

**IN THE SUPREME COURT OF OHIO**

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

**Plaintiff-Appellant,**

**v.**

**GLENN E. HOLDEN, et al.,**

**Defendants-Appellees.**

\* **Case No. 2014-0791**  
\*  
\* **On Appeal from the Summit**  
\* **County Court of Appeals,**  
\* **Ninth Appellate District**  
\*  
\*  
\* **Court of Appeals**  
\* **Case No. CA-26970**  
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**APPELLEES' MOTION FOR RECONSIDERATION**

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Pursuant to Supreme Court Rule of Practice 18.02, Appellees Glenn and Ann Holden move the Court to reconsider its Opinion, *Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016-Ohio-4603, with respect to whether Appellant Deutsche Bank had standing when the Complaint was filed due to the assignment of mortgage. The Court should clarify that when the note attached to the Complaint is payable to an entity that is not the plaintiff then the plaintiff/mortgagee does not have standing to foreclose, even if the note was discharged in bankruptcy.

“If a plaintiff attaches documents to his complaint, which he claims establish his case, such documents can be used to his detriment to dismiss

the case if they along with the complaint itself establish a failure to state a claim. *Adlaka v. Giannini*, 7th Dist. No. 05 MA 105, 2006-Ohio-4611, ¶ 34.” *Beard v. New York Life Ins. & Annuity Corp.*, 2013-Ohio-3700, ¶ 11.

Appellant Deutsche Bank filed a Complaint with an exhibit of a note that was payable to Novastar Mortgage, Inc. Based on the note attached to the complaint and the fact that the assignment of mortgage did not expressly transfer the note Deutsche Bank lacked standing to file a complaint for foreclosure.

The Court should also clarify the contradictory language in paragraphs 26, 27, and 34 of the Opinion and hold that in a summary judgment motion a bank must first establish that it is entitled to enforce the note before the court can determine if the equities support a judgment of foreclosure for the mortgagee. At a minimum, material issues of fact remained for trial as to whether Deutsche Bank had possession of the original note when the complaint was filed. Without possession at filing Deutsche Bank lacked an injury because the mortgage is merely security for the debt.

In the Ninth District Court of Appeals the Appellees raised four assignments of error in their merit brief, but the Ninth District reversed based on the first assignment of error and did not issue a decision on the

other three assignments. This Court should remand the case to the Ninth District for a decision on the other three assignments of error.

Appellees Glenn and Ann Holden are filing the attached memorandum in support of their motion and respectfully request that the Court reconsider its decision.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on July 8, 2016 a true and accurate copy of the foregoing document was served by ordinary U.S. Mail to the following:

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**MEMORANDUM IN SUPPORT OF APPELLEE’S  
MOTION FOR RECONSIDERATION**

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**I. INTRODUCTION**

The Opinion reversed the judgment of the Ninth District Court of Appeals and reasoned “because the bank owned the mortgage at the time that it commenced the foreclosure action, it had standing to foreclose on the property and the right to collect the deficiency on the note from the proceeds of the foreclosure sale.” *Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016-Ohio-4603, ¶ 3-4.

The Court stated, “the issue of standing, i.e., whether a party filing a lawsuit has been damaged and therefore has a justiciable claim, see Fed.

Home Loan Mtge. Corp. v. Schwartzwald, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 21, becomes moot with regard to this note because no judgment can be obtained on it by virtue of the bankruptcy discharge of the maker's obligation." *Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016-Ohio-4603, ¶ 6.

However, paragraph 26 of the Opinion contradicts paragraph 6 because the Court held, "Even in a case in which the personal liability of the debtor has been discharged in bankruptcy, however, the creditor seeking to foreclose on the mortgage must prove that it was the person or entity entitled to enforce the note secured by the mortgage." *Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016-Ohio-4603, ¶ 26.

Based on the facts of this case Appellant Deutsche Bank did not have standing because the note attached to the Complaint was not indorsed by lender Novastar Mortgage, Inc. and the assignment of mortgage did not state that it transferred the note. *See Complaint, Exhibits A and C*.

Deutsche Bank did not have standing to file a complaint merely by being an assignee of the mortgage because Appellees' mortgage was granted to Mortgage Electronic Registration Systems, Inc. ("MERS") and MERS did not have any interest in Appellee Glenn Holden's note. *See Complaint, Exhibits A and B*. A mortgage without the note is a nullity because the

mortgage is only security for the debt (the note). *See Carpenter v. Longan*, 83 U.S. 271, 274, 21 L.Ed. 313 (1872). “A party who only has the mortgage but no note has not suffered any injury...possession of the mortgage is of no import unless there is possession of the note.” *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228, ¶12.

A material issue of fact remained for trial regarding whether Appellant Deutsche Bank possessed the original note indorsed in blank when the complaint was filed.

The Court properly found that “Deutsche Bank must still demonstrate that it is the party entitled to enforce the note—regardless of whether it can obtain a personal judgment on it against the Holdens.” *Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016-Ohio-4603, ¶ 27.

Appellant Deutsche Bank cannot establish that it is entitled to enforce the note without possession. There is a material issue of fact for trial about whether Deutsche Bank had possession when the complaint was filed and the appearance of the original note when the complaint was filed.

“If a plaintiff attaches documents to his complaint, which he claims establish his case, such documents can be used to his detriment to dismiss the case if they along with the complaint itself establish a failure to state a

claim. *Adlaka v. Giannini*, 7th Dist. No. 05 MA 105, 2006-Ohio-4611, ¶ 34.” *Beard v. New York Life Ins. & Annuity Corp.*, 2013-Ohio-3700, ¶ 11.

Appellees move for reconsideration and the Court should clarify that when the note attached to the Complaint indicates that an entity other than the plaintiff is entitled to enforce the note then the plaintiff/mortgagee does not have standing to foreclose even if the note was discharged in bankruptcy. The Court should also clarify the contradictory language in paragraphs 26, 27, and 34 of the Opinion and hold that in a summary judgment motion a bank must first establish that it is entitled to enforce the note before the court can determine if the equities support a judgment of foreclosure. The Court should also remand this case to the Ninth District Court of Appeals for a decision on the second, third, and fourth assignments of error raised in Appellees’ merit brief.

## II. DISCUSSION

- A. The Court should clarify that when the note attached to the Complaint is payable to an entity that is not the plaintiff then the plaintiff/mortgagee does not have standing to foreclose even if the note was discharged in bankruptcy.

Appellant Deutsche Bank did not have standing when the Complaint was filed because the note attached to the Complaint was payable to

Novastar Mortgage, Inc. and the assignment of mortgage did not transfer the note. *See Complaint, Exhibits A, B, and C.*

In the Opinion the Court clarified that *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017 did not hold that only a note or just a mortgage was sufficient for standing to file a complaint for foreclosure. *See Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016- Ohio-4603, ¶ 29-32.

However, the Court erred when it analyzed the Complaint that was filed against Appellees Glenn and Ann Holden:

“In its complaint, Deutsche Bank acknowledged that the bankruptcy court had relieved Glenn Holden’s obligation on the note, and it stated that it was not seeking a personal judgment on the note but was only seeking to enforce its security interest against the property. It attached to the complaint a valid assignment of the mortgage and a note that referenced that mortgage and thus “alleged such a personal stake in the outcome of the controversy that [it is] entitled to have a court hear [its] case,” *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7. This pleading precluded a dismissal for lack of standing. To achieve judgment on its foreclosure claim, Deutsche Bank needed to prove that it was the party entitled to enforce the note.”

*Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016-Ohio-4603, ¶ 33.

Deutsche Bank did not have standing to file a Complaint because Deutsche Bank was not the original lender and the note attached as Exhibit A to the Complaint was not indorsed. *See Complaint, Exhibit A.*

In order to have standing Appellant Deutsche Bank must be entitled to enforce the note, but the note attached to the complaint was not indorsed. Although the note referenced a mortgage, the note was payable to non-party Novastar Mortgage Inc. and the assignment of mortgage did not expressly state that the note was transferred. *See Complaint*. Since the facts in Appellees' case are that the mortgage was granted to MERS and MERS had no interest in the note, then an assignment of mortgage that does not transfer the note cannot provide standing to file a complaint for foreclosure, even if the note has been discharged in bankruptcy.

“Where a promissory note is secured by a mortgage, the note, not the mortgage, represents the debt. The mortgage, is, therefore, a mere incident, and an assignment of such incident will not, in law, carry with it a transfer of the debt...” *Kernohan v. Manss.*, 53 Ohio St. 118, 133, 41 N.E. 258, 1895 Ohio LEXIS 129 (Ohio 1985).

The assignment of mortgage from MERS does not mention transferring the promissory note. *See Complaint, Exhibit C*.

The Supreme Court of Oregon in *Brandrup v. ReconTrust Co., NA*, 303 P. 3d 301 Oregon Supreme Court 2013 held that MERS is not a beneficiary of a deed of trust because MERS has no interest in the note:

For purposes of ORS 86.735(1), the "beneficiary" is the lender to whom the obligation that the trust deed secures is owed or the lender's

successor in interest. Thus, an entity like MERS, which is not a lender, may not be a trust deed's "beneficiary," unless it is a lender's successor in interest.

*Brandrup v. ReconTrust Co., NA*, 353 Ore. 668, 303 P. 3d 301 (2013).

In Appellees Glenn and Ann Holden's case the mortgage cannot provide standing to sue because any amounts advanced for escrow or insurance would be added to the amount owed under the note. Appellees' mortgage expressly states that "This Security Instrument secures to Lender" and "Lender" is defined on the mortgage as "Novastar Mortgage, Inc." *Complaint, Exhibit B*. Since the mortgagee MERS does not have an interest in the note then the only entity able to claim any amount due under the note and mortgage would be the Lender Novastar Mortgage, Inc.

"A party who only has the mortgage but no note has not suffered any injury...possession of the mortgage is of no import unless there is possession of the note." *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228, ¶12.

Based on the note attached to the Complaint Appellant Deutsche Bank did not have an injury and lacked standing.

- B. The Court should clarify that the contradictory language in paragraphs 26, 27, and 34 of the Opinion and hold that in a summary judgment motion a bank must first establish that it is entitled to enforce the note before the court can determine if the equities support a judgment of foreclosure for the mortgagee.

The Holden appeal involved a summary judgment decision. When analyzing Deutsche Bank's motion for summary judgment the Court reasoned, "For purposes of summary judgment, the bank established that it had received an assignment of the Holdens' mortgage, that its mortgage interest survived the bankruptcy, and that the Holdens had defaulted. Thus, the bank met its Civ.R. 56 burden of proof to demonstrate its right to foreclose on the property..." *Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016- Ohio-4603, ¶ 34. However, in paragraph 26 of the Opinion the Court held, "Even in a case in which the personal liability of the debtor has been discharged in bankruptcy, however, the creditor seeking to foreclose on the mortgage must prove that it was the person or entity entitled to enforce the note secured by the mortgage." *Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016- Ohio-4603, ¶ 26.

Additionally, in paragraph 27 of the Opinion the Court stated, "Deutsche Bank must still show that it is the holder of the note that establishes the debt in order to foreclosure " and "Deutsche Bank must still demonstrate that it is the party entitled to enforce the note—regardless of whether it can obtain a personal judgment on it against the Holdens." *Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016- Ohio-4603, ¶ 27.

Since a bank must be entitled to enforce the note in order to obtain a judgment of foreclosure the Court should clarify the language referenced above in paragraph 34 of the Opinion so people are not misled into thinking that only an assignment of mortgage is sufficient for a Civil Rule 56 motion.

Paragraph 34 of the Opinion should also be clarified because it uses the term “deficiency on the note” and in the context of foreclosure cases the term “deficiency” is usually used to refer to a deficiency judgment under R.C. 2329.08.

The Opinion further stated, “The Holdens’ assertion that transfer of a note requires physical delivery of the instrument is correct, see R.C. 1303.22, but of no avail in this case because the bank had the note in its possession before it filed the complaint.” *Deutsche Bank Natl. Trust Co. v. Holden*, Slip Opinion No. 2016- Ohio-4603, ¶ 34. However, it is a factual issue for trial as to whether Deutsche Bank had possession of the original note *indorsed in blank* when the complaint was filed.

When reviewing a summary judgment motion the Ninth District Court of Appeals was correct to reverse the judgment of foreclosure:

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.

*Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333, ¶15.

It is a factual issue for trial regarding whether Deutsche Bank had possession of the original note when the complaint was filed. Without possession Appellant Deutsche Bank would not have standing to file a complaint. If Appellant was not entitled to enforce the note (R.C. 1303.31 requires possession except for lost notes) then Appellant could not seek to foreclose the mortgage because Deutsche Bank lacked an injury.

The note attached to complaint was not indorsed, and after Appellees filed a motion to dismiss Appellant Deutsche Bank argued "the Note need not be specifically indorsed to Plaintiff to permit Plaintiff to prevail on its claims in this case." *Appellant's opposition filed on December 12, 2011*. Appellees filed counterclaims partially based on the lack of indorsement from the original lender, and Deutsche Bank still never mentioned an indorsement being on the note and never filed an Amended Complaint with a different note.

There is a factual issue for trial regarding whether Appellee Glenn Holden's note was altered by someone adding an indorsement after the complaint was filed. Appellees opposed summary judgment and argued that Deutsche Bank filed a motion for relief from stay in Appellees' bankruptcy

case on September 29, 2010 and the note attached to the motion for relief from stay did not have an indorsement. The motion for relief from stay directly contradicts the Affidavit of Megan L. Theodoro that claimed the note had an indorsement in blank when Chase took possession in 2005. *See Affidavit of Megan L. Theodoro*. If the note had an indorsement in blank since 2005 then the indorsement would have been on the note filed in 2010 during the Holdens' bankruptcy case and would have been on the note attached to the Complaint filed in 2011. Since an indorsed note was not filed in the Holdens' bankruptcy or attached to the Complaint then a material issue of fact remains for trial.

C. The Court should remand the case to the Ninth District Court of Appeals for consideration of The Second, Third, and Fourth Assignments of Error or for trial on the counterclaims

Although the Holdens had four assignments of error in their merit brief, the Ninth District Court of Appeals found the first assignment of error to be dispositive and reversed. *See Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333.

The Second Assignment of Error in the Appellees' merit brief was:

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

The Ninth District Court of Appeals reasoned, “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.” *Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333, ¶ 21.

The Third Assignment of Error in Appellees’ merit brief was:

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

The Fourth Assignment of Error in Appellees’ merit brief involved whether Appellees Glenn and Ann Holden’s motion for summary judgment should have been granted when the note attached to the complaint was payable to Novastar Mortgage, Inc.

With regards to the third and fourth assignments of error the Ninth District Court of Appeals stated, “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).” *Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333, ¶ 22.

In this appeal before the Supreme Court of Ohio Appellant Deutsche Bank's Proposition of Law was "If standing is challenged, a party seeking to foreclose a mortgage is only required to demonstrate an interest in either the note or mortgage." *Appellant's Merit Brief*.

This Court's Opinion on July 1, 2016 does not address the issues raised by the second, third, and fourth assignments of error in Glenn and Ann Holden's merit brief filed in the Ninth District Court of Appeals.

In addition, the case should also be remanded for consideration of the first assignment of error on the issue of Appellees' counterclaims for violations of the Ohio Consumer Sales Practices Act (CSPA) and Fraud. The Ninth District Court of Appeals held that there was a material issue of fact on Appellees Glenn and Ann Holden's CSPA and fraud counterclaims.

*Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333, ¶ 19-20.

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.

*Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333, ¶ 19.

The counterclaims were not specifically addressed by the Supreme Court of Ohio's opinion and the case should be remanded for trial on the counterclaims, where recovery of damages could offset the amount of the arrearages or even preclude Deutsche Bank from foreclosing.

Appellees respectfully request that the case be remanded back to the Ninth District Court of Appeals for a ruling on the other assignments of error raised in Appellees' brief.

### **III. CONCLUSION**

A person with only an interest in the mortgage is statutorily excluded by R.C. 1303.31 from enforcing the note. *See R.C. 1303.31*. Appellant Deutsche Bank did not have standing to file a complaint because the note attached to the complaint was payable to Novastar Mortgage, Inc. Even if this Court were to find that standing to file a complaint existed, there was still a material issue of fact for trial regarding possession of the original note at the time of filing the complaint. Finally, since the Ninth District Court of Appeals only rendered a decision on the first assignment of error this case should be remanded for a decision on the other three assignments of error or be remanded for trial on the counterclaims.

Appellees Glenn and Ann Holden respectfully request that the Court reconsider its Opinion.

Respectfully submitted,

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