ORIGINAL

IN THE SUPREME COURT OF OHIO

FEDERAL HOME LOAN MORTGAGE CORP. *	**Case Nos. 2011-1201 and 2011-1362**
*	**On Appeal from the Greene County Court of Appeals, Second Appellate District**
Plaintiff-Appellee *	
-vs- *	**Court of Appeals Case No. 2010 CA 0041**
DUANE SCHWARTZWALD, et al. *	
Defendants-Appellants. *	

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RELEVANT FACTS

Although the parties' statements of the facts are not substantially different, there are a few points that should be emphasized.

First, Freddie Mac directs the Court's attention to the Notice of Filing of Note filed on April 24, 2009. *Brief of Appellee Federal Home Loan Mortgage Corporation*, p. 3 (hereafter "*Freddie Mac Brief*"). However, as Freddie Mac admits, the version of the note attached to that document was never authenticated. *Id.* The only authenticated copy of the note properly before the trial court was the one attached to Mr. Kennerty's affidavit. That copy of the note did not contain any endorsements. *Id.* p. 4.

Second, the Assignment of Mortgage which purportedly assigned the Schwartzwalds' mortgage from Wells Fargo Bank to Freddie Mac was executed on May 15, 2009, one month *after* Freddie Mac filed its complaint in this case. *Id.* p. 3. It was language contained in the Assignment of Mortgage which the Court of Appeals found gave Freddie Mac the rights of a holder.

Finally, as stated by Freddie Mac, the sum total of the facts on which it relies to establish its status as a "person entitled to enforce the note" were presented to the trial court through the affidavit of Herman John Kennerty. *Id.* p. 4. Freddie Mac does not, however, disclose that Mr. Kennerty is a self-acknowledged "robo-signer." In a deposition taken in a Washington foreclosure case, Mr. Kennerty admitted that when signing foreclosure-related documents, such as affidavits like the one he signed for this case, he did not review the contents of the affidavit for accuracy.[1]

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[1] A copy of Mr. Kennerty's deposition transcript is found *at http://www.scribd.com/doc/40362950/Deposition-Transcript-of-John-Kennerty.* Among the various admissions he made during his deposition, Mr. Kennerty stated that neither he

Importantly, Freddie Mac does not allege that it established to the trial court that it was entitled to enforce the note at the time the complaint was filed. At best, it became a "person entitled to enforce the note" only after it was assigned the mortgage on May 15, 2009. It is this disparity in timing that is the central point of contention in this case.

REPLY ARGUMENT

The conflict certified by the Second Distrct Court of Appeals is:

> "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."

To resolve the conflict that exists among the Ohio's various appellate districts, the Court must differentiate between a plaintiff with standing and one who is a real party in interest. Freddie Mac believes that standing and real party in interest status are one in the same and exist only as a needless, technical hurdle in the foreclosure process. The Schwartzwalds contend the two are distinct concepts deeply rooted in American and Ohio jurisprudence, that they serve different functions in the orderly administration of justice. Indeed, the Schwartzwalds argue that standing is a fundamental component of the constitutional grant of jurisdiction to Ohio's common pleas courts.

The Court must then determine whether, in a foreclosure action, the lack of either status may be "cured" by taking an assignment of the mortgage prior to the entry of judgment. Freddie Mac believes that it, and any other foreclosing lender, should be permitted to file foreclosure actions *before* it has any legally cognizable interest in either the note or the mortgage. As long as the lender is entitled to enforce the note and

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nor his department maintain custody of the records of Wells Fargo Bank. He also stated that he did not verify the content of the 150 or so documents that he signed daily, but rather relied on others to do so. The only thing Mr. Kennerty verified before signing was the date.

mortgage when judgment is entered, the Court should sanction the shell game that is today's mortgage industry. The Schwartzwalds, on the other hand, argue that Civ.R. 17(A) provides only limited ability to correct a real party in interest defect and contend that its "cure" provision should be narrowly applied. They believe that a person should be haled into court only by persons whose rights they are accused of injuring, not those who expect to obtain such rights at some point in the future.

Based on the facts presented to the Court, Freddie Mac lacked both standing and real party in interest status when it filed this lawsuit. The lack of standing can never be "cured" and Freddie Mac did not avail itself of the remedies of Civ.R. 17(A) to correct its real party in interest defect.prior to entry of judgment.

I. The Difference Between Standing And Real Party In Interest.

The distinction between real party in interest status under Civ.R. 17(A) and standing can be confusing at times. The reason for the confusion lies, no doubt, with the words used to define them individually. In discussing these ideas, courts will often consider some of the same factors, such as ownership of a right. That does not mean that standing and real party in interest are the same; it only means that they can share common characteristics. Both ends of a mule have hair, but they perform distinctly different functions.

The key is not whether the factors considered to determine if a person has standing are the same as those considered to determine real party in interest status. It is the nature of the anaylsis itself which is important. Are we considering whether the person has suffered an legal injury to a protected right, or whether the person making the claim owns the legal right advanced and is capable of discharging it? The first inquiry

relates to standing, the second to real party in interest.

A. Real Party In Interest Is Not Equivalent to Standing.

In 1968, Ohioans passed the Modern Courts Amendment to the Ohio Constitution. Among other things, the Modern Courts Amendment granted to the Supreme Court authority to implement rules for Ohio's courts. It was under this rule-making power that the Rules of Civil Procedure were adopted. But as this Court recently held, the rules adopted by the Court could not "abridge, enlarge, or modify any substantive right." *Havel v. Villa St. Joseph*, Slip Opinion No. 2012-Ohio-552, ¶12 (2012) (citing *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶17). Also, the Civ. R. 82 states that the Rules of Civil Procedure may not be construed so as to extend or limit the jurisdiction of any court. Civ. R. 82. *See also*, *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101 953 N.E.2d 329, ¶4 (2011) (stating "[N]either statute nor rule of court can expand our jurisdiction.").

Thus, Civ.R. 17, like all of the Rules of Civil Procedure, is purely procedural, and cannot be construed in a manner which would either enlarge any substantive right, or expand the jurisdiction of any court. Although we know what the Rule can and cannot do, the more difficult task to determining exactly what it means, and how its purposes are reconciled with other legal doctrines, such as standing. To understand its purpose, the Court should examine the historical underpinnings of the rule.

1. Historical Background of Civ.R. 17.

Like most of the Rules of Civil Procedure, Civ.R. 17(A) was modeled after its federal counterpart. 1970 Staff Notes to Civ.R. 17(A). And the federal rules were, in turn, modeled after their precursors. At common law, an only the person with legal title to a

right could not bring suit on that right. The practice in equity was more relaxed, and permitted those with a beneficial interest in the subject of the suit to assert claims. Charles Allen Wright, Arthur R. Miller & Mary K. Kane, 6A *Federal Practice and Procedure: Civil, §1541,* p. 460-61 (3d. 2010). But when state codes combined law and equity, the concept of real party in interest was adopted. The codes incorporated the equity rule and required that cases be prosecuted by the real party in interest. *Id.* The language of Civ.R. 17 came almost verbatim from Equity Rule 37, which in turn was derived from the New York Field Code of 1848. *Id.* p. 462.

2. *The Purpose of Civ.R. 17(A).*

This history is important because it demonstrates that the concept of real party in interest did not magically materialize with this Court's adoption of Civ.R.17 in 1970, or even the earlier adoption of the federal rules of procedure. It was never intended to supplant, or even supplement, the concept of standing. It is a purely procedural rule designed to protect the rights of defendants in litigation. The rule's purpose 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 such that he will be protected against another suit brought by the real party at interest on the same matter.'" *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24-25. The rule is designed to ensure that once a defendant deals with a claim, he can rest assured that no one else will seek recovery on the same claim.

And being derived from equity, the rule has a strong equitable component to it. Civ.R. 17(A)'s "cure" provision should apply only when determining the correct party is difficult or when a plaintiff makes an honest and understandable mistake. Fed.R.Civ.P.

Advisory Committee Notes, 1966 Amendment. "Modern decisions are inclined to be lenient when an honest mistake has been made in choosing a party in whose name the action is to be filed * * *. The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." *Id.; See Bank of New York v. Gindele*, 2010-Ohio-542, ¶4 (Hamilton Co. 2010).

3. Real party in interest defined.

"To determine whether the requirement that the action be brought by the real party in interest is sufficed, courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief." *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 25. The real party in interest is the one who is *directly* benefited or injured by the outcome of the case. Id. p.24. In other words, an inquiry into real party in interest status looks to see who owns the primary right at issue and can discharge the defendant of all liability for the wrongful conduct. *Cincinnati Ins. Co. v. Evans*, 2010-Ohio-2622, WD-09-012, ¶37 (Wood Co. 2010); see also *Discover Bank v. Brockmeier,* 12th Dist. No. CA2006-07-078, 2007-Ohio-1552, ¶7; *In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237, 240.

For instance, several people might claim injury as a result of damage to real property: lien holders, tenants, easement holders and licensees are examples. But all of their injuries are to rights acquired from the legal owner of the property. Thus, although they may benefit from a favorable ruling in the case, their benefit is not direct. Like their interests in the property, the benefit is indirect and is derived from the owner of the legal title. If they prosecute a claim in their own name, they would be unable to discharge the

defendant completely of liability for the injury to the property.

Whereas standing looks to ensure an injury to a legally protected right, a real party in interest inquiry presumes such injury. What it seeks to determine is whether the injured right is the one which will advance the purposes of the rule – access to discovery and defenses, and protection against multiple lawsuits over the same events.

B. Freddie Mac's Many Faces of Standing.

Freddie Mac's argument as to the nautre of standing is as puzzling as it is legally incorrect. It first alleges that the Schwartzwalds equate standing and Civ. R. 17(A) real party in interest. This assertion is made notwithstanding the caption of this section of the Reply Brief ("I. The Difference Between Standing And Real Party In Interest."), which was also included in the Schwartzwalds' initial brief. It then argues that there are three distinct forms of standing, and that real party in interest status is but one form of standing. .*Freddie Mac Brief*, pp. 27-29.

Freddie Mac drags the Court through a tortuous line of reasoning to establish a definition of "standing" which will meet its needs. One of those convenient definitions happens to coincide with "real party in interest" status found in Civil Rule 17. Of course, if Freddie Mac can persuade the Court that the relevant definition of standing is the same as Rule 17's "real party in interest" status, it can avail itself of the protection of that rule's "cure" provision. In fact, however, of Freddie Mac's three definitions of standing, only one comes close to the actual meaning of the term.

1. Standing requires injury.

Freddie Mac argues that under one meaning of the term "standing," Ohio courts actually mean that no one has standing. *Freddie Mac Brief*, p. 27. Apparently, under this

view of the term, it actually denotes the absence of something, as opposed to the presence of something. Surprisingly, this is as close as Freddie Mac gets to the true meaning of the term by identifying the linchpin of the concept: injury.

Standing requires injury in fact. *State ex rel. American Subcontractors Assn., Inc. v. Ohio State University*, 2011-Ohio-2881, 129 Ohio St.3d 111, 950 N.E.2d 535, ¶12; *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 1994-Ohio-183 (Ohio 1994). Without an injury, a plaintiff is not entitled to have an Ohio court determine the merits of his suit. *State ex rel. American Subcontractors Assn., Inc.,* at ¶1; *Bicking* at p. 320; *see also, Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 2007-Ohio-5024, 115 Ohio St.3d 375, ¶27. "Finally, plaintiff's injury cannot be merely speculative. A bare allegation that plaintiff fears that some injury will or may occur is insufficient to confer standing." *Tiemann v. University Of Cincinnati* 127 Ohio App.3d 312, 325 (Franklin Co. 1998) (quoting *Los Angeles v. Lyons (*1983), 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675).

"[T]he question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' [citation omitted] * * * 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.' [citation omitted]." *State ex rel. Dallman v. Court of Common Pleas, Franklin County,*(1973) 35 Ohio St.2d 176, 178-79 (*quoting Sierra Club v. Morton*(1972), 405 U.S. 727, 31 L.Ed.2d 636, 641). "Standing requires a demonstration of a concrete injury in fact, rather than an abstract or suspected injury." *Ohio Contractors Assn. v. Bicking*, 643 N.E.2d 1088, 71 Ohio St.3d 318, 1994-Ohio-183 (Ohio 1994); *see also, State ex rel. Consumers League of Ohio v. Ratchford*(1982), 8 Ohio App.3d 420, syll. ¶3. As this Court stated in *Ohio Hosp. Ass'n v.*

Community Mut. Ins. Co., 31 Ohio St.3d 215, 218 509 N.E.2d 1263 (1987), standing requires "concrete adverseness" of the parties. *See also, State ex rel. Carver v. Hull*, 1994-Ohio-449, 70 Ohio St.3d 570, 573, 639 N.E.2d 1175 (1994). It is injury to a legally protected interest that provides the "concrete adverseness" needed to make a case justiciable.

2. Standing can sometimes implicate the doctrine of ripeness.

Next, Freddie Mac finds another meaning of "standing" by distorting the holding in *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036 (2010). Freddie Mac insists that the plaintiff in *Kincaid* had standing, but had not fulfilled some procedural hurdle to filing suit. That is not, however, how this Court dealt with the issues presented in that case. In *Kincaid*, this Court ruled that the plaintiffs were not entitled to commence the lawsuit because they had not yet suffered an injury. Until Erie Insurance denied the Plaintiffs' claim for insurance benefits, there was beach of contract, no injury, and thus no justiciable controversy. *Id.* at ¶20. And while the Court based its decision on standing, the holding could also be read to implicate the ripeness doctrine. But such a distinction is irrelevant for two reasons. First, the lack of ripeness often goes to injury. The dispute in *Kincaid* had not yet progressed far enough for the plaintiffs to have suffered an injury. *See*, 13 Charles Alan Wright, Arthur R. Miller, Edward Cooper & Richard D. Freer, *Federal Practice and Procedure: Jurisdiction and Related Matters* §3529, at p.633 (3d. 2008). The lack of injury translates into a lack of standing. Second, both standing and ripeness go to justiciability. *Id.* pp. 634-35. And justiciability is the foundation for an Ohio common pleas court's constitutional grant of jurisdiction. Ohio Constitution, Article IV, Section 4(B).

3. The limits of Civ.R.17(A).

Freddie Mac refers to its final type of standing - "real party in interest standing" - as a mere "technicality" which courts should side-step to reach the merits of a case. *Freddie Mac Brief*, p. 29. It goes on to argue that Civ.R.17 speaks in terms of "prosecution" of a claim, not the "filing" of a claim. *Id.* at p. 33. To Freddie Mac, this indicates that Civ.R. 17(A) was not intended to dictate who may file a lawsuit. This observation provides dubious support for Freddie Mac assertion that Civ.R. 17(A) can be used to remedy a true standing deficiency.

As set forth above, Civ.R. 17(A) is procedural and cannot be interpreted to expand any substantive rights. *Havel v. Villa St. Joseph*, Slip Opinion No. 2012-Ohio-552, ¶12 (2012). The distinction between procedural and substantive law is critical. The word "substantive" relates to a common law principle, statutory law or constitutional provision which creates, defines and regulates the rights of parties. *Id.* ¶16. An example of a substantive law would be R.C. 1303.31, which states unequivocally who possesses the right to enforce a negotiable instrument. The right to enforce a negotiable instrument is limited to those persons described in the statute.

By contrast, a procedural rule, such as Civ.R.17(A) does not define who may enforce a right; it only outlines *how* the right may be enforced or how redress may be obtained through the courts. *Id.* Freddie Mac seems to argue that the silence of Civ.R. 17(A) as to who is entitled to file suit to enforce a substantive right somehow sanctions its conduct in this case. But the exact opposite is true. Because the Civ.R. 17(A) is purely procedural, it cannot be applied in a way that retroactively bestows a substantive right on Freddie Mac. Either a party possesses the substantive right when suit is filed ot it does not. If it does not, no rule of procedure can cure the deficiency. To hold otherwise would

vest the Civil Rules with the power to confer substantive rights.

4. *Freddie Mac's reliance on* Suster *is misplaced.*

Finally, Freddie Mac posits its last meaning of "standing" in terms of of Civ. R. 17(A)'s "real party in interest." *Freddie Mac Brief,* p. 28-29. It is true that many courts, including the Court of Appeals in this case, have used standing interchangeably with real party in interest. But their having done so is error, for the two concepts are distinct.

To bolster its argument, Freddie Mac cites to this Court's decision in *State ex rel. Tubbs-Jones v. Suster,* 84 Ohio St.3d 70 (1998) for the proposition that a lack of standing is not jurisdictional in nature and therefore is waived if not timely asserted. The problem with this reliance is that *Suster* did not have the support of a majority of the justices of this Court. And a plurality decision which did not receive the support of four justices of the Supreme Court is not controlling law. *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 633.

Suster was a four to three decision denying an application for writ of prohibition. The majority decision voted to deny the writ. But the main decision does, indeed, state that lack of standing challenges that capacity of the person to bring an action, not the subject matter jurisdiction of the court. *Suster*, at p. 77. Although there was a majority of justices which voted to deny the writ of prohibition, only three justices joined in that portion of the opinion which addressed whether standing was jurisdictional. Justice Cook, although voting with the majority on judgment and much of the opinion, expressly withheld support from that portion of the opinion relied upon by Freddie Mac. *Id.* at p. 79. Thus, that portion of the opinion was not a majority decision of the Court.

Indeed, three of the Court members joined in a dissent wherein they voted to grant the writ of prohibition. *Id.* p. 79-80. This is significant because the grant of a writ of

prohibition is a judgment that the common pleas court patently lacks subject matter jurisdiction to proceed in the case. This means that the dissenting justices found that standing is a prerequisite to a common pleas court's exercise of subject matter jurisdiction. Those three votes, together with Justice Cook's refusal to join with the majority opinion on the standing issue, means that a majority of the Court actually voted standing does involve the court's subject matter jurisdiction.[2]

In *Suster*, the plurality did cite to two cases in support of its proposition - *State ex rel. Smith v. Smith*, 1996-Ohio-215, 75 Ohio St.3d 418, 662 N.E.2d 366 (Ohio 1996) and *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 594 N.E.2d 616 (Ohio 1992). In reality, however, *Smith* relied on *LTV Steel*. *Smith*, supra, 75 Ohio St.3d at p. 420.[3] *LTV Steel*, on the other hand, involved a writ of prohibition barring an appellate court from considering an appeal. LTV Steel argued that the appellate court lacked jurisdiction to consider an appeal of a trial court order because the trial court lacked jurisdiction due to a lack of standing by the intervening plaintiff in that court. *LTV Steel*, supra, at p. 251. This Court merely held that an attack on a trial court's jurisdiction cannot divest an appellate court of jurisdiction to hear an appeal from the trial court. Id. If the position advanced by LTV Steel were the law, no appeal could be had from a decision in which jurisdiction was contested. *LTV Steel* does not stand for the proposition that standing is never jurisdictional. Moreover, the Ohio Supreme Court's recent ruling in *Kincaid v. Erie Ins. Co.*, supra, removes the ambiguity caused by this line of cases.

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[2] Because she did not explain her vote, we are left to speculate as to why Justice Cook did not support this portion of the decision, and still voted with the majority on judgment. It could be because she felt that the petitioner had failed to meet the other requirements for a writ of prohibition, such as establishing a lack of remedy by way of direct appeal.

[3] The other case relied on in *Smith* was *State ex rel. Lipinski v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, 1995-Ohio-96, 74 Ohio St.3d 19, 21 (Ohio 1995). That case dealt with whether the defense of *res judicata* could divest a trail court of jurisdiction to hear a case.

II. Standing Is A Necessary Component Of The Jurisdiction Of Ohio's Common Pleas Courts.

Freddie Mac prefers to ignore the Schwartzwalds' argument about the limiting nature of the phrase "justiciable matters" contained in Article IV, Section 4(B) of the Ohio Constituion . It does not acknowledge that a plaintiff's standing is required to render a dispute justiciable. Instead, it of addressing the Schwartwalds' argument directly, it obfuscates. It argues that matters may be justiciable without regard to the parties asserting the claim. *Freddie Mac Brief*, p. 39. But the justiciability of disputes has never been viewed in such a vaccum. It must be considered in light of the standing of the party seeking to invoke the jurisdiction of the court. In this respect, standing has always been an integral part of the jurisdiction of Ohio courts. *Kincaid*, supra, at ¶17; see also, *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio.St.3d 216, 218.

A. The General Jurisdiction Of The Common Pleas Court Is Restricted By Article Iv, Section 4(B) Of The Ohio Constitution.

Freddie Mac insists that the jurisdiction of Ohio's common pleas courts is limitless. But as this Court has often stated, that jurisdiction is in fact limited. "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*." *Dumas v. Estate of Dumas*, 1994-Ohio-312, 68 Ohio St.3d 405, 408, 627 N.E.2d 978 (1994) (quoting *Saxton v. Seiberling*, 48 Ohio St. 554, 558-59, 29 N.E. 179 (1891) (emphasis added). The last words of the quoted passage are key, and delineate the limits of a common pleas court's jurisdiction. And the language of Article IV, Section 4(B) denies a common pleas court jurisdiction over matters that are not justiciable. *See, BCL Enterprises, Inc. v. Ohio Dept. of Liquor Control*, 1997-Ohio-254, 77 Ohio St.3d 467, 469, 675 N.E.2d 1 (1997).

Freddie Mac argues, however, that a plaintiff may, through the action of filing a complaint, vest a common pleas court with jurisdiction even in the absence of a justiciable matter. *Freddie Mac Brief*, p. 39-40. This argument fails in light of recent decisions of this Court, for no act of the General Assembly or rule implemented by this Court can expand the jurisdiction of Ohio courts. *ProgressOhio.org v. Kasich*, 129 Ohio St.3d at ¶4. Surely, then, the simple act of filing a lawsuit cannot do what State's legislature and highest Court cannot accomplish under the express authority of the Constitution..

B. A Patently False Allegation In A Complaint Is Not Sufficient To Confer Standing On A Party So That a Court May Enter Judgment.

Freddie Mac also contends that the mere allegation of injury in a complaint is sufficient to establish standing for purposes of the entire case. It goes on to argue that it established its standing because it "allege[d] it was a party entitled to enforce the Note and that the terms of the Note had been breached." *Freddie Mac Brief*, p. 45. The first of these assertions is legally incorrect; the second is factually false.

An allegation of injury is a necessary requirement of any well-pled complaint. See generally, Civ. R. 8. Without such an allegation, the complaint, on its face, must be dismissed for lack of a justiciable matter. It does not follow, however, that the bare allegation of injury is sufficient to vest a trial court with jurisdiction beyond that necessary to determine whether a justiciable matter exists. The courts of Ohio have the power to determine their own jurisdiction. *State ex rel. Plant v. Cosgrove*, 2008-Ohio-3838, 119 Ohio St.3d 264, 893 N.E.2d 485, ¶5 (2008). Once the jurisdiction of a trial

court is challenged, however, the court should determine whether it does, in fact, have the authority to hear the case on its merits.

Moreover, Freddie Mac's assertion that it alleged injury as a "person entitled to enforce the Note" is simply false. In its complaint, Freddie Mac made two factual allegations which were proven to be material misrepresentations. First, it alleged that it was the "holder" of the Note. COMPLAINT (filed April 15, 2009), ¶1. But the Court of Appeals determined that Freddie Mac never acquired the status of a "holder' of the note. OPINION, ¶¶ 41, 52. Further, Freddie Mac never made the argument to the trial court that it was "a person entitled to enforce the note" under R.C. 1303.31. It first made that argument on appeal. And the Court of Appeals concluded that Freddie Mac was not a "person entitled to enforce the note" when suit was filed. It did not obtain that status until it received the rights of a holder through the May 15, 2009 Assignment of Mortgage.

Freddie Mac also alleged in the Complaint that the mortgage "was assigned to the plaintiff herein." *Id.* ¶ 3. That allegation, too, proved false because the Assignment of the Mortgage from Wells Fargo Bank to Freddie Mac was not executed until a month after the Complaint was filed. Thus, Freddie Mac's protestations that it properly alleged its standing are contrary to fact.

Freddie Mac's claims in this case were for breach of contract. And under Ohio law, only a party to a contract, or a third-party beneficiary, may sue to enforce the contract. *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161, 566 N.E.2d 1220. Moreover, the primary contract claim, for default of a promissory note, is strictly governed by R.C. 1303.31. Without qualifying as a person entitled to enforce the

note when the case was filed, Freddie Mac could not have possessed standing to invoke the jurisdiction of the trial court.

C. The Applicability of Federal Case Law to this Case.

Freddie Mac goes to great lengths to persuade the Court that it is not bound by federal cases discussing Article III "case or controversy" standards. Of course, Freddie Mac is correct. Article III standing does not govern the role of standing in Ohio's courts. The Schwartzwalds did not cite the Court to those cases to suggest that this Court was bound to follow federal law on the issue. It cited the federal cases because so much of this Court's standing jurisprudence is based directly on U.S. Supreme Court decisions.

By way of example, the following are a few of the decisions of this Court with address standing and that cite to U.S. Supreme Court precedent:

State ex rel. Dallman v. Court of Common Pleas, Franklin County, 35 Ohio St.2d 176, 178-79, 298 N.E.2d 515 (Ohio 1973) (citing to *Sierra Club v. Morton (*1972), 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636; *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663; and *Flast v. Cohen,* 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947).

State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St.2d 457, 490-91, 351 N.E.2d 127 (Ohio 1976) (citing to *United States v. Richardson (*1974), 418 U.S. 166, 178, 94 S.Ct. 2940, 41 L.Ed.2d 678; *Schlesinger v. Reservists Comm. to Stop the War (*1974), 418 U.S. 208, 220, 94 S.Ct. 2925, 41 L.Ed.2d ; *Sierra Club v. Morton (*1972), 405 U.S. 727, 731, 92 S.Ct. 1361, 31 L.Ed.2d 636; *Data Processing Service v. Camp (*1970), 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184; and *Baker v. Carr (*1962), 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663; *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947; *Abington School Dist. v. Schempp (*1963), 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844).

City of Middletown v. Ferguson, 25 Ohio St.3d 71, 495 N.E.2d 380 (Ohio 1986) (citing to *Sierra Club v. Morton (*1972), 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636).

City of Cleveland v. City of Shaker Heights, 30 Ohio St.3d 49, 51, 507 N.E.2d 323 (Ohio 1987) (relying on *Sierra Club v. Morton (*1972), 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636)

Ohio Pyro, Inc. v. Ohio Dept. of Commerce, 2007-Ohio-5024, 115 Ohio St.3d 375, 875 N.E.2d 550, ¶27 (Ohio 2007) (citing *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, 88 S.Ct. 1942, 20 L.Ed.2d

947)

DeRolph v. State, 1997-Ohio-84, 78 Ohio St.3d 193, 677 N.E.2d 733 (Ohio 1997) (citing *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 *and Nixon v. United States (*1993), 506 U.S. 224, 228, 113 S.Ct. 732, 735, 122 L.Ed.2d 1)

The Schwartzwalds do not argue that plaintiffs in Ohio's courts must establish Article III standing. They do, however, argue that standing, as defined by this Court, is a necessary component of a justiciable matter. And because this Court has historically relied on U.S. Supreme Court case law in considering both standing and justiciability, the Schwartzwalds thought it prudent to do so as well.

D. Decisions From Other States.

This Court is not the first state supreme court in the nation to wrestle with these issues. Several other courts have had to do so as well. The Supreme Court of Oklahoma recently handed down two decisions in cases nearly identical to this one. *Deutsche Bank National Trust v. Brumbaugh*, 2012 OK 3, 109223 (OKSC) and *Deutsche Bank National Trust Co. v. Byrams*, 2012 OK 4, 108545 (OKSC). In these cases, the Court dismissed the foreclosure complaints because the plaintiff was not a "person entitled to enforce the instrument" when it filed the lawsuits. The Court found this lack of standing was a fatal defect, and, as a result, the trial court never acquired subject matter jurisdiction over the cases. See also, *U.S. Bank N.A. v. Kimball*, 27 A.3d 1087 (Vt. S.C. 2011); *U.S. Bank Nat. Ass'n v. Ibanez*, 941 N.E.2d 40, 458 Mass. 637 (Mass. S.C. 2011); *Patterson v. GMAC Mortgage, LLC*, 2100490 (Jan. 20, 2012) (Al. Civ. Appeals).

III. Assignment Of The Mortgage After Suit Is Filed Is Not A "Cure" Recognized Under Civil Rule 17(A).

Freddie Mac dismisses out of hand the Schwartzwalds' argument that even if

standing were really "real party in interest" status, Civ. R. 17(A) does not permit curing the deficiency by assignment of an interest in the subject of the lawsuit prior to judgment. Instead, it states merely that the Assignment of Mortgage acts as ratification by Wells Fargo Bank of the filing of the foreclosure action by Freddie Mac. But ratification under Civ.R. 17(A) requires more than the ambiguous act as dashing off an assignment.[4] Ratification requires an affirmative authorization for the continuation of the action, as well as an agreement to be bound by the outcome of the case. *Icon Group v. Mahogany Run Dev. Corp.*, 829 F. 2d 473, 478 (3d. Cir. 1987).

Moreover, the cure provisions of Civ. R. 17(A) are not unbridled. The "cures" are to be used only when the plaintiff made an "honest or understandable mistake" in bringing the suit in his own name. *Ohio Cent. RR. Sys. v. Mason Law Firm Co., L.P.A.*, 2009-Ohio-3238, 182 Ohio App.3d 814, 915 N.E.2d 397, ¶41 (Franklin Co. 2009); see also, *Wieburg v. GTE Southwest, Inc.*, 272 F.3d 302,308-09 (5th Cir. 2001).

CONCLUSION

Standing is a substantive, jurisdictional requirement which is distinct from Civ.R. 17(A)'s real party in interest status. Real party in interest, on the other hand, is a procedural concept designed to afford the defendant some protection from multiple suits over the same alleged wrongdoing. And its "cure" provisions are narrow written and should be narrowly construed only so as to avoid injustice.

For the foregoing reasons, Appellants Duane and Julie Schwartzwald request that the Court reverse the decision of the Greene County Court of Appeals, and remand the case with instructions to dismiss the action.

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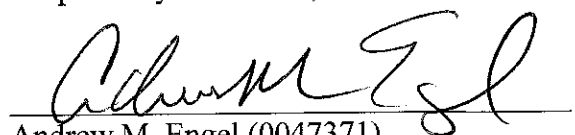
[4] Freddie Mac's reliance on the Assignment of Mortgage as ratification of its actions is even more dubious in light of the robo-signing scandal which has permeated the nation's foreclosure proceedings.

Respectfully Submitted,



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