Supreme Court of Ohio Clerk of Court - Filed October 06, 2015 - Case No. 2014-0791

**IN THE SUPREME COURT OF OHIO**

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| **DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2005-4, ASSET-BACKED CERTIFICATES, SERIES 2005-4,** | * | **Case No. 2014-0791** |
| | * | |
| | * | **On Appeal from the Summit County Court of Appeals, Ninth Appellate District** |
| | * | |
| **Plaintiff-Appellant,** | * | **Court of Appeals Case No. CA-26970** |
| **v.** | * | |
| | * | |
| **GLENN E. HOLDEN, *et al*.,** | * | |
| | * | |
| **Defendants-Appellees.** | * | |

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# MERIT BRIEF OF PLAINTIFF-APPELLANT DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2005-4, ASSET-BACKED CERTIFICATES, SERIES 2005-4

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## I. Introduction

This case presents the Court with the opportunity to conclusively establish what is required to demonstrate standing in a foreclosure action. In *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, the foreclosing plaintiff conceded that it had neither an interest in the note nor the mortgage at the time of filing, but argued that any defect in standing could be cured by a post-filing assignment. 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 28. The Court held that a lack of standing could not be cured and that "because [the plaintiff] failed to establish an interest in the note ***or*** mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court." *Id*. (emphasis added).

In this case, Plaintiff-Appellant Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2005-4, Asset-Backed Certificates, Series 2005-4 ("DBNTC"), filed a complaint attaching a copy of the promissory note ("Note") in favor of the original lender, but also included the mortgage ("Mortgage") and the assignment of mortgage to DBNTC. As part of its summary judgment submission, DBNTC demonstrated that it was the assignee of the mortgage prior to filing the complaint and had possessed the promissory note, indorsed in blank, for years prior to filing the complaint. In addition, DBNTC presented evidence it owned the underlying debt since 2005. On this record, the trial court found that DBNTC possessed standing to file the Complaint, and proved it was the party presently entitled to a judgment on the Note and Mortgage.

The Ninth District reversed. *Deutsche Bank Natl. Trust Co. v. Holden*, 9th Dist. No. 26970, 2014-Ohio-1333 (the "Opinion"). In the Opinion, the Ninth District held that there was a genuine issue of material fact as to DBNTC's standing created by the differences between the promissory note attached to the complaint and the "wet ink" original promissory note submitted

as part of summary judgment. Opinion, ¶ 15. Relying on its own prior precedent, the Ninth District completely neglected to address DBNTC's standing as the recorded mortgagee.

Since *Schwartzwald*, eight Ohio District Courts of Appeal interpreted it to hold that a plaintiff possesses standing to commence a foreclosure action by having an interest in ***either*** the note ***or*** the mortgage at the time the complaint is filed. *HSBC Bank USA, N.A. v. Sherman*, 1st Dist. Hamilton No. C-120302, 2013-Ohio-4220, syllabus ¶ 3; *PHH Mtge. Corp. v. Unknown Heirs*, 2d Dist. Montgomery No. 25617, 2013-Ohio-4614 (jurisdiction declined in case number 2013-1890); *Bank of New York Mellon v. Herres*, 2d Dist. Montgomery No. 25890, 2014-Ohio-1539, ¶ 29; *Wells Fargo Bank, N.A. v. Dawson*, 5th Dist. Stark No. 2013CA00095, 2014-Ohio-269; *Bank of New York Mellon v. Matthews*, 6th Dist. Fulton No. F-12-008, 2013-Ohio-1707, ¶ 15; *CitiMortgage, Inc. v. Loncar*, 7th Dist. Mahoning No. 11-MA-174, 2013-Ohio-2959, ¶ 16; *CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶ 22; *U.S. Bank, N.A. v. Gray*, 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340, ¶¶ 27-35; *Fed. Home Loan Mtge. Corp. v. Koch*, 11th Dist. Geauga No. 2012-G-3084, 2013-Ohio-4423, ¶¶ 34-40; *Deutsche Bank Natl. Trust Co. v. Santisi*, 11th Dist. Trumbull No. 2013-T-0048, 2013-Ohio-5848; *Bank of New York Mellon v. Burke*, 12th Dist. Butler No. CA2012-12-245, 2013-Ohio-2860, ¶ 16; *SRMOF 2009-1 Trust v. Lewis*, 12th Butler Dist. Nos. CA2012-11-239, CA2013-05-068, 2014-Ohio-71. As noted above, the Ninth District Court of Appeals has required a foreclosing plaintiff to demonstrate standing at the commencement of the action by having an enforceable interest in ***both*** the note ***and*** the mortgage. *BAC Home Loans Servicing, LP v. McFerren*, 9th Dist. Summit No. 26384, 2013-Ohio-3228, ¶ 13.

The Opinion continues the Ninth District's misinterpretation of *Schwartzwald*. It is undisputed that DBNTC was the recorded mortgagee at the time of filing the Complaint. It was

also undisputed that at the time of judgment, it possessed the original promissory note, indorsed in blank. The original Note was produced in three depositions. Under *Schwartzwald,* that was a sufficient showing of standing to commence the action and ultimately enter judgment for DBNTC. This Court should reverse the Ninth District and reinstate the judgment.

## II. Facts

On September 1, 2005, Defendant Glenn Holden executed a Note in favor of Novastar Mortgage, Inc. ("Novastar"), in the amount of $69,300.00. Deposition of Ann Holden, Exhibit 6 ("Ann Depo.") and Deposition of Glenn Holden, Exhibit 6 ("Glenn Depo."); Affidavit of Megan L. Theodoro, Exhibit A-1 ("Affidavit"). The Holdens secured repayment of the Note through a mortgage against 1050 Shadybrook Drive, Akron, OH 44312 (the "Property"). Ann Depo. p. 24, Exhibit A-5; Glenn Depo., pp. 28, 63; Affidavit, A-2.

The Mortgage identified Mortgage Electronic Registration Systems, Inc. ("MERS") as the nominee for the lender (Novastar) and its successors and assigns. *Id.*, ¶ C. The Mortgage was recorded with the Summit County Recorder on September 15, 2005 as Instrument No. 55234144. Affidavit, ¶ 5, Exhibit A-2.

DBNTC presented evidence demonstrating that the original Note was indorsed in blank and delivered to JPMorgan Chase Bank, N.A. ("Chase"), in its capacity as the servicer for DBNTC in December 2005. Affidavit, ¶ 8. No contrary evidence was presented. Chase remained in possession of the original Note, which was presented for inspection during the depositions in this case. *Id.*; Deposition of Frank Dean, pp. 41-42 ("Dean Depo");[1] see also Ann Depo., pp. 25-26; Glenn Depo. pp. 26-27. As is customary, the indorsement on the Note was not dated.

[1] As part of the summary judgment proceedings, the Holdens deposed Frank Dean, an employee of Chase, as the servicer for DBNTC.

DBNTC purchased the Note on November 1, 2005. Affidavit, ¶ 7. After making the first payment on the Note to Novastar, the Holdens made their subsequent payments to Chase beginning in 2005, as servicer for DBNTC. Ann Depo. pp. 33-34.

In 2009, the Holdens stopped making payments on the Note. Ann Depo., pp. 47, 49, Exhibit 7; Affidavit, ¶ 10, Exhibit A-5.

On September 17, 2010, MERS executed an Assignment of Mortgage ("Assignment") to DBNTC. Affidavit, Exhibit A-3. The Assignment was recorded with the Summit County Recorder's office on September 28, 2010, as Instrument Number 55728242. *Id.* Chase, on behalf of DBNTC, has always possessed the original Mortgage and the original Assignment. Dean Depo., pp. 39-40; 42.

On July 16, 2011, Chase sent the Holdens a notice of default and warning of acceleration and foreclosure if the Note was not brought current. Affidavit, ¶ 9; Exhibit A-4. No payments were made after receiving this letter.

On August 12, 2011, DBNTC filed the Complaint in this case. Count One of the Complaint sought to establish the balance due on the Note, and Count Two sought to foreclose the Mortgage. The Complaint noted that Glenn Holden's personal liability on the Note had been discharged through a bankruptcy, and Ann Holden was not personally liable because she had not signed the Note. The Complaint sought additional advances made under the terms of the Mortgage. Complaint, ¶ 9.

The Complaint alleged at paragraph 4, that DBNTC "has the requisite standing to invoke the jurisdiction of this Court as evidenced by Exhibit A, Exhibit B, and Exhibit C." *Id.*

Exhibit A to the Complaint was a copy of the Note. The copy attached as Exhibit A contained a stamp on the first page that stated "I hereby certify that this is a true and accurate

copy of the original" with a signature. Complaint, Exhibit A. Neither the stamp nor signature indicate the date of execution. *Id.* The copy of the Note attached to the Complaint did not contain the indorsement by Novastar. *Id.*

A copy of the Mortgage was attached to the Complaint as Exhibit B. *Id.* The Assignment was attached to the Complaint as Exhibit C. *Id.*

On November 9, 2011, the Holdens filed a Motion to Dismiss, arguing that because the copy of the Note attached to the Complaint was payable to Novastar, not DBNTC, the trial court lacked subject matter jurisdiction. The Holdens also argued that the trust for which DBNTC served as trustee was supposed to have closed in 2005, and therefore the Assignment was invalid. On February 21, 2012, the Trial Court denied the Motion to Dismiss.

On March 7, 2012, the Holdens filed an Answer and Counterclaim. The Counterclaim asserted claims for breach of the Fair Debt Collections Practices Act ("FDCPA," 15 U.S.C. § 1692, et seq.), Invasion of Privacy by Intrusion upon Seclusion, violations of the Ohio Consumer Sales Practices Act, and common law fraud, all of which were premised on the allegation that DBNTC lacked the ability to enforce the Note and Mortgage. DBNTC filed a Motion to Dismiss the Counterclaims, which was denied on September 7, 2012.

On November 16, 2012, the Holdens filed a Motion for Summary Judgment ("Holdens' MSJ"). The Holdens argued that DBNTC "was not the holder of [the Note] and has never been the holder of the Note." Holdens' MSJ, 5. The only "evidence" put forth by the Holdens was that the copy of the Note attached to the Complaint was payable to Novastar and contained no indorsements. *Id.*, 6. They contended that the Assignment was invalid because it did not comport with the terms of a 2005 "pooling and servicing agreement" ("PSA") that required the "mortgage loan" to be transferred prior to June 30, 2006. *Id.*

On November 20, 2012, DBNTC filed a cross-motion for summary judgment ("DBNTC MSJ"). It pointed out the undisputed fact that DBNTC had been in possession of the original Note, indorsed in blank, since 2005. DBNTC MSJ, 9; Dean Depo., pp. 37, 45; Affidavit, ¶ 8, Exhibit A-1. It also pointed out that DBNTC was the recorded mortgagee since September 2010 – nearly a year before the filing of the Complaint. DBNTC MSJ, 10; Affidavit, ¶ 5, Exhibit A-3. The facts also established that DBNTC purchased the underlying debt in December 2005.

DBNTC addressed the individual elements of the Counterclaim, and pointing out that as to the PSA, the terms of the PSA required "mortgage loans" (referring to the Note) to be transferred, not the Mortgages themselves. DBNTC, MSJ, 14-15. The PSA did not require assignments of mortgages to be executed at the time of purchase, especially where "the Mortgage Loan is registered on the MERS system." *Id.*, 15.

On April 3, 2013, the Trial Court issued an Order Granting DBNTC's MSJ, and denying the Holdens' MSJ ("MSJ Order"). The Trial Court found that DBNTC "has established through Civ.R. 56 evidence that it has been the holder of the Note since 2005." MSJ Order, 3. The Court also found that any issue with the Assignment's validity in relation to the PSA was "without merit." *Id.* On April 30, 2013, the Trial Court issued a Decree in Foreclosure.

The Holdens appealed to the Ninth District, arguing that there was an issue of fact on standing because of the differences between the copy of the Note attached to the Complaint and the original introduced at the time of summary judgment. The Holdens asserted that they had introduced evidence to demonstrate that DBNTC was not the "holder" of the Note at the time the Complaint was filed and that evidence of the right to enforce the Note and the Mortgage was required to "invoke the jurisdiction" of the Court. Holden Brief, 5-13, 23. The Holdens did not raise any argument relating to the validity of the Assignment in their initial brief.

DBNTC responded by noting that to establish standing, a "plaintiff need only demonstrate through summary judgment evidence that it had the rights to enforce either the note or the mortgage at the time the suit was filed." DBNTC Brief, 5; citing *CitiMortgage v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶¶ 21-22. DBNTC recognized that the Ninth District had disagreed with *Patterson* and required evidence of a right to enforce both the Note and the Mortgage to satisfy *Schwartzwald*. DBNTC Brief, 6; citing *McFerren*, ¶¶ 9-10.

DBNTC pointed out that it was undisputed that DBNTC presently held the original Note, which was indorsed in blank, and that there was no evidence to contradict the testimony that DBNTC had possessed the Note since 2005. DBNTC Brief, 7, citing Affidavit, ¶ 8, Exhibit A-1 ("Chase came into possession of the original Note in December of 2005, where it was then stored in Chase's facility in Monroe, Louisiana until it was sent to [DBNTC's] counsel in connection with this litigation. At the time Chase came into possession of the Note on behalf of [DBNTC], it was indorsed in blank."). DBNTC also argued in the alternative that as the owner of the underlying debt since 2005, it was the party entitled to enforce the note pursuant to R.C. 1303.31 prior to the filing of the Complaint. DBNTC Brief, 10-12.

In the Opinion, the Ninth District acknowledged *Schwartzwald*, and noted under its own precedent "the real party in interest in a foreclosure action 'is the current holder of the note and mortgage.'" Opinion, ¶ 7, quoting *Quantum Servicing Corp. v. Haugabrook*, 9th Dist. Summit No. 26542, 2013-Ohio-3516, ¶ 8, quoting *Wells Fargo Bank N.A. v. Horn*, 9th Dist. Lorain No. 12CA010230, 2013-Ohio-2374, ¶ 10.[2]

The Ninth District concluded that DBNTC "failed to explain why Chase would have an unindorsed copy of the note in its possession since it was only the servicer for [DBNTC] and not

[2] *Horn* was reversed by this Court in April 2015. *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637

for MERS or Novastar. This creates a genuine issue of material fact since Ms. Theodoro averred that the note in Chase's possession had always contained a blank indorsement from Novastar to [DBNTC]." Opinion, ¶ 13. The Court concluded that based on this issue, "there is a genuine issue of material fact as to whether [DBNTC] was the holder of the note at the time the complaint was filed. Accordingly, the trial court erred in granting" DBNTC's summary judgment motion. Opinion, ¶ 15. The Ninth District did not address the assignment of the Mortgage, or the fact that DBNTC was the mortgagee of record at the time of the filing of the Complaint.

## III. Argument

**Proposition of Law No. 1:** If standing is challenged, a party seeking to foreclose a mortgage is only required to demonstrate an interest in either the note or mortgage.

This case presents the Court with the opportunity to clarify the application of *Schwartzwald*: whether to "invoke the jurisdiction" of the Court, a foreclosing plaintiff is required to demonstrate that it possesses an interest in the "note ***or*** mortgage" or the "note **and** mortgage." The record here is undisputed – through its servicer, Chase, DBNTC possessed the original Note, indorsed in blank and was the recorded mortgagee at the time of filing the Complaint. The Ninth District found that because there was a genuine issue of material fact as to DBNTC's standing to enforce the Note, that it did not possess standing to foreclose. That holding is not consistent with *Schwartzwald* and conflicts with the rationale of all of the other District Courts of Appeal that have addressed this issue.

### A. This Court's foreclosure standing cases.

#### 1. *Schwartzwald*.

In *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, Federal Home Loan Mortgage Corporation ("Freddie Mac") filed a foreclosure complaint and the defendants timely filed an answer, raising lack of standing as a defense.

*Schwartzwald*, 2012-Ohio-5017, at ¶¶ 11, 13. The defendants then moved for summary judgment on the grounds that Freddie Mac lacked standing. *Id*. The trial court denied the defendants' motion and instead entered summary judgment in favor of Freddie Mac. *Id*., ¶ 14. The defendants timely appealed. *Id.*, ¶ 15.

The Second District affirmed, holding that even though the evidence did not show that Freddie Mac had standing when it filed its complaint, the defect was cured "by the assignment of the mortgage and transfer of the note prior to entry of judgment." *Id*., ¶ 15. The defendants timely filed a direct appeal to this Court, and asked the Court to resolve a conflict on whether a defect in standing could be cured by a post-complaint assignment. *Id.*

This Court reversed, holding that to invoke the jurisdiction of a common pleas court, Freddie Mac had to show standing as of the filing of the complaint. *Id*., ¶ 24. The Court reasoned that "standing is to be determined as of the commencement of suit" (*Id.*, ¶ 24, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351, fn. 5 (1992)), and "invoking the jurisdiction of the court 'depends on the state of things at the time of the action brought.'" *Id.*, ¶ 25, quoting *Mollan v. Torrance*, 22 U.S. 537, 539, 6 L.Ed. 154 (1824). "[P]ost-filing events that supply standing that did not exist on filing'" must be disregarded. *Id.*, ¶ 26, citing 13A Wright, Miller & Cooper, Federal Practice and Procedure 9, Section 3531 (2008). The Court ultimately noted, because Freddie Mac "failed to establish an interest in the **note or mortgage** at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court." *Id.*, ¶ 28.

In *Schwartzwald*, not only did the exhibits to the complaint fail to show that Freddie Mac had standing to enforce either the note or mortgage, during the proceedings, Freddie Mac presented no evidence that it had standing as of the date of the filing of the complaint.

*Schwartzwald*, 2012-Ohio-5017, at ¶ 29. Freddie Mac failed to show it held an interest in either the note or mortgage at the time the suit was filed. As it held no interest at the commencement of the suit, the Court held the case should be dismissed for lack of standing. *Id.*

Because Freddie Mac conceded it had no evidence of the right to enforce either the note or mortgage prior to filing the complaint, *Schwartzwald* did not have to address whether a foreclosure plaintiff could demonstrate standing through a right to enforce the note *or* the mortgage, or was required to show both.

2. *Kuchta*

This is not the first (or second) time the Ninth District's interpretation of *Schwartzwald* has come before this Court. In *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶¶ 18-20, this Court acknowledged that *Schwartzwald* affected jurisdiction, but was not subject to collateral attack.

In *Kuchta*, the defendants participated in the action. They raised the issue of standing in their answer, but did not oppose summary judgment. 2014-Ohio-4275, ¶¶ 2-3. Judgment was entered in favor of Bank of America, and the Kuchtas did not appeal. *Id.*, ¶ 4.

Before the sheriff's sale was to occur, the Kuchtas moved to vacate the summary judgment and decree of foreclosure on the basis of standing, including arguing that Bank of America was not the party entitled to enforce the note and mortgage when the foreclosure action was filed. *Id.*, ¶ 5. The trial court denied the motion. *Id.*

The Ninth District reversed, holding that under *Schwartzwald*, all standing challenges were jurisdictional and affected subject-matter jurisdiction, and jurisdiction could be challenged at any time. This Court reversed the Ninth District, holding that the use of the term "jurisdiction" in *Schwartzwald* did not connote "subject-matter jurisdiction." *Id.*, ¶ 21. The Court clarified that

a "determination of standing necessarily looks to the rights of the individual parties to bring the action, as they must assert a *personal* stake in the outcome of the action in order to establish standing. *Id.*, ¶ 23; citing *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27. The Court held that "a particular party's standing, or lack thereof, does not affect the subject-matter jurisdiction of the court in which the party is attempting to obtain relief." *Id.* The Court reversed the Ninth District, and determined that standing issues could only be challenged on direct appeal. *Id.*, ¶ 24.

3. *Horn*

This Court next rejected the Ninth District's interpretation of *Schwartzwald* in *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637. In that case, the plaintiff alleged in the complaint that it was the successor by merger to a previous entity but did not attach that evidence of the merger to the complaint, and instead provided that proof as part of its summary judgment motion. *Id.*, ¶ 6. The Ninth District reversed the entry of summary judgment *sua sponte* on the basis of standing, holding that under *Schwartzwald* standing had to be shown as of the filing of the complaint, and that this meant that proof of standing had to be attached to the initial complaint.

The Court noted that the Ninth District had again imposed a requirement on *Schwartzwald* not justified in the text of the opinion: "the import of our holding in *Schwartzwald* is that the plaintiff in a foreclosure action must have standing at the time that it files its complaint. But nowhere in this opinion did the court indicate that the plaintiff must also submit proof of standing at that time…Proof of standing may be submitted *subsequent* to filing the complaint." *Id.*, ¶ 12.

B. The District Courts' application of "note or mortgage" versus "note and mortgage" under *Schwartzwald.*

Outside of the Ninth District, Ohio appellate courts have interpreted *Schwartzwald* to permit standing in a foreclosure action to be established by showing the right to enforce **either** the note **or** mortgage: *HSBC Bank USA, Natl. Assocs. v. Sherman*, 1st Dist. Hamilton No. C-120302, 2013-Ohio-4220 (appeal pending as case number 2013-2003); *PHH Mtge. Corp. v. Unknown Heirs*, 2d Dist. Montgomery No. 25617, 2013-Ohio-4614; *Wells Fargo Bank, N.A. v. Dawson*, 5th Dist. Stark No. 2013CA00095, 2014-Ohio-269; *Deutsche Bank Natl. Trust Co. v. Santisi*, 11th Dist. Trumbull No. 2013-T-0048, 2013-Ohio-5848; *SRMOF 2009-1 Trust v. Lewis*, 12th Butler Dist. Nos. CA2012-11-239, CA2013-05-068, 2014-Ohio-71.

In *Sherman*, the First District found that a party who attached to the complaint a recorded assignment of mortgage but a non-enforceable copy of the promissory note still had standing. *Sherman*, 2013-Ohio-4220, ¶ 15.

In *PHH Mtge.* and *Santisi*, the Second and Eleventh Districts held that a plaintiff who attached an enforceable promissory note to the complaint had standing to enforce the note and mortgage, regardless of any issues with the assignment of mortgage. *PHH Mtge.*, 2013-Ohio-4614, ¶ 7; *Santisi*, 2013-Ohio-5848, ¶¶ 24-26. In both cases, the courts found that the copy of the note attached to the complaint was either indorsed in blank, making it "bearer" paper, or had been specially indorsed to the plaintiff. *PHH Mtge.*, 2013-Ohio-4614, ¶ 7, fn. 1; *Santisi*, 2013-Ohio-5848 at ¶ 24, citing R.C. 1303.25. As a person entitled to enforce a note, the plaintiffs had standing. *Id.*

In *Dawson*, the Fifth District (like the First District) held that a party who had filed a complaint including an assignment of mortgage but an unindorsed copy of the promissory note still had standing. *Dawson*, 2014-Ohio-269, ¶ 23.

In *Lewis*, the Twelfth District found that the recorded assignment of mortgage attached to the complaint was sufficient to demonstrate standing to enforce the note and mortgage, even when the complaint referenced the note as being lost. 2014-Ohio-71, ¶¶ 15-17.

C. Standing in a foreclosure action can be established by showing a legally protected interest in either the note or the mortgage.

Establishing standing is not the same as establishing a right to judgment. "Standing does not depend on the merits of the plaintiff's claim." *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7. "Rather, standing depends on whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case." *Id. See also State ex rel. Cleveland Heights v. Cuyahoga Metro. Housing Authority*, 50 Ohio St.3d 47, 50, 553 N.E.2d 249 (1990). Standing requires the plaintiff to show a legal interest that the law may recognize, not that the plaintiff will prevail on that claim. Succinctly, standing requires the plaintiff to show a right sufficient to open the courthouse doors.

1. *The mortgagee or an assignee of a mortgage has standing to file a foreclosure action.*

In a foreclosure action, standing may be established by showing an interest in a mortgage alone. Notes and mortgages are separate contracts. *Cranberry Fin., LLC v. S&V Partnership*, 186 Ohio App.3d 275, 2010-Ohio-464, 927 N.E.2d 623, ¶ 29 (6th Dist.), citing *Hurd v. Robinson*, 11 Ohio St. 232, 234 (1860); *Fifth Third Bank v. Hopkins*, 177 Ohio App.3d 114, 2008-Ohio-2959, 894 N.E.2d 65, ¶ 16 (9th Dist.). They have different remedies: an action on a note is a proceeding against the maker personally for the balance due; an action on a mortgage seeks to terminate the owner's interest in property. *Spence v. Insurance Co.*, 40 Ohio St. 517, 520-21

(1884) ("separate actions may therefore be maintained, one to foreclose and the other for a personal judgment").

Note and mortgage interests may be enforced at the same time, or they can be enforced independently and separately in different, and even successive, actions. *Doyle v. West*, 60 Ohio St. 438, 444, 54 N.E. 469 (1899) (foreclosure of a mortgage may be had without pursing a claim on the note; determination in a foreclosure action of the question of fact about the amount outstanding under the note would be res judicata in a subsequent separate action brought on the note); *Bank of New York Mellon v. Frey*, 6th Dist. Sandusky No. S-12-044, 2013-Ohio-4083, ¶¶ 14-15 (mortgagee may seek to enforce the mortgage only); *Hopkins*, 2008-Ohio-2959, ¶ 18 (claims on mortgage and note may be brought independently); *The Broadview Savings & Loan Co. v. Crow*, 8th Dist. Cuyahoga Nos. 44690, 44691, 45002, 1982 Ohio App. LEXIS 12139, *7 (Dec. 30, 1982) (because they are distinct causes of action that may be pursued separately, a dismissal with prejudice of a prior foreclosure action did not bar a subsequent action filed to enforce the note).

A person with an interest in the mortgage may enforce it, even when the note is not enforceable. *Bradfield v. Hale*, 67 Ohio St. 316, 321-24, 65 N.E. 1008 (1902) (mortgagee can bring action to enforce the mortgage, even where the note is barred); *Fisher v. Mossman*, 11 Ohio St. 42, 45-46 (1860) (where an action can no longer be brought upon the note, the mortgage may be enforced if brought within the statute of limitations for enforcing mortgages); *Weaver v. Bank of New York Mellon*, 10th Dist. Franklin No. 11AP-1065, 2012-Ohio-4373, ¶¶ 9, 14 (*in rem* action to proceed on mortgage may proceed even if the *in personam* claim on the note is barred). For example, if a debtor's obligation on a note is discharged in bankruptcy (like Glenn Holden's

Note obligation), the mortgage survives and may be enforced. *First Place Bank v. Blythe*, 7th Dist. Columbiana No. 12-CO-27, 2013-Ohio-2550, ¶ 35.

As illustrated by the Mortgage in this case, mortgages may impose additional, independent contract obligations upon the mortgagor that are not imposed under the note or enforced by an action on the note. For example, mortgages may include a covenant of title from the mortgagor; relief for breach of that covenant may be had only in an action brought under the mortgage, not the note. Complaint, Exhibit B. Mortgages often include provisions addressing rights to insurance or eminent domain proceeds; the rights to those proceeds are independent of the note. *Id.* Mortgagors may promise not to cause or permit the presence, use, disposal, or storage of hazardous substances at the property; those obligations are not created by the note. *Id.* These contract rights, provided by and enforced under the mortgage, exist independent of the note.

Similarly, mortgages typically include promises that a mortgagor will maintain hazard insurance and state that the mortgagee may purchase such insurance if the mortgagor fails to maintain it and then charge the cost to the mortgagor. *Id.* They also typically provide that the mortgagee may pay taxes and assessments attributable to the property, and charge those to the mortgagor. *Id.* Those costs, and other similar advances under a mortgage, are separate contract obligations secured by the mortgage but are *not* obligations under the note.

An example will illustrate the differences. Assume "A" and "B" execute a note, while "A" and "C" execute a mortgage against Blackacre with the provisions that are the same as the Mortgage in this case. A and C have the obligation under the mortgage to keep Blackacre in good repair; B makes no such promise. B has promised to pay the Note and is personally liable

for not doing so; C had made no such promise. The contracts are related, but exist independently, imposing separate obligations.

Enforcement of the mortgage can occur independent of the note. Using the example above, assume that in breach of the mortgage, A and C fail to procure insurance, and the mortgagee incurs expenses to obtain that insurance. C is liable for those expenses, B is not. Assume B pays off the principal and interest under the note in full, so that the note has been fully satisfied and returned to A and B. The expenses incurred by the mortgagee to care for Blackacre are still recoverable under the mortgage, and the mortgagee may foreclose on the mortgage to recover them, even though the obligation under the note has been extinguished.

Mortgages may be assigned. The common law has long recognized that an interest in a mortgage can be assigned, giving the assignee standing. *Kernohan v. Manss*, 53 Ohio St. 118, 133-34, 41 N.E. 258 (1895) ("*Kernohan II*") (assignee of an interest in a mortgage receives legal title to the mortgage and an equitable interest and chose in action in the debt). Even when another party is the note holder, or where the note interest cannot be enforced at all, the assignee of the mortgage may enforce that interest. *Kernohan v. Durham*, 48 Ohio St. 1, 18, 26 N.E.2d 982 (1891) ("*Kernohan I*") (in some circumstances, the interest of the assignee of the mortgage is superior to the interest of the holder of the note); *Bradfield v. Hale*, 67 Ohio St. 316, 321-24, 65 N.E. 1008 (1902) (mortgagee can bring action to enforce the mortgage where the note cannot be enforced).

For over a century, Ohio law has held that an assignee of an interest in a mortgage has enforceable legal and equitable interests. *Kernohan II*, 53 Ohio St. at 133-34 (a mortgage assignee has legal title to the mortgage and an equitable interest and "chose in action" in the

debt);[3] *Kernohan I*, 48 Ohio St. at 18 (holding that a mortgage assignee had the right to enforce and obtain judgment when someone else possessed the note). R.C. 5301.32 now authorizes an assignment of an interest in a mortgage.

A person claiming to be the mortgagee has an interest which the law recognizes and will enforce. *Sherman*, 2013-Ohio-4220, ¶ 15; *Dawson*, 2014-Ohio-269, ¶ 23; *Lewis*, 2014-Ohio-71, ¶¶ 15-17. A person claiming to the assignee of a mortgage likewise has an interest that the law recognizes and will enforce. *Kernohan II*, 53 Ohio St. at 133-34; R.C. 5301.32. Accordingly, the mortgagee of record has "standing" to file a suit; the mortgagee has the legal right to open the court house doors to see if it is entitled to foreclose.

2. *A person with the right to enforce the note has standing to file a foreclosure action.*

Although not presented by the facts of this case, the "note or mortgage" analysis is also supported by Ohio case law and secondary sources if a party only demonstrates a right to enforce the promissory note at the time of filing. A mortgage can be considered as an 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. Mtge. 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).

[3] A "chose in action" is a "proprietary right in personam, such as a debt owed by another person" or "the right to bring an action to recover a debt, money, or thing." *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121, at ¶ 19.

This Court's decision in *Kernohan II*, is an excellent illustration of these principles. In *Kernohan II*, Martin executed notes and a mortgage in favor of McGill. McGill recorded the mortgage with the recorder. *Kernohan II* 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 II* 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.*

If a party has an enforceable note, but is not the mortgagee, the U.C.C. Permanent Editorial Board suggests that standing to enforce the note is separately present:

> 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 * * * .

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.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf ("PEB Report"). Because security follows the debt, a person entitled to enforce a note has standing to enforce the mortgage securing its payment. *PHH Mtge.*, 2013-Ohio-4614, ¶ 7; *Santisi*, 2013-Ohio-5848, ¶¶ 24-26.

3. *A party entitled to enforce a note or mortgage is presumed to be entitled to enforce the other instrument.*

As reflected in the previous section, the law imposes a rebuttable presumption that if the note or mortgage has been transferred, there was also a transfer of the other. *U.S. Bank, N.A. v. Rex Station, Ltd.*, 2d Dist. Montgomery No. 26019, 2014-Ohio-1857, ¶¶ 21-22, jurisdiction declined 2014-0947 (Sept. 3, 2014). That presumption may be overcome only if it is shown that the parties to the transfer specifically intended to sever the mortgage from the note. This is the

approach of the Restatement of the Law 3d, Property (Mortgages), Section 5.4 (1997) (the "Restatement").

When a note is transferred, assigned, or negotiated, the law presumes that the parties to that transaction also intended to transfer the mortgage with the note—the law presumes that the right to enforce the mortgage "follows" the right to enforce the note. *Rex Station Ltd.*, 2014-Ohio-1857, ¶ 21 ("Historically, Ohio courts have recognized that 'the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.'"), quoting *Koch*, 2013-Ohio-4423, ¶ 36.

The inverse is also true—the right to enforce the note presumptively follows the assignment of the right to enforce the mortgage. *Chase Home Fin., LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶¶ 13-20; *Rex Station, Ltd.*, 2014-Ohio-1857, ¶¶ 21-22; *Koch*, 2013-Ohio-4423, ¶ 36; *Bank of N.Y. v. Dobbs*, 5th Dist. Knox No. 2009-CA-000002, 2009-Ohio-4742, ¶¶ 27-36. *See also Fed. Home Loan Mtge. Corp. v. Trissell*, 2d Dist. Montgomery No. 25935, 2014-Ohio-1537, ¶¶ 14-15; *Dawson*, 2014-Ohio-269, ¶ 23; *Matthews*, 2013-Ohio-1707, ¶ 15; *Fed. Home Loan Mtge. Corp. v. Rufo*, 11th Dist. Ashtabula No. 2010 CV 795, 2012-Ohio-5930, ¶ 44.

These are also the rules advocated by the American Law Institute. "A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." Restatement § 5.4(a). This is the "mortgage follows note" rule. Similarly, "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." Restatement § 5.4(b). This is the "note follows mortgage" rule.

The reason for the presumption 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 person … because separating the obligation from the mortgage results in a practical loss of efficacy of the mortgage." Restatement Cmt. a. "When the right of enforcement of the note and the mortgage are split, the note becomes, as a practical matter, unsecured. This result is economically wasteful and confers and unwarranted windfall on the mortgagor." *Id*. "It is conceivable that on rare occasions a mortgagee will wish to disassociate the obligation and the mortgage, but that result should follow only upon evidence that the parties to the transfer so agreed." *Id*.[4]

4. *DBNTC had standing to commence this action.*

At the time of filing the Complaint, DBNTC was the assignee of the Mortgage. Affidavit, Exhibit A-3. This fact, alone, gave DBNTC standing to initiate the action, subject to ultimately proving its claims. *Rex Station Ltd.*, 2014-Ohio-1857, ¶ 21; Restatement § 5.4(b). Put simply, by being the mortgagee of record, DBNTC had a sufficient legal interest in this dispute to open the courthouse doors and commence this action to find out whether it would ultimately be able to foreclose.

At the time of judgment, DBNTC demonstrated not only that it had an interest in both the Mortgage in Note, it also demonstrated that it was the person entitled to enforce the Note. The Note was originally payable to Novastar. Aff., Exhibit A-1. Novastar indorsed the Note in blank. Affidavit, ¶ 8; Exhibit A-1. In 2005, DBNTC purchased the loan. Affidavit, ¶ 7. The record

[4] The final portion of this section of the Restatement states "[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures." Restatement § 5.4(c). That rule does not operate in a vacuum—it operates with the other rules in Section 5.4 which *presume* that note and mortgage interests travel together. In any event, that portion of the Restatement does not address cases where the mortgagor undertakes promises that are independent of the note (for example, promises in the mortgage to pay property taxes or to protect the property from hazardous substances), or cases (such as *Kernohan I*) in which the mortgagee is entitled to enforce the note in preference to the note holder.

shows that Chase, as servicer for DBNTC, received and had possession of the original Note prior to judgment. *Id.*; Dean Depo. 41-42. The record also shows that DBNTC purchased the underlying debt in 2005. Affidavit, ¶ 7.

There was no evidence introduced to contradict these facts, and there was no evidence that the Note and Mortgage were intended to have been severed from one another. Consequently, DBNTC was a person entitled to enforce the Note as a "holder" of a blank-indorsed negotiable instrument. R.C. 1303.31(A)(1); R.C. 1301.201(B)(21)(a); R.C. 1303.25(B). Furthermore, it is worth noting that as Glenn Holden had received a discharge in bankruptcy, DBNTC never even sought to enforce personal liability on the Note.[5]

There was no evidence that the Note and Mortgage were intended to have been severed from one another (quite the opposite—the record has been that Chase, as servicer for DBNTC has been in possession of the original Note and Mortgage since 2005 at the time DBNTC purchased the debt). As a result, the law presumes that DBNTC has the rights in *both* the Note and the Mortgage. *Rex Station Ltd.*, 2014-Ohio-1857, ¶ 21; Restatement § 5.4(a) (mortgage follows note).

DBNTC's undisputed interest as the assignee of the Mortgage was presumptively accompanied by a transfer of the Note. There is no evidence that the parties to any of the transfers of the Note or Mortgage intended to sever them from one another. As a result, the presumption that the Note and Mortgage interests stayed together applies; even if standing to

[5] In *Groveport Madison Local Schs. Bd. of Educ. v. Franklin County Board of Revision*, Ohio Supreme Court Case No. 2012-1476, 2013-Ohio-4627, ¶ 26, after citing *Schwartzwald* for the proposition that "standing is determined as of the commencement of the action," this Court noted, that [i]f the complainant's standing is challenged, the complainant may prove its standing without being bound by what it asserted on the face of its [] complaint." (citing *Schwartzwald*, ¶ 24).

foreclose a mortgage required proof of the right to enforce the note, DBNTC had standing. This Court should adopt DBNTC's proposition of law and reverse.

D. The Ninth District's contrary conclusion is incorrect.

In the Opinion, the Ninth District cites *Quantum Servicing Corp. v. Haugabrook*, 9th Dist. Summit No. 26542, 2013-Ohio-3516, ¶ 8 and *Wells Fargo Bank N.A. v. Horn*, 9th Dist. Lorain No. 12CA010230, 2013-Ohio-2374, ¶ 10 for the proposition that a foreclosing plaintiff must demonstrate an interest in the Note *and* the Mortgage. As discussed above *Horn* has been reversed by this Court. *Haugabrook* does not address the issue in detail.

The only Ninth District decision that actually discusses why "note and mortgage" is important as opposed to "note or mortgage" is the decision in *McFerren*, 2013-Ohio-3228. The Ninth District's rationale is incorrect.

First, the Ninth District is the only Court to condition standing to foreclose on showing a right to enforce *both* the note *and* the mortgage. *Compare Herres*, 2014-Ohio-1539, ¶ 29; *Koch*, 2013-Ohio-4423, ¶¶ 34-40; *Sherman*, 2013-Ohio-4220, syllabus paragraph 3; *Gray*, 2013-Ohio-3340, ¶¶ 27-35; *Loncar*, 2013-Ohio-2959, ¶ 16; *Burke*, 2013-Ohio-2860, ¶ 16; *Matthews*, 2013-Ohio-1707, ¶ 15; *Patterson*, 2012-Ohio-5894, ¶ 22. Indeed, all other Ohio districts have interpreted this Court's statement that one must demonstrate an interest in the "note or mortgage" to mean exactly what it says: "or." *Schwartzwald*, ¶ 28.

Second, *McFerren* does not address whether mortgages are contracts in their own rights, distinct from (although related to) notes that they secure. *E.g. Cranberry Fin., LLC*, 2010-Ohio-464, ¶ 29, citing *Hurd*, 11 Ohio St. at 234; *Hopkins*, 2008-Ohio-2959, ¶ 16. *McFerren* does not address this Court's prior precedent which holds that mortgages can be enforced independently

from the notes they secure, and even if the notes cannot be enforced. *E.g. Bradfield*, 67 Ohio St. at 321-24; *Doyle*, 60 Ohio St. at 444; *Spence*, 40 Ohio St. at 520-21.

*McFerren* also does not address the rule of law that presumes that a transfer of a note or mortgage is presumptively accompanied by a transfer of the other. *E.g. Dunlap*, 2014-Ohio-3484, ¶¶ 13-20; *Rex Station, Ltd.*, 2014-Ohio-1857, ¶¶ 21-22; *Koch*, 2013-Ohio-4423, ¶ 36; *Dobbs*, 2009-Ohio-4742, ¶¶ 27-36; Restatement § 5.4(a) and (b). Finally, *McFerren* does not address the fact that obligations that arise from the mortgage, such as advances for taxes and insurance, are separate and distinct from obligations owed under a note.

Instead, the Ninth District referred to a Comment and an Illustration from Restatement Section 5.4 which only apply when there is evidence that the parties specifically intended to sever of the note from the mortgage. *McFerren* cited Comment e from Section 5.4 for the proposition that "in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation." *McFerren*, 2013-Ohio-3228, ¶ 12. But *McFerren* ignored the next sentences of the Comment, which states the isolated circumstances to which it applies: "For example, assume that the original mortgagee transfer the mortgage ***alone*** to A and the promissory note that it secures to B. Since the obligation is not enforceable by A [because the facts assume that the mortgage was transferred 'alone'—i.e. that the note and mortgage were intended to be severed (or, in other words, that the presumption does not apply)], A can never suffer a default and hence cannot foreclose the Mortgage." Restatement § 5.4, Cmt. e (emphasis added).

Likewise, the Ninth District's opinion says:

> "While it is possible to assign a mortgage and retain possession of the note, '[t]he practical effect of such a transaction is to make it impossible to foreclose the mortgage, unless the transferee is also

> made an agent or trustee of the transferor or otherwise has authority to foreclose in the transferor's behalf.'"

*McFerren*, 2013-Ohio-3228, ¶ 12, quoting Restatement § 5.4, Illustration 6 (incorrectly cited to in *McFerren* as "Section 5.4(c)"). *McFerren* omitted the most important part of that Comment:

> It is possible for a mortgagee to assign the mortgage while retaining full ownership of the obligation, ***but only if the parties so agree***. See Illustration 7. The practical effect of such a transaction is to make it impossible to foreclose the mortgage, unless the transferee is also made an agent or trustee of the transferor or otherwise has authority to foreclose in the transferor's behalf. See Comment e.

Restatement § 5.4, Illustration 6 (emphasis added to portion omitted in *McFerren*).

The problem with *McFerren* is that the Ninth District never cited the rules of presumption under the Restatement, let alone apply them. Had the Ninth District applied Section 5.4(b)'s rule, the mortgage assignment in *McFerren* would have resulted in the presumption of the transfer of the interest in the note, and since there was no evidence in *McFerren* of an intent to sever the note from the mortgage, the Ninth District should have then affirmed the summary judgment for the plaintiff, instead of reversing and remanding the case for further proceedings.

This Court should not follow *McFerren*, which has never been approved outside the Ninth District. This Court should preserve its long-standing precedent and the approach of all of the other courts of appeal by adopting the propositions of law and reverse the judgment below.

E. <u>The only case citing *Holden* positively outside the Ninth District is distinguishable.</u>

It is worth noting that the Tenth District cited *Holden* positively relating to issues involving the copies of a promissory note attached to the complaint and authenticated at the time of summary judgment.

In *FV-I, Inc. v. Lackey*, 10th Dist. Franklin No. 13AP-983, 2014-Ohio-4944 – a case that did not address standing, but rather enforceability – the plaintiff filed a complaint, attaching a copy of the promissory note containing an allonge indorsing the note to the plaintiff from a successor of the original payee. *Id.*, ¶ 15. The version of the note attached to the summary judgment motion did not have an allonge, but had two indorsement stamps from the original payee, one indorsing the note specifically to the plaintiff. *Id.*

The Tenth District, citing the Opinion and *U.S. Bank v. McGinn*, 6th Dist. Sandusky No. S-12-004, 2013-Ohio-8, held that this created a genuine issue of material fact as to what version was the actual, enforceable note, and when the plaintiff came to possess it. *FV-I*, 2014-Ohio-4944, ¶ 16. Despite being the recorded mortgagee, the Tenth District completely failed to address the impact of this status on the standing analysis.[6]

*McGinn* did address the issue of the status of the plaintiff as the mortgagee, as it was undisputed that the mortgage was not assigned until after the complaint was filed. But the case noted that a plaintiff "need not prove that the mortgage was assigned prior to its filing of the complaint * * * [but] can establish its standing by demonstrating that the note was transferred prior to the date the complaint was filed." *McGinn* at ¶ 21. The case involved different copies of the promissory note. The copy attached to the complaint contained a specific indorsement from the original payee to a third party, and then from the third party in blank. *Id.*, ¶ 6. The copy of the note attached to the summary judgment motion had the blank indorsement converted to a specific indorsement, and then a third indorsement to the plaintiff. *Id.*

[6] The Eighth District rejected *FVI-I*, holding that its own decision in *Patterson* controls. *Fannie Mae v. Hicks*, 8th Dist. No. 102079, 2015-Ohio-1955, 35 N.E.3d 37, ¶ 19-20.

Unlike the Opinion and *FV-I*, the *McGinn* court noted that it only addressed the dispute regarding the promissory note, because there was no evidence that the plaintiff was the mortgagee when the complaint was filed. *Id.*, ¶ 21.

Between *FV-I* and *McFerren*, the law as to whether a plaintiff is required to demonstrate an interest in the "note or mortgage" or the "note and mortgage" in order to establish standing is in flux. *Schwartzwald* answered the question directly by its use of the phrase "note or mortgage." This Court's precedent regarding the separate enforceability of a note and mortgage, as well as the American Law Institute's application of the restatement presumption both support the determination that only an interest in either the note or the mortgage is required. The Opinion should be reversed.

## IV. Conclusion

*Schwartzwald* set the requirements for standing in mortgage litigation. The Ninth District has twice improperly extended that case and been reversed by this Court, and is wrong again here. Standing is not whether a plaintiff is entitled to win – it only evaluates whether a plaintiff has alleged a controversy sufficient to invoke the jurisdiction of the Court. Consequently, because a mortgage is separately enforceable from a promissory note, and because being the mortgagee comes with a presumption of the right to enforce the secured note, an uncontroverted status as the recorded mortgagee is sufficient to demonstrate standing to enforce the note and mortgage.

Here, the Ninth District lost its way by concluding that irrefutable proof of both was required to demonstrate standing. It was uncontroverted that DBNTC was the recorded mortgagee prior to filing the Complaint. This was enough to establish standing.

At the time of judgment, DBNTC undisputedly possessed the note, indorsed in blank. The trial court properly granted summary judgment. The Ninth District, imposing its own errant version of *Schwartzwald*, reversed. This Court should clarify the law and reinstate the judgment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2015, a true copy of the foregoing document was served by ordinary U.S. Mail, postage paid, upon the following:

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Counsel

850938.3

IN THE SUPREME COURT OF OHIO

14-0791

| | | |
|---|---|---|
| **DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2005-4, ASSET-BACKED CERTIFICATES, SERIES 2005-4,** | * | **On Appeal from the Summit County Court of Appeals, Ninth Appellate District** |
| **Plaintiff-Appellant,** | * | **Court of Appeals Case No. CA-26970** |
| **v.** | * | |
| **GLENN E. HOLDEN, *et al.*,** | * | |
| **Defendants-Appellees.** | * | |

**NOTICE OF APPEAL OF PLAINTIFF-APPELLANT DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2005-4, ASSET-BACKED CERTIFICATES, SERIES 2005-4**


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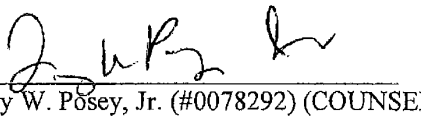
FILED
MAY 15 2014
CLERK OF COURT
SUPREME COURT OF OHIO

**Notice of Appeal of Plaintiff-Appellant Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2005-4, Asset-Backed Certificates, Series 2005-4**

Appellant Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2005-4, Asset-Backed Certificates, Series 2005-4 hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. CA-26970 on March 31, 2014.

This case raises a question of great general interest.

Respectfully submitted,



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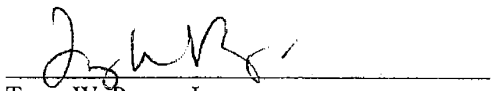

Terry W. Posey, Jr.

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COURT OF APPEALS
DISTRICT

STATE OF OHIO )
)ss:
COUNTY OF SUMMIT )

2014 MAR 31 AM 8: 1
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE

Appellee

v.

GLENN E. HOLDEN, et al.

Appellants

C.A. No. 26970

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2011 08 4500

DECISION AND JOURNAL ENTRY

Dated: March 31, 2014

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HENSAL, Judge.

{¶1} Appellants, Glenn E. Holden and Ann M. Holden, appeal from the judgment of the Summit County Court of Common Pleas. For the following reasons, this Court affirms in part and reverses in part.

I.

{¶2} On September 1, 2005, Mr. Holden executed a promissory note for $69,300 in favor of Novastar Mortgage, Inc. for the property located at 1050 Shadybrook Drive in Akron, Ohio. The note was secured by a mortgage on the property executed by both Mr. and Mrs. Holden in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Novastar. On September 17, 2010, MERS assigned the mortgage to Deutsche Bank National Trust Company as Trustee for Soundview Home Loan Trust 2005-4, Asset-Backed Certificates, Series 2005-4 ("Deutsche Bank").

{¶3} On August 12, 2011, Deutsche Bank filed a complaint for foreclosure against the Holdens, CitiFinancial, Inc. and JP Morgan Chase Bank, N.A. Attached to its complaint, Deutsche Bank included copies of the promissory note executed in favor of Novastar, the mortgage executed in favor of MERS, the assignment of the mortgage from MERS to Deutsche Bank and the preliminary judicial report. The promissory note attached to the complaint contained no indorsements and bore a stamp indicating that it was a "true and accurate copy of the original."

{¶4} In response to the complaint, the Holdens filed an answer and counterclaim, which alleged that Deutsche Bank violated the Fair Debt Collection Practices Act, the Consumer Sales Practices Act, committed fraud and an invasion of privacy. After completion of discovery, the parties filed cross-motions for summary judgment. The trial court denied the Holdens' motion for summary judgment, but granted Deutsche Bank's motion on both its claims and the counterclaims. The Holdens now appeal and raise four assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT WHEN A MATERIAL ISSUE OF FACT REMAINED FOR TRIAL AS TO WHETHER APPELLEE HAD POSSESSION OF APPELLANT[ ] GLENN HOLDEN'S NOTE WHEN THE COMPLAINT WAS FILED SINCE THE NOTE ATTACHED TO THE COMPLAINT WAS NOT INDORSED BY THE ORIGINAL LENDER.

{¶5} The Holdens argue that the trial court erred in granting summary judgment to Deutsche Bank as a genuine issue of material fact remained for trial as to whether Deutsche Bank was in possession of Mr. Holden's note at the time it filed the lawsuit. This Court agrees in part.

{¶6} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). "We apply the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Garner v. Robart*, 9th Dist. Summit No. 25427, 2011–Ohio–1519, ¶ 8. Pursuant to Civil Rule 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

*Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977). The movant must specifically identify the portions of the record that demonstrate an absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). If the movant satisfies this initial burden, the nonmoving party has a reciprocal burden to point to specific facts that show a genuine issue of material fact for trial. *Id.* The nonmoving party must identify some evidence that establishes a genuine issue of material fact, and may not rely upon the allegations and denials in the pleadings. *Sheperd v. City of Akron*, 9th Dist. Summit No. 26266, 2012–Ohio–4695, ¶ 10.

{¶7} Civil Rule 17(A) provides that "[e]very action shall be prosecuted in the name of the real party in interest." "[A] party lacks standing to invoke the jurisdiction of the court unless he has * * * some real interest in the subject matter of the action." (Emphasis deleted.) *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012–Ohio–5017, ¶ 22, quoting *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179 (1973). "The real party in interest in a foreclosure action 'is the current holder of the note and mortgage.'" *Quantum Servicing Corp. v. Haugabrook*, 9th Dist. Summit No. 26542, 2013-Ohio-3516, ¶ 8, quoting *Wells Fargo Bank N.A. v. Horn*, 9th Dist. Lorain No. 12CA010230, 2013–

Ohio–2374, ¶ 10. Whether the plaintiff has standing to bring the action is a jurisdictional matter that is determined at the time of the filing of the complaint. *Schwartzwald* at ¶ 25.

**{¶8}** Revised Code Section 1303.31(A)(1) provides that the holder of a negotiable instrument is one of the persons entitled to enforce the instrument. "When an instrument is indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." R.C. 1303.25(B).

**{¶9}** In support of its motion for summary judgment, Deutsche Bank attached an affidavit from Megan L. Theodoro, an assistant secretary for JPMorgan Chase Bank, National Association ("Chase"). She averred that Chase serviced the Holdens' loan on behalf of Deutsche Bank. Ms. Theodoro testified that Deutsche Bank purchased the note from Novastar on November 1, 2005, as part of a pooling and servicing agreement, which named Chase as the loan's servicer. According to her, Chase acquired physical possession of the original note in December of 2005 and stored it at its Monroe, Louisiana facility until it was forwarded to Deutsche Bank's attorney in connection with the filing of the foreclosure complaint. Ms. Theodoro further testified that, when Chase received the note, it was endorsed in blank. Attached to her affidavit was what she stated was a copy of the "original Note," which contained an undated blank indorsement from Novastar.

**{¶10}** Thus, Deutsche Bank has filed two different copies of the same note–one with and one without an indorsement. Both copies purport to be true and accurate copies of the original note. Ms. Theodoro's affidavit fails to explain why the copy of the note attached to her affidavit differs from the one attached to the complaint when, from her averments, the note, while in Chase's possession, had always contained a blank indorsement from Novastar to Deutsche Bank.

**{¶11}** In support of its motion for summary judgment, Deutsche Bank also offered into the record the deposition testimony of Chase employee, Frank Dean. When asked at his deposition to view what Deutsche Bank's counsel represented to him was the original note, Mr. Dean testified that it contained an indorsement to Deutsche Bank. He compared the original note to the copy attached to the foreclosure complaint and agreed that the copy attached to the complaint did not have the indorsement. He further testified as follows:

> Q: If this case was referred to foreclosure by Chase, then why does the note attached to the complaint not contain an [i]ndorsement?
>
> * * *
>
> A: It's my opinion that we were in receipt not only of the original note, but a certified true copy of the note. And * * * whoever went into the image vault and extracted a copy of the mortgage for foreclosure counsel extracted the unendorsed copy rather than the endorsed copy.

This Court notes that Mr. Dean's explanation does not appear to be based on personal knowledge of what actually occurred, but rather his opinion of what may have occurred.

**{¶12}** The Sixth District encountered a similar situation in *U.S. Bank, N.A. v. McGinn*, 6th Dist. No. S-12-004, 2013-Ohio-8. In *McGinn*, the foreclosing lender attached a copy of the note to its complaint that contained two indorsements. When the lender filed a summary judgment motion, however, it submitted a copy of the note that had three indorsements. The homeowners argued that the inconsistent copies of the note created a genuine issue of material fact as to whether the lender was in possession of the note at the time the complaint was filed. In response to the homeowners' argument, the lender submitted an affidavit from a representative of the loan servicer. He averred that, because multiple copies of the note are maintained in the servicer's custody, he "believe[d]" that someone must have inadvertently attached an earlier copy of the note to the complaint that differed from the actual note with all the indorsements. *Id.*

at ¶ 23. The Sixth District concluded that the representative failed to offer a definitive explanation for the additional indorsements and that his belief fell short of the Civil Rule 56(E) affidavit standard, which requires personal knowledge of the matters contained therein. *Id.* at ¶ 25.

**{¶13}** In this case, Deutsche Bank has failed to explain why Chase would have an unindorsed copy of the note in its possession since it was only the servicer for Deutsche Bank and not for MERS or Novastar. This creates a genuine issue of material fact since Ms. Theodoro averred that the note in Chase's possession had always contained a blank indorsement from Novastar to Deutsche Bank. Deutsche Bank further argues that this Court should disregard the copy of the note attached to the complaint since a document is not attached to a pleading under Civil Rule 10 for the purposes of presenting evidence to prove a claim, but rather to assert a claim or defense. We are not persuaded, however, that, under these circumstances, we can disregard the copy of the note attached to the complaint when it is inconsistent with another copy of the note produced in support of summary judgment.

**{¶14}** In the recent case of *Fannie Mae v. Trahey*, 9th Dist. Lorain No. 12CA010209, 2013-Ohio-3071, this Court also faced a similar issue when the foreclosing lender attached a copy of the note to its complaint that contained a blank indorsement from the original lender. In that case, the foreclosing lender filed an amended complaint, which included a different copy of the note. The note attached to the amended complaint demonstrated an indorsement from the original lender to another lender and then a second indorsement from that lender in blank. We concluded that the inconsistencies between the indorsements contained on the submitted notes created a genuine issue of material fact that precluded summary judgment as we could not ascertain which lender possessed the note at the time the foreclosure was filed. *Id.* at ¶ 12. *But*

*see Bridge v. Ocwen Fed. Bank FSB*, N.D.Ohio No. 1:07 CV 2739, 2013 WL 4784292 (Sept. 6, 2013) (slip opinion) (distinguishing *Trahey* and finding that two different copies of identical promissory note did not create genuine issue of material fact so as to preclude summary judgment from being granted to the foreclosing lender).

**{¶15}** Due to the inconsistencies between the copies of the note and the lack of an explanation based on personal knowledge as to how Deutsche Bank came to offer two different copies of the note into the record, this Court concludes that there is a genuine issue of material fact as to whether Deutsche Bank was the holder of the note at the time the complaint was filed. Accordingly, the trial court erred in granting Deutsche Bank's motion for summary judgment on its foreclosure complaint.

**{¶16}** Deutsche Bank advances an additional argument in its appellate brief that, even if it did not establish that it was the holder of the note, it still had the right to enforce the note as a non-holder in possession of the note. Deutsche Bank, however, did not make this argument in its motion for summary judgment, and it may not raise the issue for the first time on appeal. *See Hignett v. Schwarz*, 9th Dist. Lorain No. 10CA009762, 2011-Ohio-3252, ¶ 22.

**Holdens' Counterclaims**

**{¶17}** The Holdens set forth a limited argument that, because there is a genuine issue of material fact as to whether Deutsche Bank had possession of the note, the trial court erred in granting summary judgment to Deutsche Bank on their counterclaims. The Holdens' first counterclaim attacked the validity of the assignment of mortgage from MERS and alleged that, due to the invalid assignment, Deutsche Bank violated the Fair Debt Collection Practices Act. This particular claim neither asserts any allegations concerning the note nor do the Holdens submit any argument in support of their claim that the trial court erred in granting summary

judgment. This Court has repeatedly held that, "[i]f an argument exists that can support [an] assignment of error, it is not this court's duty to root it out." *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998).

**{¶18}** Likewise, the Holdens failed to offer any support for their contention that the trial court erred in granting summary judgment to Deutsche Bank on their counterclaim for invasion of privacy by intrusion upon seclusion. *See id.* This Court notes that the claim does not concern the note in any way.

**{¶19}** The Holdens' remaining counterclaims, however, do concern whether Deutsche Bank held the note. They alleged that Deutsche Bank violated the Ohio Consumer Sales Practices Act "by making a false presentation that a legal obligation was owed" and committed fraud by making false representations that they were entitled to enforce the note. Due to our conclusion that there is a genuine issue of material fact on the issue of whether Deutsche Bank was the holder of the note at the initiation of the litigation, we conclude that there was also a genuine issue of material fact on the Holdens' Ohio Consumer Sales Practices Act and fraud counterclaims.

**{¶20}** Accordingly, the trial court did not err in granting summary judgment to Deutsche Bank on the Holdens' Fair Debt Collection Practices Act and invasion of privacy counterclaims. It did, however, err in granting summary judgment to Deutsche Bank on its foreclosure complaint along with the Holdens' Ohio Consumer Sales Practices Act and fraud counterclaims. Their first assignment of error is sustained on that basis.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED BY GRANTING APPELLEE DEUTSCHE BANK'S MOTION FOR SUMMARY JUDGMENT BECAUSE DEUTSCHE BANK DID NOT SATISFY ALL CONDITIONS PRECEDENT TO FORECLOSURE SINCE THE ACCELERATION LETTER DID NOT

COMPLY WITH THE LANGUAGE OF PARAGRAPH 22 OF APPELLANTS' MORTGAGE.

**{¶21}** In their second assignment of error, the Holdens argue that the trial court erred in granting Deutsche Bank's motion for summary judgment because it failed to establish that it had fulfilled its obligation to send them a satisfactory acceleration letter. In light of our resolution of the Holdens' first assignment of error, this argument is not yet ripe for review and we decline to address it. *See Trahey*, 2013-Ohio-3071 at ¶ 13.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED BY RELYING ON THE AFFIDAVIT OF MEGAN L. THEODORO FILED IN SUPPORT OF APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE AFFIDAVIT WAS NOT MADE UPON PERSONAL KNOWLEDGE.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT WHEN THE NOTE ATTACHED TO THE COMPLAINT WAS PAYABLE [TO] NOVASTAR MORTGAGE, INC. NOT APPELLEE DEUTSCHE BANK AS TRUSTEE AND THE ASSIGNMENT OF MORTGAGE FROM MERS WAS NOT SUFFICIENT TO INVOKE THE SUBJECT MATTER JURISDICTION OF THE COURT.

**{¶22}** In their third assignment of error, the Holdens argue that the trial court erred in granting Deutsche Bank's motion for summary judgment because Ms. Theodoro's affidavit was not made upon her personal knowledge. In their fourth assignment of error, the Holdens argue that the trial court erred in granting Deutsche Bank's motion for summary judgment because Deutsche Bank was required to possess both the note and mortgage in order to have standing to file its foreclosure complaint. In light of our resolution of the Holdens' first assignment of error, these arguments are moot. This Court, therefore, declines to address them. App.R. 12(A)(1)(c).

III.

{¶23} The Holdens' first assignment of error is sustained in part, their second assignment of error is not ripe for review, and their third and fourth assignments of error are moot. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
CONCURS.

BELFANCE, P. J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

MARC E. DANN and GRACE DOBERDRUK, Attorneys at Law, for Appellants.

RICHARD A. FRESHWATER and STEPHEN D. WILLIGER, Attorneys at Law, for Appellee.

DANIEL M. HORRIGAN
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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

| | | |
|---|---|---|
| DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE | ) | CASE NO. CV 2011 08 4500 |
| Plaintiff | ) | JUDGE CORRIGALL JONES |
| vs | ) | |
| GLENN E. HOLDEN, ET AL. | ) | ORDER |
| Defendants | ) | |

---

This matter is before the Court upon Plaintiff Deutsche Bank National Trust Company as Trustee's ("Deutsche Bank or Plaintiff") motion for summary judgment filed pursuant to Civ.R. 56 in favor of its complaint and against Defendants Glenn and Ann Holden's (the "Holdens") counterclaim.

The Holdens file a brief in opposition to the motion for summary judgment. The Holdens also file for summary judgment in their favor on their counterclaim and on Deutsche Bank's complaint. The Court deems all matters submitted and will proceed to consider the pending motions.

Deutsche Bank filed this action in foreclosure against the Holdens in regards to a promissory note executed by Glenn Holden on September 1, 2005 with Novastar Mortgage

Company ("Novastar") and a Mortgage executed by both Holdens on the same date. Deutsche Bank moves for summary judgment on its complaint asserting that the Holdens have not made a payment on the debt since 2009 and it is entitled to judgment on the note and mortgage. Defendants file a counterclaim, asserting causes of action for violations of the Federal Debt Collection Practices Act, invasion of privacy, violations of Ohio's Consumer Sales Practices Act, and fraud. Both parties move for summary judgment on their respective claims.

*Holden's Motion for Summary Judgment on Plaintiff's Complaint*

The Holdens move for summary judgment on grounds that the Court lacks jurisdiction under the Ohio Supreme Court holding of *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012 Ohio 5017. In *Schwartzwald*, the Court held that a plaintiff must have a valid assignment of the mortgage at the time of the filing of the complaint. The Court further held that if, at the commencement of the action, a plaintiff does not have standing to invoke the court's jurisdiction, the "common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance." *Id.* at ¶ 38. "The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint; however, that dismissal is not an adjudication on the merits and is therefore without prejudice." *Id.* at ¶ 40.

The Holdens argue that the note and exhibits attached to the complaint demonstrate that Plaintiff did not have standing to file the complaint against them. The Holdens argue that the note attached to the complaint is payable to Novastar Mortgage, Inc. and does not contain any indorsement. The Holdens state that the assignment of mortgage was executed on September 17, 2010, five years after the closing date for the trust pursuant to the applicable Pooling and Servicing Agreement. The Holdens complain that Plaintiff is attempting to foreclose on behalf of a trust that it does not have a legal right to enforce.

Deutsche Bank replies that in contrast to the facts in *Schwartzwald*, Megan Theodoro ("Theodoro"), on behalf of JPMorgan Chase National Association ("Chase") in its capacity as servicer for Deutsche Bank, avers in an affidavit that Deutsche Bank purchased the debt as evidenced by the Note on or about November 1, 2005 as part of a Pooling and Servicing Agreement and that pursuant to that Agreement, Chase is the servicer for the Mortgagors' loan on behalf of Deutsche Bank. Theodoro further avers that Chase came in original possession of the Note in December 2005. Deutsche Bank also refers to the deposition of Frank A. Dean, Jr., Chase's representative, (Dean depo. pg. 52-55).Thus, Deutsche Bank asserts that is has been holder of the original Note since 2005.

The Court finds that Deutsche Bank has established through Civ.R. 56 evidence that it has been the holder of the Note since 2005. A bank need not prove that the mortgage was assigned prior to its filing of the complaint; rather, the bank can establish its standing by demonstrating that the note was transferred prior to the date the complaint was filed. *See, U.S. Bank, N.A.v. McGinn, (6th Dist.)2013 Ohio 8, 2013 Ohio App. LEXIS 2.* The Court further finds the Holdens' argument that the assignment of the mortgage is invalid due to failure to contain the proper indorsements required by the Pooling and Servicing Agreement to be without merit.

The Holdens also challenge the validity of the Mortgage. First, they assert that the acknowledgement clause on the original mortgage may be invalid because the Holdens' names are typed, not handwritten, next to their signatures. The Court finds that if the typewritten names could be found to be an issue, the Holdens acknowledged in their depositions that they signed the mortgage. Therefore, the Court finds this argument without merit.

The Holdens argue secondly, that the assignment is invalid due to whether Wanda Chapman, who executed the assignment of mortgage as a corporate officer of MERS is actually an employee of Chase Bank. The Holdens cite Ann Holden's deposition testimony that she believed,

due to internet searching, that Wanda Chapman was an employee of Chase. The Court finds Ann Holden's testimony of Wanda Chapman's employment status to be insufficient to create an issue of fact.

The Holdens also challenge whether the assignment was actually signed by Wanda Chapman or whether the signature was a stamped signature. In his deposition testimony, Dean testified that while the Wanda Chapman's signatures looked like they were written in different pens, in response to whether the signature was possibly a stamp, Dean testified no. (Dean depo, pg41-42). Thus, the Court finds that the Holdens' fail to raise an issue of fact as to the authenticity of Wanda Chapman's signature.

The Holdens also argue that Deutsche Bank failed to comply with conditions precedent, specifically, that Deutsche Bank failed to provide notice of acceleration as required under Paragraph 22 of the Holdens' mortgage. The Holdens argue that although Theodoro's affidavit includes an exhibit of an Acceleration Warning, the letter does not contain the language required by paragraph 22 of the Holdens' mortgage. Thus, they argue the acceleration notice does not strictly comply by not containing a date by which the default may be cured, by suggesting 32 days rather than a specific date, and by notifying the Holdens that they had the right to bring a court action rather than a foreclosure proceeding. Upon review of the notice requirements set forth in the Mortgage and the notice sent to the Holdens, the Court finds that such notice sufficiently advises the Holden of their default and the bank's intent to accelerate the terms of the Note. Thus, the Court finds this argument to be without merit.

Based upon the foregoing, the Court denies the Holden's motion for summary judgment on Deutsche Bank's complaint.

*Deutsche Bank's Motion for Summary Judgment on its Complaint*

In its complaint, Deutsche Bank asserts that it has standing to enforce a promissory note executed by Glenn Holden on September 1, 2005 with Novastar Mortgage Company ("Novastar") and is entitled to foreclose on a Mortgage executed by both Holdens on the same date due to Holden's default of payment on the Note. Deutsche Bank argues that the evidence shows that Deutsche Bank has been the holder of the original Note, which was endorsed in blank, since December 2005 and that it remains in possession of the Note. Deutsche Bank further argues that the Holdens have not made a payment on the debt since 2009 and Plaintiff is entitled to judgment on the Note and mortgage.

The Holdens raise several issues in response, including whether there was a proper assignment of the Note. As noted above, the Court finds the Holdens' arguments not supported by the evidence and therefore not well taken. As such, the Court finds that Deutsche Bank has established by Civ.R. 56 evidence that it is the holder of the original Note, which was endorsed in blank, since December 2005; that MERS, acting as its nominee, properly assigned the Mortgage to Deutsche Bank prior to the filing of this action; and that the Holden's are in default of payment on the debt since 2009. Thus, Deutsche Bank's motion for summary judgment is granted on its complaint.

*Deutsche Bank's Motion for Summary Judgment on Counterclaims*

In the first count of their Counterclaim, the Holdens assert that Deutsche Bank's attempt to collect the subject debt constitutes violations of the Fair Debt Collection Practices Act. The Holdens argue that the documents attached to the complaint are false and deceptive in addition to challenging the assignment on various grounds that include that Wanda Chapman did not have authority to execute the assignment and the lack on endorsement prior to the closing date. The Court has found nothing improper relative to the assignment or documents involved in this matter.

As such, the Court finds the Holdens' first counterclaim asserting violations of the Fair Debt Collections Practices Act not well taken.

The Holdens assert an Invasion of Privacy Claim in Count Two by Deutsche Bank by publishing false information about them when Deutsche Bank as trustee is not a creditor of the Holdens. Based upon the foregoing findings that there was a proper assignment and Deutsche Bank has properly filed the instant complaint, the Court finds Count Two of Holden's counterclaim not well taken.

In Count Three, the Holdens allege that Plaintiff engaged in improper, illegal, and abusive debt collection practices which also constituted unfair and deceptive practices in violation of the Ohio Consumer Sales Practices Act. Deutsche Bank argues that both banks and trust companies are not subject to the claims under the Act. Deutsche Bank secondly argues that there were no false representations made as Deutsche Bank is the creditor on the Note since December 2005. Based upon the foregoing finding that the assignment was proper and Deutsche Bank was the holder of the Note since December 2005, and thus entitled to enforce the Note and mortgage, the Court finds as a matter of law, that there were no false representations made which would subject Deutsche Bank to violations under the CSPA, even if found to be applicable.

Lastly, the Holdens assert a claim of common law fraud for numerous alleged false representations made and false documents filed. Having found that the documents submitted in support of its complaint and motions were properly supported Civ.R. 56 documents, the Court finds the Holdens' argument not well taken.

Based upon the foregoing discussion, the Court finds no issues of material fact as to the claims asserted in the Holdens' counterclaims and grants Deutsche Bank's motion for summary judgment on the Holdens' counterclaim. Deutsche Bank's motion for summary judgment on its

complaint is granted. The Holdens' motion for summary judgment on Plaintiff's complaint and on its counterclaims is denied.

Plaintiff shall file a final Order and Decree of Foreclosure. Costs to Defendants.

It is so Ordered.

JUDGE AMY CORRIGALL JONES

Attorney Richard A. Freshwater/Laura A. Hauser
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