

ORIGINAL

IN THE SUPREME COURT OF OHIO

<b>WELLS FARGO BANK, N.A.</b>	*	<b>CASE NO. 2013-1534</b>
<b>Appellant</b>	*	<b>On Appeal from the Lorain County</b>
<b>-vs-</b>	*	<b>Court of Appeals, 9<sup>th</sup> District Case</b>
	*	<b>Nos. 12CA010230</b>
<b>BRIAN HORN, et al.</b>	*	
<b>Appellee.</b>	*	

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**MOTION OF APPELLEE BRIAN HORN TO SUPPLEMENT THE RECORD AND DISMISS APPEAL**

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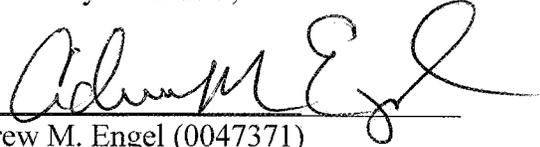
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Pursuant to S.Ct.Prac.R. 15.08, Appellee Brian Horn moves the Court to order supplementing the record and dismissing this appeal for the reasons set forth in the accompanying memorandum.

Respectfully submitted,



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#### **MEMORANDUM**

In this case, the Court of Appeals reversed the judgment of the trial court and remanded the case with instructions to the trial court to dismiss the case for lack of standing. Wells Fargo did not seek a stay of the Court of Appeals's decision. On February 10, 2014, the trial court followed the Court of Appeals's mandate and dismissed the case without prejudice. Appellee believes that these events affect this Court's jurisdiction over this case.

##### 1. The Court Should Supplement The Record.

S.Ct.Prac.R. Rule 15.08 provides for a supplemental record to be certified and transmitted

to the Clerk of this Court should it be needed to resolve the issues presented in the appeal. In this case, the record as presented to the Court of Appeals was transmitted to the Clerk of this Court in the usual manner. That means, however, that the Court does not have the record of the events in the trial court which transpired after the record was submitted to the Court of Appeals.

As is apparent from the record transmitted from the Court of Appeals, the trial court's judgment was reversed and the case remanded to the trial court with instructions to dismiss it for lack of standing. After this Court initially declined to accept jurisdiction over Appellant's discretionary appeal, the trial judge, pursuant to the Court of Appeals's mandate, did just that – he dismissed the case without prejudice on February 10, 2014. A copy of the trial court's Journal Entry is attached hereto.

Because the trial court's dismissal could impact this Court's jurisdiction over this case, the Court should have the entire record before it.

## 2. The Court Should Dismiss This Appeal As Moot.

This Court has long held that it will not issue advisory opinions. *State ex rel. Essig v. Blackwell*, 103 Ohio St.3d 481, 2004-Ohio-5586, 817 N.E.2d 5, ¶ 34. And if an appeal is moot any decision by the Court would be an advisory opinion. *State ex rel. Sawyer v. Cendroski*, 118 Ohio St.3d 50, 2008-Ohio-1771, ¶8. In this case, the trial court's dismissal moots this appeal.

“When a case has been appealed, the trial court retains all jurisdiction not inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment.” *Yee v. Erie County Sheriff's Dept.*, 51 Ohio St.3d 43, 44 (1990) (citing *In re Kurtzhalz* (1943), 141 Ohio St. 432, 25 O.O. 574, 48 N.E.2d 657, paragraph two of the syllabus). Following a decision by the Court of Appeals, however, “[j]urisdiction may be conferred on the trial court \* \* \* through an order by the reviewing court remanding the matter for consideration.” *Howard v. Catholic Social*

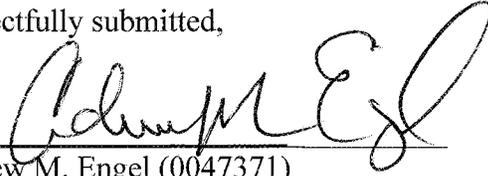
*Services of Cuyahoga County, Inc.*, 70 Ohio St.3d 141, 147 (1994); see also, *Estate of Beavers v. Knapp*, 10<sup>th</sup> Dist No. 07AP-612, 175 Ohio App.3d 758, 790 (citing *Bank of New York v. Bartmas*, 10<sup>th</sup> Dist. No. 04AP-1011, 2005-Ohio-6099, ¶ 14). In this case, the Court of Appeals remanded the case to the trial court with a direction to dismiss the case without prejudice. Thus, the trial court was revested with jurisdiction to carry out the Court of Appeals's mandate.

Should Wells Fargo have desired to avoid the trial court's exercise of jurisdiction to carry out the mandate, it should have filed a motion to stay pending appeal. Both App. R. 27 and S.Ct.Prac.R. 4.01(A)(2) provide a mechanism for an appellant to obtain a stay pending an appeal to this Court. Without such a stay in place, the trial court was free to exercise the limited jurisdiction conferred upon it by the Court of Appeals.

The trial court's dismissal of the case was without prejudice. And a dismissal without prejudice is not an adjudication of the merits, and therefore, not a final appealable order. *Thornton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124 24 (2009); *Hensley v. Henry*, 61 Ohio St.2d 277, 279 (1980) (holding that a voluntary dismissal without prejudice was not a final order from which a trial court could grant relief under Civ.R. 60(B)). Indeed, as this Court held in *Federal Home Loan Mtg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 979 N.E.2d 1214, 2012-Ohio-501, generally a dismissal for lack of standing is without prejudice "[b]ecause there has been no adjudication on the underlying indebtedness, our dismissal has no effect on the underlying duties, rights, or obligations of the parties. *Id.* ¶ 40. Because the trial court's dismissal was without prejudice, it did not determine the action. Wells Fargo is free to refile its case.

For these reasons, Appellee asks that the Court to order the record be supplemented and this appeal be dismissed as moot.

Respectfully submitted,



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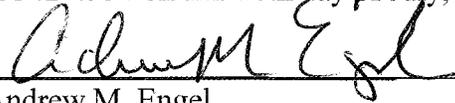
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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon Scott A. King, Esq. and Terry W. Posey, Esq., THOMPSON HINE LLP, **THOMPSON HINE LLP**, Austin Landing I, 10050 Innovation Drive, Suite 400, Dayton, Ohio 45342-4934 on this 16th day of July, 2014.



Andrew M. Engel



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LORAIN COUNTY, OHIO

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RON NABAKOWSKI, Clerk  
JOURNAL ENTRY  
Hon. Judge James L. Miraldi, Judge

Date 2/4/14

Case No. 10CV167220

WELLS FARGO BANK NA  
Plaintiff

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VS

BRIAN HORN, et al.  
Defendant

MARC DANN  
Defendant's Attorney (216) 373-0539

This Court is informed that the Ohio Supreme Court declined to accept jurisdiction of this case. Pursuant to the reversal and the remanding of this case in *Wells Fargo Bank NA v. Horn*, 9th Dist. Lorain No. 12CA010230, 2013-Ohio- 2374, this court hereby dismisses Plaintiff's complaint without prejudice due to lack of standing at the time Plaintiff filed its complaint. Costs to Plaintiff.

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James L. Miraldi  
JUDGE JAMES L. MIRALDI

cc: All parties

\*10CV167220\*