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I. **EXPLANATION OF WHY THIS COURT LACKS JURISDICTION TO HEAR THIS APPEAL AND WHY THIS MATTER DOES NOT CONCERN ONE OF GREAT PUBLIC AND GENERAL INTEREST**

Since the order that Defendants Sterling Telecom Office Building, LLC and Mark Munsell (collectively, Defendants”) seek to appeal from is not a final, appealable order pursuant to R.C. 2505.02, the Ohio Court of Appeals for the Eighth Appellate District (“Eighth District”) properly dismissed the appeal due to a lack of jurisdiction. Consequently, this Court also lacks jurisdiction to consider this premature appeal. In particular, Defendants seek to appeal the Eighth District’s decision *sua sponte* (the “Decision”) dismissing Defendants’ appeal because the decision from the Cuyahoga County, Ohio Court of Common Pleas (the “Trial Court”) denying Defendants’ motion to dismiss this action (the “Dismissal Decision”) was not a final, appealable order under Ohio law.

Despite longstanding Ohio precedent providing that such preliminary decisions are not afforded appellate review, Defendants seek to have this Court take jurisdiction of this case to consider this appeal. However, the Dismissal Decision is not appealable under Ohio law. In this matter, the Trial Court considered standing under a motion to dismiss procedural test. The Trial Court will subsequently have to analyze the standing of Plaintiff when considering whether to render judgment in favor of Plaintiff. Therefore, as the Eighth District determined, it is premature to afford the Dismissal Decision appellate review since such decision does not meet the requirements of R.C. 2505.02.

Additionally, in support of jurisdiction, Defendants have argued that the Dismissal Decision constitutes a final, appealable order because it concerns a matter of great public and general interest because of this Court’s recent decision in *Federal Home Mortgage Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017. Even assuming that the Dismissal Decision met the requirements of R.C. 2505.02, which it does not, the appeal in *Schwartzwald* concerned

the appeal of a judgment entry and decree of foreclosure, not a preliminary decision concerning a motion to dismiss. Here, the Trial Court has not yet determined whether Plaintiff is entitled to obtain judgment and a decree of foreclosure against Defendants. Rather, the Trial Court only held that, for standing purposes, Noteholder met the standard set forth in Civ. R. 12(B)(6) to prevail on a motion to dismiss.

Defendants maintain that *Schwartzwald* is illustrative of the argument that this Court should exercise its discretionary review of the Dismissal Decision because the Schwartzwalds lost their personal residence while pursuing their appeal. However, Defendants are already afforded procedural protections that address these concerns. First, the Trial Court has not yet rendered judgment and a decree of foreclosure against Defendants. As such, there is no imminent sheriff's sale since judgment has not been rendered in this case against Defendants. Second, prior to rendering judgment, the Trial Court will nonetheless have to further address Defendants' arguments regarding standing. Third, assuming that Noteholder successfully obtains a judgment entry and decree of foreclosure in its favor, Defendants can always seek a stay of execution at any time before the scheduled sheriff's sale. Thus, the concerns raised by Defendants are abrogated by the procedural rules and statutory law already in place to protect a party pending the outcome of an appeal. Rather than utilizing existing mechanisms under Ohio law, Defendants want to bypass the process employed by our courts and have an immediate appeal of a preliminary decision concerning standing in derogation of Ohio law.

II. STATEMENT OF THE CASE

A. Procedural Background

Defendants have filed three motions to obtain the dismissal of this case based upon procedural issues pertaining to Noteholder's standing. Noteholder commenced this case on

December 14, 2011 seeking foreclosure of the property commonly known as the Sterling Building and located at 1255 Euclid Avenue in Cleveland, Ohio, securing over \$8,000,000.00 in indebtedness owed by Defendant Sterling Telecom Office Building, LLC, and also seeking personal liability against Defendants (the “Original Complaint”). *Pl. ’s Complaint for Damages, Foreclosure and Other Relief* (Dec. 14, 2011). A mere two days after Plaintiff commenced this action, Defendants filed their first Motion to Dismiss (the “First Motion”) with the Trial Court asserting that Noteholder lacked standing, and argued, despite the very terms of the Original Complaint, that the action had been commenced in the name of ORIX Capital Markets, LLC. *Defendants’ Motion to Dismiss* (Dec. 16, 2011). After extensive briefing by the parties on the First Motion, the trial court issued its *Journal Entry* (“Entry”) denying Defendants’ First Motion. *Entry* (July 26, 2012). In its Entry, the Trial Court held that, “[t]he allegations of the complaint (and the amended complaint) indicate that plaintiff has standing to bring this case.” *Id.* at p. 3. Furthermore, the Trial Court found, in pertinent part, as follows:

Defendant asserts that the complaint contains inconsistent allegations in that the plaintiff alleges it is the “[N]oteholder,” yet an affidavit attached to the complaint refers to the beneficial owners as the “owners” of the subject loan. However, the complaint’s use of the term “[N]oteholder” is merely a shorthand term of convenience that refers to the entire named plaintiff. The introductory paragraph of the complaint makes it clear that “[N]oteholder” is meant as a short reference to the named [P]laintiff, and not as a substantive allegation that describes the legal relationship of the [P]laintiff to the promissory note.

* * *

While it may be true that Orix Capital Markets, LLC does not have standing to bring this case for itself, the lengthy descriptive name of the [P]laintiff set forth on the complaint *makes clear that Orix Capital Markets, LLC is acting in a representative capacity on behalf of the alleged real party in interest, i.e. the certificate holders.* There is no question that a [P]laintiff may sue in a representative capacity, as Civ.R. 9(A) specifically contemplates the filing of an action in a representative capacity.

The complaint therefore contains allegations that describe the relationship of the loan servicer to the Trustee, and to the former Trustee, of the trust in which the subject loan is held. These allegations are sufficient to satisfy the purpose of the complaint, which is to “give the defendant fair notice of the claim and an opportunity to respond.” *EverStaff, LLC v. Sansai Environmental Technologies, LLC*, 2011-Ohio-4824 (8th Dist.)

Id. at pp. 2-3 (emphasis added).

Contemporaneously with the filing of the Entry, the Trial Court granted *Plaintiff's Motion for Leave to File an Amended Complaint*, which was filed of record on August 13, 2012 (the “Amended Complaint”) and replaced the Original Complaint. *Amended Complaint for Damages, Foreclosure and Other Relief* (Aug. 13, 2012). On the day after the Entry was rendered by the Trial Court, Defendants filed their *Motion for Reconsideration Based upon Plaintiff's Failure to Register with the Ohio Secretary of State* (the “Second Motion”). *Second Motion* (July 27, 2012). After further extensive briefing on the Second Motion, on October 26, 2012 Magistrate Thomas Vozar of the Trial Court denied Defendants’ Second Motion. *Magistrate's Order* (Oct. 25, 2012).

On January 3, 2013, Defendants filed their *Motion to Dismiss Based on the Recent Decision of the Ohio Supreme Court* (the “Third Motion”). *Third Motion* (Jan. 13, 2013). On February 21, 2012, Magistrate Vozar of the Trial Court issued his decision denying the Third Motion. *Magistrate's Decision* (Feb. 21, 2013). In his decision, Magistrate Vozar stated as follows:

Defendant appears to argue for an extension of this holding to mean that a foreclosure plaintiff must submit proof of standing with the filing of the complaint. However, there is nothing in the *Schwartzwald* decision that supports such an extension. To the contrary, in a recent case from the Eighth District Court of Appeals following *Schwartzwald, U.S. Bank v. Downey*, 2013-Ohio-494 (8th Dist.) ¶ 24, the foreclosure plaintiff “filed valid affidavits with its summary judgment motion to prove that it was the holder of the note.”

Id. at pp. 1-2.

Thereafter, Defendants objected to the Magistrate's decision. On July 26, 2013, the Trial Court issued its Dismissal Decision overruling Defendants' objections to the Magistrate's decision. In its Dismissal Decision, the Trial Court noted that the Magistrate properly utilized the Civ. R. 12(B)(6) standard since the issue was whether Noteholder had standing to pursue the matter. *Dismissal Decision* at p. 2. The Trial Court further found as follows:

Plaintiff has alleged in both its complaint and amended complaint that, "[p]laintiff holds the Note, Mortgage, Guaranty, and related loan documents. ... ORIX Capital Markets, LLC ("ORIX") has been appointed Special Servicer by the controlling class certificate holder of the Noteholder." The complaint therefore contains allegations that describe the relationship of the loan servicer [to] that of the Noteholder. These allegations, construed in a light most favorable to the plaintiff, and taken as admitted, are sufficient to satisfy the purpose of the complaint, which is to "give the defendant fair notice of the claim and an opportunity to be heard." *EverStaff, LLC v. Sansai Environmental Technologies, LLC*, 2011-Ohio-4824 (8th Dist.).

Id. at p. 3.

Thereafter, the Eighth District, *sua sponte*, issued its Decision dismissing Defendants' appeal of the Dismissal Decision pursuant to R.C. 2505.02 and *Matteo v. Principe*, 8th Dist. No. 92894, 2010-Ohio-1204.

B. The Applicable Loan Documents

As more fully set forth in Noteholder's Original Complaint and Amended Complaint,² the original lender of the obligation at issue in this matter was Prudential Mortgage Capital Company, LLC (the "Original Lender"). *Original Complaint* at ¶ 1; *Amended Complaint* at ¶ 1. Thereafter, the Original Lender assigned all of its interests in the loan documents at issue in this

² As set forth herein, Noteholder filed its Amended Complaint with the Trial Court as a precautionary filing to include therein as an exhibit the subsequent filing of the assignment of the Mortgage to the successor trustee at the county level in order to address the allegations raised by Defendants in this matter.

matter to Prudential Mortgage Capital Funding, Inc. (the “Second Lender”). *Id.* The Second Lender thereafter assigned all of its interest in the loan documents to LaSalle National Association, as Trustee for the registered holders (collectively, the “Certificate Holders”) of Prudential Securities Secured Financing Corporation, Commercial Mortgage-Pass Through Certificates Series 2001-C1 (the “Trust”). *Id.* The Certificate Holders are the beneficial interest holders of the loan documents at issue in this matter. *Id.* This action was brought by the Certificate Holders through their special servicer ORIX Capital Markets, LLC (“ORIX”), as their representative. *Original Complaint* at Ex. 2; *Amended Complaint* at Ex. 2.

Although the trustee for the Certificate Holders has changed through the years, the named Certificate Holders with the beneficial interest in the loan documents have always remained the same. LaSalle Bank National Association, the original trustee, merged with Bank of America, National Association (“Bank of America”). When Noteholder filed its Original Complaint, it asserted that U.S. Bank National Association (“U.S. Bank”) was the successor trustee for the Certificate Holders. *Id.* In particular, in both the Original Complaint and Amended Complaint, Noteholder alleged as follows:

Plaintiff holds the Note, Mortgage, Guaranty, and related loan documents (as hereafter defined). The original lender was Prudential Mortgage Capital Company, LLC (the “Original Lender”). The Original Lender assigned all of its interests in the Note, Mortgage, Guaranty, and related loan documents to Prudential Mortgage Capital Funding, Inc. (the “Second Lender”). The Second Lender assigned all of its interests in the Note, Mortgage, Guaranty, and related loan documents to LaSalle Bank National Association, as Trustee for the registered holders of Prudential Securities Secured Financing Corporation, Commercial Mortgage-Pass Through Certificates, Series 2001-C1. The Trustee LaSalle Bank National Association has merged with Bank of America, National Association (“Bank of America;”), and *U.S. Bank is the successor trustee for the registered holders of Prudential Securities Financing Corporation, Commercial Mortgage-Pass Through Certificates, Series 2001-C1.* Copies of the applicable assignment documents are hereinafter further described and attached to this Complaint. ORIX Capital Markets,

LLC (“ORIX”) has been appointed Special Servicer by the controlling class certificate holder of the Noteholder. A true, correct, and complete copy of the Limited Power of Attorney appointing ORIX is attached hereto as Exhibit 1. A copy of an Affidavit of John Sanborn, Senior Asset Manager for ORIX, in support of this Complaint is attached hereto as Exhibit 2.

Original Complaint at ¶ 1; *Amended Complaint* at ¶ 1 (emphasis added).

The controlling class certificate holder of the loan documents appointed ORIX as special servicer for the loan at issue in this matter. *Id.* Therefore, this action was properly commenced in the Trial Court by ORIX, as a representative of the Certificate Holders, for the benefit of the Certificate Holders.

III. THIS COURT CANNOT EXERCISE JURISDICTION OVER THIS MATTER

The Eighth District properly entered its Decision dismissing the appeal since the Dismissal Decision is not a final, appealable order. Pursuant to Section 3(B)(2), Article IV, Ohio Constitution and R.C. 2505.03, appellate courts have jurisdiction to review only final orders, judgments or decrees. *Browder v. Shea*, 10th Dist. No. 04AP1217, 2005-Ohio-4782, ¶ 10. R.C. 2505.02(B) defines a final order, specifying those orders which may be reviewed, affirmed, modified or reversed on review in a court of appeals. A trial court’s order is final and appealable only if it meets the requirements of R.C. 2505.02(B) and, if applicable, Civ. R. 54(B). *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596, 716 N.E.2d 184 (1999).

This Court has established a two-step analysis for determining whether an order is final and appealable. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 21, 540 N.E.2d 266 (1989). First, the order must fit into at least one of the categories set forth in R.C. 2505.02(B). *Noble v. Colwell*, 44 Ohio St.3d 92, 96 (1989). R.C. 2505.02(B) defines a final order as, “(1) [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment; [or] (2) [a]n order that affects a substantial right made in a special

proceeding or upon a summary application in an action after judgment.” If an order satisfies R.C. 2505.02(B), the court must determine whether the Civ. R. 54(B) language is appropriate.

Under Ohio law, it is well settled that an order denying a motion to dismiss is not a final, appealable order under R.C. 2505.02(B)(1) because it does not determine the action and prevent a judgment. *State v. Eberhardt*, 56 Ohio App.2d 193, 197-98, 381 N.E.2d 1357 (1978); *In re Fennell*, 4th Dist. No. 02CA19, 2002-Ohio-5233, ¶ 11; *Lonigro v. Lonigro*, 2nd Dist. 11346, 55 Ohio App.3d, 561 N.E.2d 573 (1989) (holding that denial of a motion to dismiss based on a lack of jurisdiction is not a final appealable order); *Ferrell v. Standard Oil Company of Ohio*, 11 Ohio St. 3d 169, 464 N.E.2d 550 (1984).

Furthermore, a foreclosure is not a special proceeding pursuant to R.C. 2505.02(B)(2) since foreclosures were in existence prior to the year 1853. *Fifth Third Bank (Central Ohio) v. Banks*, 10th Dist. No. 04AP-860, 2005-Ohio-4972, 16; *Centex Home Equity Co., LLC v. Williams*, 3rd Dist. No. 6-06-07, 2008-Ohio-902; *Vinton Cty. Natl. Bank v. Hammond*, 4th Dist. No. 1337, 1987 Ohio App. LEXIS 8035; *Huntington Natl. Bank v. Prep Academies, Inc.*, 10th Dist. No. 10AP-655, 2011-Ohio-1194, 2011 Ohio App. LEXIS 1031.

In this case, the Dismissal Decision is not a final, appealable order pursuant to R.C. 2505.02(B), and therefore the Eighth District properly issued its Decision dismissing the appeal. In particular, R.C. 2505.02(B)(1) has no applicability because a denial of a motion to dismiss does not determine the action and prevent a judgment.³ Additionally, R.C. 2505.02(B)(2) has no applicability to this matter because a foreclosure is not a special proceeding. Consequently, the Dismissal Decision is not a final, appealable order, and the Eighth District properly entered the

³ “A motion to dismiss for lack of standing is treated as a motion to dismiss pursuant to Civ. R. 12. Specifically, a lack of standing may properly be raised in a motion to dismiss premised on Civ. R. 12(B)(6).” *Revocable Living Trust of Mandel v. Lake Erie Utils. Co.*, 8th Dist. No. 97859, 2012-Ohio-5718, 11; *PNC Bank, Natl. Assn. v. Botts*, 10th Dist. No. 12AP-256, 2012-Ohio-5383, ¶ 22.

Decision dismissing the appeal. As such, this Court should decline to exercise its discretionary jurisdiction over this matter.

IV. THIS CASE DOES NOT CONCERN AN INTEREST OF GREAT PUBLIC OR GENERAL CONCERN

The Dismissal Decision finding that Noteholder has standing pursuant to Civ. R. 12(B)(6) does not involve an interest of general public concern. Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim. *Ohio Pyro, Inc. v. Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27; *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 22. To have standing, a party must have a personal stake in the outcome of a legal controversy with an adversary. *Ohio Pyro, Inc.*, 2007-Ohio-5024 at ¶ 27. To have standing, a plaintiff must show that they suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief. *Moore v. Middletown, Ohio*, 133 Ohio St. 3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 20.

A. Plaintiff is the Holder of the Loan

In foreclosure cases, a plaintiff must establish that it has an interest in the note or mortgage at the time that the lawsuit is filed to demonstrate standing to invoke the jurisdiction of the common pleas court. *Fed. Home Loan Mortgage Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017. The Supreme Court of Ohio has stated that “[i]t is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, *in an individual or representative capacity, some real interest in the subject matter of the action.*” *Schwartzwald*, 2012-Ohio-5017 at ¶ 22 (emphasis added) (citing *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973)).

R.C. 1303.31 provides that a person entitled to enforce an instrument is defined to

include the following:

- (1) The 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 or division (D) of section 1303.58 of the Revised Code.
- (B) A person may be a “person entitled to enforce” the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

R.C. 1303.31.

R.C. 1301.21(B)(21) further states that a holder is a person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession. Furthermore, a nonholder in possession has the rights of a holder where the transferee delivered the instrument for the purpose of vesting the right to enforce it in the recipient. R.C. 1303.22(A) and 1303.31.

In this case, Plaintiff alleged in both its Complaint and Amended Complaint as follows:

Plaintiff holds the Note, Mortgage, Guaranty, and related loan documents (as hereafter defined). The original lender was Prudential Mortgage Capital Company, LLC (the “Original Lender”). The Original Lender assigned all of its interests in the Note, Mortgage, Guaranty, and related loan documents to Prudential Mortgage Capital Funding, Inc. (the “Second Lender”). The Second Lender assigned all of its interests in the Note, Mortgage, Guaranty, and related loan documents to LaSalle Bank National Association, as Trustee for the registered holders of Prudential Securities Secured Financing Corporation, Commercial Mortgage-Pass Through Certificates, Series 2001-C1. The Trustee LaSalle Bank National Association has merged with Bank of America, National Association (“Bank of America”), and U.S. Bank is the successor trustee for the registered holders of Prudential Securities Secured Financing Corporation, Commercial Mortgage-Pass Through Certificates, Series 2001-C1. Copies of the applicable assignment documents are hereinafter further described and attached to this Complaint. ORIX Capital Markets, LLC (“ORIX”) has been appointed Special Servicer by the controlling class certificate

holder of the Noteholder. A true, correct, and complete copy of the Limited Power of Attorney appointing ORIX is attached hereto as Exhibit 1. A copy of an Affidavit of John Sanborn, Senior Asset Manager for ORIX, in support of this Complaint is attached hereto as Exhibit 2.

Original Complaint at ¶ 1; Amended Complaint at ¶ 1 (emphasis added).

Further, Mr. Sanborn provided affidavits to both the Complaint and Amended Complaint attesting as follows:

The original lender was Prudential Mortgage Capital Company, LLC (the "Original Lender"). The Original Lender assigned all of its interests in the Note, Mortgage, Guaranty, and related loan documents to the Second Lender Prudential Mortgage Capital Funding, Inc. (the "Second Lender"). The Second Lender assigned all of its interests in the Note, Mortgage, Guaranty and related loan documents to Noteholder. While the Noteholder remains the same, the trustee has been redesignated from Bank of America, N.A. to U.S. Bank National Association. *ORIX Capital Markets, LLC ("ORIX") has been appointed Special Servicer by the controlling class certificate holder of the Noteholder.* True, correct, and complete copies of the allonges, assignments, and limited power of attorney are attached to Plaintiff's Complaint as Exhibits 1, 4, 7, and 10.

Original Complaint at Ex. 2, ¶ 2; Amended Complaint at Ex. 2, ¶ 2 (emphasis added).

Plaintiff has alleged that it *holds* the loan documents at issue in this matter. Hold is defined as, "to possess, to occupy, to be in possession and administration of." Black's Law Dictionary, 2nd. Plaintiff has alleged that it is in possession of the loan documents. Furthermore, Plaintiff has included with its Original Complaint and Amended Complaint copies of the assignments from the prior assignors to the Noteholder, and specifically attested to the change in the trustee from Bank of America to U.S. Bank. Noteholder has alleged in both its Original Complaint and Amended Complaint that ORIX was appointed as special servicer by the controlling class certificate holder of the Noteholder.⁴ Consequently, Plaintiff has set forth sufficient allegations in its Original Complaint and Amended Complaint clearly detailing

⁴ At the commencement of this action, ORIX was also the controlling class certificate holder, controlling class representative, and general special servicer over the Trust at issue in this matter.

Noteholder's standing to pursue this matter.

Furthermore, the Certificate Holders are the beneficial owners of the loan documents. At the time of filing and thereafter, the Certificate Holders held the beneficial ownership of the loan at issue in this matter, and clearly had and maintain an interest in the loan and applicable loan documents. While Defendants assert that based upon this Court's decision in *Schwartzwald* the Noteholder does not have standing to prosecute this matter, the issue in *Schwartzwald* is inapposite to the facts before this Court. In *Schwartzwald*, the Supreme Court of Ohio was faced with the issue as to whether a lack of standing at the commencement of a foreclosure action may be subsequently cured by obtaining an assignment of a note and mortgage sufficient to establish standing prior to the entry of judgment and substituting the real party in interest pursuant to Civ. R. 17. *Schwartzwald*, 2012-Ohio-5017 at ¶ 19. Unlike the Certificate Holders in this case, in *Schwartzwald* the plaintiff had no recognizable interest in the loan at the time that the complaint was filed.

Here, at the time of filing, the Certificate Holders were the beneficial owners of the loan documents, and consequently had a real interest in this matter. In its Original Complaint and Amended Complaint, Noteholder provided sufficient documentation evidencing that the Certificate Holders were the beneficial owners of the loan. As a trustee, U.S. Bank and its predecessor merely act for the benefit of the named Certificate Holders. The Certificate Holders have always remained the beneficial owners. Further, although Plaintiff does not believe it was necessary, Noteholder filed an Amended Complaint in accordance with Civ. R. 15 to recognize the recordation of the assignment with the Cuyahoga County, Ohio Recorder acknowledging at a local, county level the change in the trustee from Bank of America to U.S. Bank that occurred *prior* to the filing of this action, as alleged in the Original Complaint and applicable

documentation. *Original Complaint; Amended Complaint.*

B. Defendants Lack Standing to Challenge the Validity of the Assignments

Despite Defendants' numerous filings in this case to the contrary, Defendants lack standing to challenge the validity of the allonges and assignments of the loan documents, the applicable pooling and servicing agreement ("PSA"), or the Trust. Under Ohio law, a borrower lacks standing to contest the validity of these documents. *CitiMortgage, Inc. v. Patterson*, 8th Dist. No. 98360, 2012-Ohio-5894; *see also, Bank of New York Mellon Trust Co. v. Unger*, 8th Dist. No. 97315, 2012-Ohio-1950, ¶ 35; *Bridge v. Aames Capital Corp.*, Case No. 1:09 CV 2947, 2010 U.S. Dist. LEXIS 103154 (N.D. Ohio 2010). In this case, Defendants themselves lack standing to challenge the validity of the allonges and assignments of the loan documents, the PSA, and the Trust's ability to maintain this cause of action. *See e.g., Patterson*, 8th Dist. No. 98360, 2012-Ohio-5894; *Unger*, 8th Dist. No. 97315, 2012-Ohio-1950, ¶ 35; *Bridge*, Case No. 1:09 CV 2947, 2010 U.S. Dist. LEXIS 10315.

C. The Trust is a Common Law Trust and Not a Real Estate Investment Trust

The Trust is a common law trust and not a real estate investment trust. R.C. 1747.01(A) states in as follows:

"Real estate investment trust" means a trust created by an instrument, pursuant to common law or enabling legislation, under which any estate or interest in real property is held, managed, administered, controlled, invested, reinvested, or operated by a trustee or trustees for the benefit and profit of persons who are or may become the holders of transferable certificates of beneficial interest, issued pursuant to the provisions of the trust instrument, such transferability being either restricted or unrestricted, *which trust intends to comply or has at any time complied or intended to comply with sections 856, 857, and 858 of the "Internal Revenue Code of 1954," 68A Stat. 3, 26 U.S.C. 1, as now or hereafter amended.*

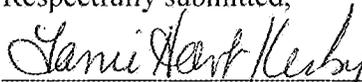
R.C. 1747.01(A) (emphasis added).

A review of the PSA confirms that the Trust was not formed to comply with the pertinent sections of the Internal Revenue Code as set forth in R.C. 1747.01(A). Rather, the Trust, by its very terms, is a common law trust. The Trust does not hold title to the real estate at issue in this matter, but rather is merely the holder of the loan documents. It is generally known in Ohio that various types of trusts can be mortgagees or hold title to real estate. Robert M. Curry and James Geoffrey Durham, *Ohio Real Property Law and Practice* § 6.15 (6th ed. 2011). These trusts include business trusts, undisclosed trusts, disclosed trusts (such as a common law trusts), and real estate investment trusts. R.C. 5301.03; R.C. 1746.01; R.C. 1747.01; Ohio State Bar Association, Ohio Standards of Title Examination sec. 3.18, Standard A (1999-2005). As a common law trust, the Trust was not formed to comply with the pertinent sections of the Internal Revenue Code as set forth in R.C. 1747.01(A) or to otherwise conduct operations within the forum state. Consequently, there is no requirement that the Trust register with the Ohio Secretary of State.

V. CONCLUSION

Based upon the foregoing, Noteholder respectfully requests that this Court deny jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

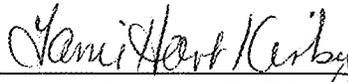
I hereby certify that a copy of the foregoing was served upon the following by ordinary

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