclosure context is where the plaintiff has an executed contract to acquire both ownership and possession of the note. A typical contract in this context is a “pooling and servicing agreement” (“PSA”), where the note is put into a trust, and ownership of the note is transferred to the trust.<sup>13</sup> While the PSA would again give a trustee an interest in litigation over the balance due under the note (and thus “standing” in the traditional sense), without possession of indorsed note (or possession “plus” evidence of transfer by the holder), that trustee would not be a real party in interest.

And that is the fatal error in the logic of the Schwartzwalds, the CLSPs, and the First and Eighth Districts. Even if common pleas courts were subject to the requirements for the limited jurisdiction of federal courts, and even if the Ohio Constitution requires that the named plaintiff prove (and not merely allege) facts showing “standing” as of the date of the filing of the complaint, these requirements are met by a showing that one has a direct interest in the litigation, *not* by the standards used for determining whether one is the real party in interest. The test for one is simply not the same test used for the other. In the foreclosure context, a plaintiff can show “standing” by proving ownership, having possession of the original note or having a contract for its acquisition, even though none of these would satisfy the requirements for being a person entitled to enforce the note and thus being the real party in interest under R.C. 1303.31.

In this case, while the record reflects that Freddie Mac did not meet the requirements to be a real party in interest under R.C. 1303.31 at the time that it filed the Complaint, Freddie Mac

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<sup>13</sup> <http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/PSA.pdf> contains a description of how to find a PSA, how it works, and how it operates.

did not have to do so. Freddie Mac satisfied any threshold “standing” requirement by alleging it was a party entitled to enforce the Note and that the terms of the Note had been breached. Those allegations were sufficient to invoke the court’s jurisdiction. Freddie Mac only had to satisfy the additional requirements to be a “real party in interest” prior to the entry of judgment. Civ.R. 17(A).

In any event, even if there had to be “proof” of standing as of the filing of the Complaint, Freddie Mac alleged in the Complaint that it had possession (“a hold of”) of the Note at the commencement of the action and supported this allegation with an affidavit.<sup>14</sup> While that was not sufficient to meet the requirements to be a real party in interest, it was sufficient to confer “standing.” Freddie Mac then satisfied the requirements to be a real party in interest when it obtained the assignment from Wells Fargo, making it a person in possession with the rights of a holder. R.C. 1303.31(A)(2). The standing arguments of the Schwartzwalds and the CLSPs have no merit.

## 2. The Schwartzwalds’ Civ.R. 17 Arguments.

At the end of their Brief, the Schwartzwalds claim that Civ.R. 17 requires the action be maintained by the real party in interest, but limits the options to cure real party in interest defects to “ratification, substitution, or joinder,” and that a named plaintiff acquiring an assigned interest after initiation of the complaint is not one of these methods. That too is misguided. Brief, 20-21. The assignment *itself* is evidence of the original creditor’s “ratification” of the action. *Aquila, LLC v. City of Bangor*, 640 F.Supp. 2d 92, 101 (D. Me. 2009). The assignment sufficed under Civ.R. 17. This argument has no merit.

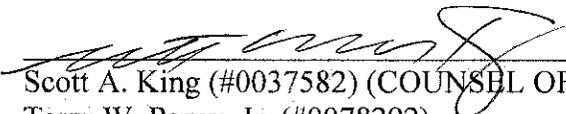
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<sup>14</sup> Admittedly, the affidavit does not describe the beginning of Freddie Mac’s possession of the Note. However, pursuant to Civ.R. 56, the Schwartzwalds, as cross-movants on this issue, had the obligation to present verified facts showing that Freddie Mac did not possess standing at the initiation of the Complaint.

**IV. CONCLUSION.**

Mortgage foreclosures 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 (a) hold R.C. 1303.31 sets the standards to determine who has the right to enforce a promissory note; (b) reaffirm the rule of *Kernohan* (and now of the U.C.C.) that whoever is the person entitled to enforce the note is also the person entitled to enforce a mortgage which secures its payment; (c) hold that there is no requirement for a plaintiff in a mortgage action to file an assignment of mortgage; and (d) confirm Civ.R. 17(A)'s express directive that the status of being a real party in interest need only be proven, if challenged, prior to the entry of judgment. In doing so, the Court should affirm the Second District's decision in the direct appeal.

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 31st day of January, 2012.

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