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	*	**Case No. 2014-0791**
	*	
	*	**On Appeal from the Summit County Court of Appeals, Ninth Appellate District**
	*	
Plaintiff-Appellant,	*	
	*	**Court of Appeals**
v.	*	**Case No. CA-26970**
	*	
GLENN E. HOLDEN, et al.,	*	
	*	
Defendants-Appellees.	*	

MERIT BRIEF OF APPELLEES GLENN AND ANN HOLDEN

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I. Introduction

For over a century it has been the law in Ohio that "Where a promissory note is secured by 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 1895).

This makes sense.

Before a plaintiff in any case may avail itself of the use of an Ohio court, that litigant must first have an injury in fact.

A party who has a mortgage but not the note does not have the type of cognizable injury that would create a justiciable controversy under Article IV of the Ohio Constitution. See Ohio Constitution Article IV, Section 4(B)

Now Appellant Deutsche Bank National Trust Company as Trustee for Soundview Home Loan Trust 2005-4, Asset-Backed Certificates Series 2005-4 ("Deutsche Bank") invites this Court to reverse this 120 year precedent and hold that in a foreclosure the plaintiff only needs to demonstrate an interest in either the note or mortgage.

This Court should reject that invitation.

Adopting Appellant's proposition would put Ohio far out of the mainstream of how courts in judicial foreclosure states around the nation interpret the straightforward provisions of the Uniform Commercial Code ("UCC"). Under the UCC the note is the evidence of the debt in Ohio's version of the UCC. R.C. §1303.31 defines who is entitled to enforce a note. The mortgage exists in a subordinate role and is merely security for the debt, therefore a plaintiff that is assigned only the mortgage does not have sufficient injury to invoke the jurisdiction of an Ohio Court of Common Pleas. This is precisely what the Ninth District Court of Appeals held in *BAC Home*

Loan Serv. v. McFerren, 2013-Ohio-3228 when it reversed summary judgment and reasoned that "the Supreme Court did not intend to imply that simply possessing the mortgage is sufficient to establish standing given that a party who simply holds the mortgage suffers no injury. *See Schwartzwald*, at ¶ 28."

Even if the Court wanted to address issues of standing, the case before the court does not present an opportunity to do so. The Appellant misinterprets the holding of the Ninth District Court of Appeals and twists for its own argument the posture of the case before the court. This case is not about what is required to demonstrate standing to file a complaint for foreclosure. Standing is the allegation of an injury or personal stake in the outcome of a controversy. *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7. But, when a plaintiff files a motion for summary judgment the plaintiff must actually prove that its allegations of standing are true. The plaintiff must establish that it was entitled to enforce the note and was the mortgagee at the time the complaint was filed.

In *Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333 the Ninth District Court of Appeals reversed summary judgment because a material issue of fact remained for trial as to whether or not Appellant was the holder of the note because at different times in the proceedings Appellant and its servicer put forward different versions of the note. The Court of Appeals determined that these discrepancies require a trial to determine which, if any, of the versions of the note the Appellant held at the time of filing the complaint for 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.
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> *Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333, ¶15.

Finally, many of the arguments advanced in Appellant's merit brief are barred by res judicata because as the Ninth District Court of Appeals in *Holden* stated:

> 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.
>
> *Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333, ¶16.

This court has held that arguments which were not raised below may not be considered for the first time on appeal. *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 279."

Appellant attempts to frame this case as an issue implicated under this Court's decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017 but in *Schwartzwald* this Court reversed the judgment and dismissed the case for lack of standing since the plaintiff conceded that did not have an interest in the note or mortgage when the complaint was filed. In the case *sub judice*, all the Ninth District did is correctly point out that Deutsche Bank made inconsistent statements about the condition of the note and its right to enforce that created an issue of fact for trial. The issue of whether holding a mortgage is, alone, a sufficient basis to establish standing is simply not before this court.

Statement of Facts

On August 12, 2011 Appellant Deutsche Bank filed a Complaint for Foreclosure against Appellees Glenn and Ann Holden that had an exhibit of a note payable to "Novastar Mortgage, Inc." (Complaint, Exhibit A). The note attached to the Complaint had a stamp on the first page that stated, "I hereby certify that this is a true and accurate copy of the original." (Complaint, Exhibit A, page 1). The note does not have an indorsement. (Complaint). The mortgage lists Mortgage

Electronic Registrations Systems, Inc. ("MERS") as the mortgagee. (Complaint, Exhibit B). MERS has no interest in the note. (Complaint, Exhibit A). The assignment of mortgage did not contain any language purporting to transfer the note. (Complaint, Exhibit C).

Appellees Glenn and Ann Holden filed a motion to dismiss arguing that the note was payable to Novastar Mortgage, Inc. and not to Appellant Deutsche Bank and that the mortgage was severed from the note. (Appellees' Motion to Dismiss). Appellant Deutsche Bank filed an opposition to the motion to dismiss and did not say that the note was indorsed, did not seek to amend the complaint with a different note, and stated "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). In the Trial Court's order denying the motion to dismiss, the trial court judge made a specific finding that Deutsche Bank admitted the note was not indorsed to Deutsche Bank:

> Deutsche Bank argues that the assignment of the mortgage and its status as current holder of the Note, even though not indorsed to Deutsche Bank, is sufficient for it to enforce the note.
>
> (Order dated February 21, 2012).

Appellees filed an Answer and Counterclaims for violations of the Fair Debt Collection Practices Act, Invasion of Privacy by Intrusion upon Seclusion, violations of the Consumer Sales Practices Act, and Common Law Fraud. When Appellant Deutsche Bank filed a motion to dismiss the counterclaims Appellant did not state that there was some mistake and that the note really was indorsed, but instead argued that it was not a false statement that Appellant was the "holder" of the unindorsed note attached to the Complaint because an assignment of mortgage was executed. (Motion to Dismiss Counterclaims, page 9). On September 7, 2012 the trial court denied the motion to dismiss Appellees' counterclaims.

At no time did Appellant Deutsche Bank file a motion for leave to file an Amended Complaint to include a note with an indorsement.

Appellees Glenn and Ann Holden filed a Motion for Summary judgment on November 16, 2012. Appellant Deutsche Bank filed a motion for summary judgment on November 20, 2012 supported by the Affidavit of Megan Theodoro who claimed that the note had an indorsement in blank when Chase took possession. (Affidavit of Megan Theodoro). Appellees opposed summary judgment and argued that Appellant Deutsche Bank had 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.

Although the trial court granted Appellant Deutsche Bank's motion for summary judgment, the Ninth District Court of Appeals reversed summary judgment on the grounds that the unindorsed note attached to the Complaint combined with the lack of personal knowledge in the Affidavit of Megan Theodoro and deposition of Frank Dean created a material issue of fact for trial. Appellant Deutsche Bank filed an appeal to the Supreme Court of Ohio.

II. Law and Argument

> **Proposition of Law No. 1:** Under the Uniform Commercial Code, a party seeking to foreclose a mortgage is required to demonstrate an interest in both the note and the mortgage at the time of filing the complaint

In *Schwartzwald*, the paragraph immediately preceding the "note or mortgage" reference focused on how the lack of an interest in the note would prevent a plaintiff from having standing to file a complaint for foreclosure. *See Schwartzwald*, ¶ 27 citing *Deutsche Bank Natl. Trust v. Brumbaugh*, 2012 OK 3, 270 P.3d 151, ¶ 11 ("If Deutsche Bank became a person entitled to enforce the note as either a holder or a nonholder in possession who has the rights of a holder after

the foreclosure action was filed, then the case may be dismissed without prejudice***"[emphasis added];

This analysis squares with the analysis of most courts in judicial foreclosure states interpreting the Uniform Commercial Code. Another case relied upon by this Court in paragraph 27 of *Schwartzwald* was *U.S. Bank Natl. Assn v. Kimball*, 190 Vt. 210, 2011 VT 81, 27 A.3d 1087, ¶ 14 that held U.S. Bank was required to show that *at the time the complaint was filed* it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to U.S. Bank" [emphasis added]).

Additionally, paragraph 27 of *Schwartzwald* cited the Maine Supreme Court holding "Without possession of or any interest in the note, MERS *lacked standing to institute* foreclosure proceedings and could not invoke the jurisdiction of our trial courts" [emphasis added]). *Mtge. Electronic Registration Sys., Inc. v. Saunders*, 2010 ME 79, 2 A.3d 289, ¶ 15.

RMS Residential Properties, L.L.C. v. Miller, 303 Conn. 224, 229, 232, 32 A.3d 307 (2011), quoting *Hiland v. Ives*, 28 Conn.Supp. 243, 245, 257 A.2d 822 (1966) *explained* that " '[s]tanding is the legal right to set judicial machinery in motion" and holding that the plaintiff had standing because it proved ownership of the note and mortgage at the time it commenced foreclosure action). Florida's appellate courts have also found the plaintiff must prove that it had standing to foreclose when the complaint was filed *McLean v. JP Morgan Chase Bank Natl. Assn.*, 79 So.3d 170, 173 (Fla.App.2012). All of the above cases were cited by this Court in paragraph 27 of *Schwartzwald* and indicate all that the note is required with the mortgage in order to foreclose.

The Eighth District Court of Appeals in *Fannie Mae v. Hicks*, 2015-Ohio-1955 reversed summary judgment when the plaintiff had an interest in the mortgage but could not establish that

it had a right to enforce the note:

> While there are circumstances such as bankruptcy proceedings that preclude a party from obtaining personal judgment on the note, it does not follow that a party can enforce a mortgage without being a "person entitled to enforce" the note. In other words, there is a significant difference between being a party that cannot obtain judgment on the note and being a party that is not entitled to enforce the note under R.C. §1303.31(A) (UCC 3-301). (Emphasis added.) The distinction is significant because it determines a party's rights as holder of the mortgage.
>
> A foreclosure proceeding is the enforcement of a debt obligation. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d. 546, 2009-Ohio-306, 906 N.E.2d 396. As a result, foreclosure in Ohio is a two-step process. *First Knox Natl. Bank v. Peterson*, 5th Dist. Knox No. 08CA28, 2009-Ohio-5096, ¶ 18. Only after the court determines liability on the underlying obligation can it proceed to the foreclosure analysis under the mortgage. Id. Thus, a determination of liability under the note is a prerequisite to enforcement of the mortgage itself because a mortgage is but an incident to the debt it secures. *Kernohan v. Manss*, 53 Ohio St. 118, 133, 41 N.E. 258 (1895). As stated by the United States Supreme Court, "[t]he note and the mortgage are inseparable; the former essential, the latter incident." *Carpenter v. Longan*, 83 U.S. 271, 274, 21 L.Ed. 313 (1872).
>
> **[…]**
>
> In other words, "[a] mortgage may be enforced only by * * * a person who is entitled to enforce the obligation the mortgage secures." Restatement (Third) of Property: Mortgages, § 5.4(C) (1997). See also *In Re Dorsey*, 13, 8036 (B.A.P. 6th Cir.2014). To find otherwise would promote the separation of the note and mortgage and potentially subject the defaulting party to claims from multiple parties.
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> *Fannie Mae v. Hicks*, 2015-Ohio-1955, ¶ 31-33.

Contrary to Appellant's statement in its merit brief, the record **is** in dispute as to whether or not Deutsche Bank had possession of Appellant Glenn Holden's original note. A material issue of fact remained for trial since the note attached as an exhibit to the Complaint was certified to be a "true and accurate copy of the original" but it is undisputed that the note did not contain an indorsement. *See Complaint, Exhibit A.*

When Appellant Deutsche Bank moved for summary judgment it did not establish that it was entitled to judgment as a matter of law because material issues of fact remained for trial

regarding possession of the original note and whether the note had been indorsed subsequent to the filing of the complaint.

A. Appellant attempts to misapply this Court's prior cases relating to what proof is necessary to establish standing to bring a foreclosure.

1. *Schwartzwald*

In *Schwartzwald* the Supreme Court of Ohio reasoned that "receiving an assignment of a promissory note and mortgage from the real party in interest subsequent to the filing of an action but prior to the entry of judgment does not cure a lack of standing to file a foreclosure action." *Schwartzwald*, ¶ 3. *Holden* is not inconsistent with *Schwartzwald* because at the summary judgment stage a plaintiff needs to provide undisputed proof that it had both the note and the mortgage at the time of filing the complaint in order to obtain judgment and a decree of foreclosure.

In *Holden* the Ninth District Court of Appeals reversed summary judgment when there was a material issue of fact regarding whether Deutsche Bank had the right to enforce the note when the complaint was filed. *Holden* does not conflict with *Schwartzwald*.

2. *Kuchta*

The case *sub judice* can be distinguished from *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275 because unlike in *Kuchta*, Appellee filed an answer denying that Deutsche Bank had standing or possession of the subject note and opposed Deutsche Bank's motion for summary judgment. Appellant Deutsche Bank failed to present undisputed evidence in its motion for summary Judgment that it had the right to enforce the note. In *Kuchta*, this court sidestepped the issue of determining whether or not the right to enforce a mortgage note was necessary at the time of filing a foreclosure complaint by deciding the matter on procedural grounds, finding that by failing to raise such issues in opposition to a motion for summary judgment the Kuchtas were barred from raising issues in a motion to vacate.

3. *Horn*

This Court's decision in *Horn* is actually consistent with the decision in *Holden* because this Court contemplated in *Horn* that proof of standing could be filed subsequent to the complaint but that such proof HAD to exist in order or a judgment to be entered. *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, ¶ 12. This is the case in *Holden* but factual issues remained for trial as to whether Appellant Deutsche Bank had the evidence. Appellant Deutsche Bank filed a Complaint for Foreclosure with a note that was payable to Novastar Mortgage, Inc. and not Deutsche Bank. When Appellant Deutsche Bank moved for summary judgment Appellant needed to establish that it was entitled to judgment as a matter of law or it would not be granted a judgment of foreclosure. The Ninth District Court of Appeals in *Holden* correctly found that there were material issues of fact for trial.

The mere submission of documents subsequent to the complaint does not remove the factual issues surrounding the credibility and validity of those documents.

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

A plaintiff that only has the mortgage, but no note has not suffered an injury and lacks standing to file a Complaint. "The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage along with it, while an assignment of the later alone is a nullity." *Carpenter v. Longan*, 83 U.S. 271, 21 L. Ed. 313, 1872 U.S. LEXIS 1157, 16 Wall. 271 (U.S. 1873).

It makes sense to require both the note and mortgage for standing to file a foreclosure complaint because foreclosure is a two-step process in Ohio. *See First Knox National Bank v. Peterson*, 2009-Ohio-5096, ¶ 18. "Once a court has determined that a default on an obligation secured by a mortgage has occurred, it must then consider the equities of the situation in order to

decide if foreclosure is appropriate." *Rosselot v. Heimbrock* (1988), 54 Ohio App.3d 103, 105-106. It is only after the court determines there is a default on the note that the Court can proceed to foreclose the mortgage.

The Ninth District Court of Appeals in *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228 correctly reasoned that having an interest in only the mortgage when the complaint was filed would not entitle a plaintiff to a judgment of foreclosure:

> It is apparent that the Ohio Supreme Court did not consider this precise issue in Schwartzwald given that the bank had conceded that it was not the holder of the note or mortgage. See, *e.g.*, *Schwartzwald* at ¶ 28 (noting that Federal Home Loans conceded there was no evidence that it had either). Thus, the language must be read in the context of the entire opinion. Like the Eighth District, this Court has previously held that a party must have the note and the mortgage in order to demonstrate standing. See, *e.g.*, *Richards*, 189 Ohio App.3d 276, 2010-Ohio-3981, at ¶ 13. Other districts have made similar holdings. See, *e.g.*, *Losantiville Holdings L.L.C. v. Kashanian*, 1st Dist. Hamilton No. C-110865, 2012-Ohio-3435, ¶ 17; *Arch Bay Holdings, L.L.C. v. Brown*, 2d Dist. Montgomery No. 25073, 2012-Ohio-4966, ¶ 16; *U.S. Bank Natl. Assn. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, ¶ 32 (7th Dist.); *Rowland*, 2008-Ohio-1282, at ¶ 12. It is unlikely that the Supreme Court intended to overturn the holdings of all of the appellate courts on the issue, especially since the issue was not directly before it.
>
> **Moreover, as explained in Schwartzwald, the fundamental requirement of standing is that the party bringing the action is actually the party who has suffered the injury.** See *Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, at ¶ 23, 28. A party who only has the mortgage but no note has not suffered any injury given that bare possession of the mortgage does not endow its possessor with any enforceable right absent possession of the note. See *Restatement of the Law 3d, Property, Mortgages*, §5.4(e), at 385 (1996) ("[I]n general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation."). In other words, possession of the mortgage is of no import unless there is possession of the note. 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 * * *." Restatement, Section 5.4(c), at 384. See also id. (noting that UCC 3-203 likely requires courts to disregard a mortgage assignment when the negotiable note is not also delivered); Christopher L. Peterson, Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory, 53 Wm. & Mary L.Rev. 111, 119 (2011), fn. 34 (compiling cases from many jurisdictions finding that the note and the mortgage are inseparable and that the assignment of a mortgage alone is a nullity). This would further support the conclusion that the Supreme Court did not intend to imply that simply possessing

> the mortgage is sufficient to establish standing given that a party who simply holds the mortgage suffers no injury. See *Schwartzwald*, at ¶ 28.
>
> Thus, we conclude that Schwartzwald did not overturn long-standing property and foreclosure principles and, therefore, BAC had to be holder of the Note and the Mortgage at the time it initiated this action order to have standing. Id.
>
> *BAC Home Loan Serv. v. McFerren,* 2013-Ohio-3228, ¶ 11-13. [**Emphasis added**].

McFerren, like *Holden*, is a summary judgment decision. Having possession of a note at the time summary judgment is filed does not indicate that a plaintiff had possession of the original note **when the complaint was filed**. If there is a factual issue regarding possession then the plaintiff is not entitled to judgment as a matter of law.

The First District Court of Appeals in *HSBC Bank USA v. Sherman*, 2013-Ohio-4220 did not interpret this Court's use of "note or mortgage" in paragraph 28 of *Schwartwald* to mean that a plaintiff could have standing by attaching a note or a mortgage to the complaint for foreclosure:

> The "or" statement must be read in the context of the entire opinion. The question of whether standing can be achieved by the filing of either document with the complaint was not presented by the facts of the case and was not necessary to the resolution of the issue presented.
>
> *HSBC Bank USA v. Sherman,* 2013-Ohio-4220, ¶ 17.

The *Sherman* and *Wells Fargo Bank, N.A. v. Dawson*, 2014-Ohio-269 cases cited by Appellant can be distinguished on a different theory under the Uniform Commercial Code relating to the right to enforce a note. The Plaintiff in *Holden* did not argue that they were a non-holder in possession with a right to enforce in their motion for summary judgment and is barred from making that argument on appeal. *See Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333, ¶16. The cases *Sherman* and *Dawson* therefore do not apply.

R.C. §1303.31 describes who is entitled to enforce a note:

> (A) "Person entitled to enforce" an instrument means any of the following persons:
> (1) The holder of the instrument;

(2) A nonholder in possession of the instrument who has the rights of a holder;

(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 1303.38 or division (D) of section 1303.58 of the Revised Code.

(B) A person may be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

R.C. §1303.31.

A person with only an interest in the mortgage is statutorily excluded by R.C. §1303.31 from enforcing the note. If a mortgagee or an assignee of the mortgage cannot also be classified into one of the categories in R.C. §1303.31 that defines who is a person entitled to enforce the original note then the mortgagee or assignee lacks standing to file for foreclosure and would not be entitled to judgment as a matter of law.

The nonholder in possession argument is also fundamentally flawed in a case such as Mr. & Mrs. Holden's mortgage was granted to the Mortgage Electronic Registration System, Inc. ("MERS"). MERS had no interest in the Appellee Glenn Holden's promissory note. Therefore an assignment of mortgage from MERS could not possibly transfer to Deutsche Bank the right to enforce the note because MERS never, ever possesses the note or the right to enforce it. *See Complaint, Exhibits A and B.*

In *SRMOF 2009-1 Trust v. Lewis*, 2014-Ohio-71 judgement was granted for the plaintiff based on the assignment of mortgage and lost note affidavit. Enforcing a lost note is governed under R.C. §1303.31(A)(3) and is not applicable to the *Holden* case.

The cases *PHH Mtge. Corp. v. Unknown Heirs of Cox*, 2013-Ohio-4614 and *Deutsche Bank Natl. Trust Co. v. Santisi*, 2013-Ohio-5848 held that the physical transfer of a note indorsed in blank resulted in an equitable assignment of the mortgage. *Deutsche Bank Natl. Trust Co. v.*

Santisi, 2013-Ohio-5848 involved a motion to vacate so the homeowner was not permitted to raise new arguments about the promissory note.

As the Tenth District Court of Appeals stated in *Deutsche Bank Natl. Trust Co. v. Thomas*, 2015-Ohio-4037 when reversing summary judgment:

> Possession of the blank-indorsed note was required to show that appellee was entitled to enforce it, which was an essential element of appellee's claim. Attaching a copy of the note to the complaint suggests that appellee may have possession of the note. However, the evidence presented in support of appellee's motion for summary judgment failed to demonstrate that there was no genuine issue of material fact as to whether appellee had possession of the blank-indorsed note and, therefore, was entitled to enforce it as the holder of the note. The trial court erred by granting summary judgment in favor of appellee.
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> *Deutsche Bank Natl. Trust Co. v. Thomas*, 2015-Ohio-4037, ¶ 19.

The Second District Court of Appeals in *Huntington Natl. Bank v. Payson*, 2015-Ohio-1976 requires that a plaintiff moving for summary judgment must be the holder of the "note and mortgage" or be a party entitled to enforce in order to obtain a judgment of foreclosure:

> "To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due." *JPMorgan Chase Bank, N.A. v. Chenoweth*, 2d Dist. Montgomery No. 25923, 2014-Ohio-3507, ¶ 20; *Nationstar Mortgage, LLC v West*, Montgomery Nos. 25813, 25837, 2014-Ohio-735, ¶ 16; *JPMorgan Chase Bank, N.A. v. Massey*, 2d Dist. Montgomery No. 25459, ¶ 20.
>
> *Huntington Natl. Bank v. Payson*, 2015-Ohio-1976, ¶ 15.

The Eighth District Court of Appeals agrees that to prevail on a motion for summary judgment the plaintiff must prove "that the plaintiff is the holder of the note and mortgage, or is a party entitled to enforce the instrument" *Fannie Mae v. Hicks*, ¶11, 2015-Ohio-1955, citing *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17; *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d

1214, ¶ 20.

The Ninth District Court of Appeals correctly reversed the decision in Holden on the basis that the inconsistencies in the note and Appellant Deutsche Bank's failure to explain these inconsistencies raised a material issue of fact for trial.

C. Standing in a foreclosure action requires an interest in both the note and mortgage as a result a Trial Court cannot grant summary judgment when a material issue of fact remains regarding a plaintiff's interest in the note and mortgage

Appellant Deutsche Bank is attempting to frame the issue as one of standing but Appellant Deutsche Bank admits that "Establishing standing is not the same as establishing a right to judgment." *Appellant's Merit Brief, Subsection C, page 13*. Appellant also states on page 13 of its merit brief:

> "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).

The *Holden* appeal is not a case where the complaint was erroneously dismissed for lack of standing. Instead the holding in the *Holden* case involves the credibility of Chase's corporate representative and the Chase employee who executed an affidavit in support of Deutsche Bank's motion for summary judgment. Since the case involved a summary judgment motion the standard for ruling on Appellant's claim was Civ.R. 56 and under the Civ.R. 56 standard there is a material issue of fact for trial.

In 2015 the Tenth District Court of Appeals in *Deutsche Bank Natl. Trust Co. v. Thomas*, 2015-Ohio-4037 reversed summary judgment because Deutsche Bank was required to have an interest in both the note and mortgage when the complaint was filed:

> A plaintiff seeking summary judgment on a foreclosure claim must demonstrate that it was entitled to enforce the note and had an interest in the mortgage on the date the foreclosure complaint was filed. *FV-I, Inc. v. Lackey*, 10th Dist. No. 13AP-983, 2014-Ohio-4944, ¶ 15. See *JPMorgan Chase Bank, N.A. v. Allton*, 10th Dist. No. 14AP-228, 2014-Ohio-3742, ¶ 12 ("Summary judgment in a foreclosure action is not appropriate unless the party seeking foreclosure demonstrates that it is entitled to enforce the note and had an interest in the mortgage on the date it filed the complaint.").
>
> *Deutsche Bank Natl. Trust Co. v. Thomas*, 2015-Ohio-4037, ¶ 9.

1. A mortgagee or an assignee of a mortgage does not have standing to file a foreclosure action if that mortgagee or assignee lacks the right to enforce the note and as a result the subsequent assignee has no actual actionable injury.

Unless there is a default on the note there is no basis to foreclose the mortgage. Appellant Deutsche Bank did not allege any other basis in the Complaint filed against Appellees Glenn and Ann Holden. (Complaint). A person who is not entitled to enforce the note has suffered no injury and lacks standing to file a complaint for foreclosure.

The mortgage alone can never provide standing to sue because any amounts advanced for escrow or insurance would be added to the amount owed to the lender under the note. Appellees Glenn and Ann Holdens' 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 it is undisputed that mortgagee MERS never had 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. The assignment of mortgage expressly transferred only the mortgage to Deutsche Bank and did not transfer the note so Deutsche Bank would not be entitled to any money advanced under the mortgage if Deutsche Bank did not possess the note. A material issue of fact existed for trial as to whether Deutsche Bank had possession of the original note when the Complaint was filed.

Finding that it is necessary for a foreclosure plaintiff to prove both the right to enforce the note and Assignment of the Mortgage would align Ohio's interpretation of the UCC with *Restatement of the Law of Property* and the Courts in most other judicial foreclosure States.

Florida courts, like many in Ohio, hold that "the right to enforce a mortgage (by forced sale of property) is dependent on the right to enforce the note secured by the mortgage. *See WM Specialty Mortg., LLC v. Salomon,* 874 So. 2d 680, 682 (Fla. 4th DCA 2004) ("[A] mortgage is but an incident to the debt, the payment of which it secures." (quoting *Johns v. Gillian*, 184 So. 140, 143-44 (Fla. 1938))." *Rodriguez v. Wells Fargo Bank, NA*, Fla. Dist Court of Appeals, 4th Dist. 2015.

This interpretation is consistent with the principle that the "mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures." *Restatement of the Law 3d, Property, (Mortgages)*, Section § 5.4(c).

The Restatement 5.4 in Comment b explains that entitlement to enforce the note is transferred by the actual delivery of the note so that the new person has possession, not through assignment of ownership or through an assignment of the mortgage. *Restatement of the Law 3d, Property, (Mortgages)*, Section § 5.4, Comment b (1997).

Without an interest in the note Appellant Deutsche Bank could not foreclose Appellees Glenn and Ann Holden's mortgage.

2. A person entitled to enforce a note has standing to file a foreclosure action if the mortgage has not been severed from the note

A person who is entitled to enforce a note may obtain judgment on the note. If the person entitled to enforce a note is also the mortgagee or assignee of the mortgage then that person may seek foreclosure of the mortgage.

Other states have interpreted the same provisions of the Uniform Commercial Code to require that a plaintiff prove a right to enforce a note at the time of filing a complaint for foreclosure in addition to proving the right to foreclose the mortgage.

In the United States of America some states conduct judicial foreclosures and other states have a non-judicial foreclosure process. There are 14 other judicial foreclosure states where courts have directly held that a foreclosure plaintiff must have both the note and the mortgage:

Connecticut

In *RMS Residential Properties, L.L.C. v. Miller*, 303 Conn. 224, 229, 232, 32 A.3d 307 2011 the Court explained that " '[s]tanding is the legal right to set judicial machinery in motion'" and held that the plaintiff had standing because it proved ownership of the note and mortgage at the time of filing the foreclosure complaint. *RMS Residential Properties, L.L.C. v. Miller*, 303 Conn. 224, 229, 232, 32 A.3d 307 (2011), quoting *Hiland v. Ives*, 28 Conn.Supp. 243, 245, 257 A.2d 822 (1966).

Florida

"A party must establish its standing to bring a mortgage foreclosure complaint by establishing an assignment or equitable transfer of the note and mortgage prior to instituting the complaint. *McLean v. JP Morgan Chase Bank,* 79 So.3d 170, 173 (Fla. 4th DCA 2012) ." *Joseph v. BAC Home Loans Servicing, LP*, 155 So. 3d 444, 445 (Fla. 4th DCA 2015).

"If standing is claimed on the basis of indorsement of the note from the original named payee, the plaintiff must establish that the note was indorsed "before the filing of the complaint in order to prove its standing as a holder." *Seidler v. Wells Fargo Bank, N.A.*, 2015 Fla. App. LEXIS 16918 (Fla. 1st DCA 2015) citing *Kiefert v. Nationstar Mortgage, LLC*, 153 So. 3d 351, 352 (Fla. 1st DCA 2014) (reversed trial judgment for the bank because Wells Fargo failed to prove its

standing and establish that it was entitled to enforce the note). *See also Farkas v. U.S. Bank, N.A.*, 165 So. 3d 796 (Fla. 4th DCA 2015) (judgment reversed due to lack of proof of standing because unindorsed note attached to complaint differed from indorsed note presented at trial).

Hawaii

"A mortgagee must establish that it was assigned the mortgage and corresponding promissory note before it has the ability to foreclose. *Citicorp Mortg., Inc. v. Bartolome*, 94 Hawaii 422, 434, 16 P.3d 827, 839 (App. 2000) (plaintiff was real party in interest in foreclosure action where it owned the mortgage and note throughout the proceedings)." *Bank of Am., NA v. Hill*, 2015 Haw.App. LEXIS 522, Hawaii Intermediate Court of Appeals (October 30, 2015).

Illinois

"To establish a *prima facie* case of foreclosure in accordance with section 15-1504, a plaintiff is required to introduce evidence of the mortgage and promissory note, at which time the burden of proof shifts to the defendant to prove any affirmative defenses. *Farm Credit Bank of St. Louis v. Biethman,* 262 Ill.App.3d 614, 622, 199 Ill.Dec. 958, 634 N.E.2d 1312 (1994)." *Bank of Am., N.A. v. Adeyiga*, 2014 IL App (1st) 131252, 72.

Indiana

In *Good v. Wells Fargo Bank, NA*, 18 NE 3d 618 - Ind: Court of Appeals 2014 partial summary judgment was reversed when there was a recorded assignment of mortgage to the plaintiff prior to the filing of the complaint but Wells Fargo did not establish that it had control over the electronic promissory note that was not indorsed and owned by Fannie Mae.

> Pursuant to statute, upon Good's request, Wells Fargo was required to provide "reasonable proof" that it was in control of the Note. 15 U.S.C. §7021(f). "Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record." *Id.* Although Good repeatedly requested such proof, Wells Fargo did not provide any

evidence documenting the transfer or assignment of the Note from Synergy to either Wells Fargo or Fannie Mae. Thus, Wells Fargo did not demonstrate it controlled the Note by showing that a system employed for evidencing the transfer of interests in the Note reliably established that the Note had been transferred to Wells Fargo. *See* 15 U.S.C. §7021(b).

Good v. Wells Fargo Bank, NA, 18 N.E. 3d 618 - Indiana Court of Appeals (September 29, 2014).

Kansas

"Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable.

"The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.] The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust. *Bellistri v. Ocwen Loan Servicing, LLC,* 284 S.W.3d 619, 623 (Mo.App.2009)." 289 Kan. at 539-40, 216 P.3d 158.

Likewise, in the instant case, this mortgage states that MERS acts "solely as nominee" for Countrywide. There is no mention of MERS in the promissory note, and there is no evidence that Countrywide assigned the note to MERS. Thus, there is no evidence that MERS has suffered any injury caused by Graham and Martinez' failure to make payments on the promissory note. The note does not obligate Graham and Martinez to make payments to MERS. Further, there is no indication that MERS possesses any interest in the promissory note, and given *Landmark's* "straw man" characterization of MERS's relationship to lenders, 289 Kan. at 539, 216 P.3d 158, there is no evidence that MERS received permission to act as an agent for Countrywide.

Having suffered no injury, MERS lacks standing to bring foreclosure action.

Mortgage Electronic Reg. Sys. V. Graham, 247 P. 3d 223, 228-229, 44 Kan.App. 2d 547, Kansas Court of Appeals (April 30, 2010).

Kentucky

It is well-settled that a party seeking foreclosure must establish by sufficient evidence ownership or the right to otherwise collect the debt. However, whether or under what circumstances it is necessary for that party to produce the original note involved in a mortgage foreclosure is much more unclear. *Necessity of Production of Original Note Involved in Mortgage Foreclosure—Twenty-First Century Cases,*

> 86 A.L.R.6th 411 (2013). Contrary to the master commissioner's report, we believe the *Stevenson* decision supports the proposition that where, as here, a plaintiff attempts to enforce bearer paper as the holder thereof and a defendant raises an issue as to actual possession of the original note, the purported holder has a duty to establish such as required by Kentucky's U.C.C.
>
> As the party moving for summary judgment, it was incumbent upon Wells Fargo to demonstrate that there existed no genuine issues of material fact. *Steelevest,* 807 S.W.2d at 480. We must conclude that the evidence in the record, as it currently stands and viewed in the light most favorable to the Acuffs, is insufficient to establish whether Wells Fargo was the holder of the Acuffs' original note and thus, the real party in interest at the time the foreclosure action was filed. Because genuine issues of material fact existed, the trial court erred in granting summary judgment.
>
> *Acuff v. Wells Fargo Bank, NA*, 460 S.W.3d 335, Kentucky Court of Appeals (May 9, 2014).

Maine

"Without possession of or any interest in the note, MERS *lacked standing to institute* foreclosure proceedings and could not invoke the jurisdiction of our trial courts" [emphasis added] *Mtge. Electronic Registration Sys., Inc. v. Saunders*, 2010 ME 79, 2 A.3d 289, ¶ 15.

The Maine Supreme Court in *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89 reasoned that MERS is not a mortgagee under Maine's foreclosure statute, an assignment from MERS only transferred the right to record the mortgage as nominee for the lender not ownership, ownership of the mortgage is required for foreclosure, and held that foreclosure requires both the note and the mortgage:

> "[A] mortgagee is a party that is entitled to enforce the debt obligation that is secured by a mortgage." *Saunders*, 2010 ME 79, ¶ 11, 2 A.3d 289 (emphasis omitted). Because foreclosure regards two documents—a promissory note and a mortgage securing that note—standing to foreclose involves the plaintiff's interest in both the note and the mortgage. See, e.g., *JPMorgan Chase Bank v. Harp*, 2011 ME 5, ¶ 9, 10 A.3d 718 (stating that the plaintiff bank's failure to establish its ownership of the mortgage renders it "vulnerable to a motion . . . challenging [its] ability to foreclose" as a matter of standing); *Saunders*, 2010 ME 79, ¶ 15, 2 A.3d 289 ("Without possession of or any interest in the note, [a party] lack[s] standing to institute foreclosure proceedings and [may] not invoke the jurisdiction of our

trial courts.").

Bank of Am., N.A. v. Greenleaf, 2014 ME 89, ¶ 9.

New Mexico

In *BAC Home Loans Servicing LP v. Smith*, New Mexico Court of Appeals 2015 the Court reversed summary judgment because BAC Home Loans Servicing, LP did not have standing when the complaint was filed with an unindorsed note and an assignment of mortgage from MERS:

> In foreclosure actions, standing is a jurisdictional prerequisite. *See Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶¶ 15, 17, 320 P.3d 1 ("[L]ack of standing is a potential jurisdictional defect . . . standing [is] a jurisdictional prerequisite for a statutory cause of action" (alteration, internal quotation marks, and citation omitted)). A party filing for foreclosure is "required to demonstrate under New Mexico's Uniform Commercial Code (UCC) that it had standing to bring a foreclosure action at the time it filed suit." *Id.* ¶ 17. In order to establish its standing to foreclose, a plaintiff must demonstrate that it had the right to enforce the note and the right to foreclose the mortgage at the time the complaint for foreclosure was filed. *Id.* Because the right to enforce the mortgage arises from the right to enforce the note, the question of standing turns on whether the plaintiff has established timely ownership of the note. *Id.* ¶¶ 17, 35.
>
> *BAC Home Loans Servicing LP v. Smith*, 2015 N.M. App. LEXIS 119, New Mexico Court of Appeals (November 4, 2015).

New York

"A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note, "either by physical delivery or execution of a written assignment prior to the commencement of the action" (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108). Moreover, "an assignment of the mortgage without assignment of the underlying note or bond is a nullity" (*U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; *see Bank of N.Y. v Silverberg*, 86 AD3d 274, 280)." *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888 (Nov. 15, 2011).

Oklahoma

In *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, 280 P.3d 328 the Supreme Court of Oklahoma stated:

> To commence a foreclosure action in Oklahoma, a plaintiff must demonstrate it has a right to enforce the note and, absent a showing of ownership, the plaintiff lacks standing. *Gill v. First Nat. Bank & Trust Co. of Oklahoma City*, 1945 OK 181, 159 P.2d 717. Article III of the Uniform Commercial Code (hereinafter U.C.C." governs negotiable instruments and is codified in the Oklahoma Statutes. Because the note is a negotiable instrument, it is subject to the requirements of the UCC. Thus, a foreclosing entity has the burden of proving it is a "person entitled to enforce an instrument" by showing it was "(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 12A-3-309 or subsection (d) of Section 12A-3-418 of this title." 12A O.S. 2001 §3-301. The Appellee has the burden of showing it is entitled to enforce the instrument. *See, Reserve Loan Life Ins. Co. v. Simmons*, 1928 OK 669, ¶ 9, 282 P. 279, 281. Unless the Appellee was able to enforce the note *at the time the suit was commenced*, it cannot maintain its foreclosure action against the Appellants.

Wells Fargo Bank, N.A. v. Heath, 2012 OK 54, 280 P.3d 328, ¶ 9.

"If Deutsche Bank became a person entitled to enforce the note as either a holder or a nonholder in possession who has the rights of a holder after the foreclosure action was filed, then the case may be dismissed without prejudice***"[emphasis added]." *Deutsche Bank Natl. Trust v. Brumbaugh*, 2012 OK 3, 270 P.3d 151, ¶ 11.

South Carolina

> An assignee stands in the shoes of its assignor. *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639, 518 S.E.2d 44, 46 (Ct.App.1999); *see also* S.C.Code Ann. § 36-3-203(b) (Supp.2012) (providing a transfer of an instrument vests in the transferee any rights the transferor had). "[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but ... the assignment of the mortgage alone does not carry with it an assignment of the note." *Hahn v. Smith*, 157 S.C. 157, 167, 154 S.E. 112, 115 (1930); *see also Ballou v. Young*, 42 S.C. 170, 176, 20 S.E. 84, 85 (1894) ("The transfer of a note carries with it a mortgage given to secure payment of such note.").
>
> "A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct.App.2009). "Generally, the party seeking foreclosure has the

burden of establishing the existence of the debt and the mortgagor's default on that debt." *Id.* at 374-75, 684 S.E.2d at 205."

Bank of Am.,NA v. Draper, 746 SE 2d 478, 2013 S.C.App. LEXIS 260, South Carolina Court of Appeals (August 27, 2013).

Vermont

U.S. Bank was required to show that *at the time the complaint was filed* it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to U.S. Bank" [emphasis added] *U.S. Bank Natl. Assn v. Kimball*, 190 Vt. 210, 2011 VT 81, 27 A.3d 1087, ¶ 14.

Wisconsin

""[A] mortgage cannot exist without a debt." *Mitchell Bank v. Schanke,* 2004 WI 13, ¶ 32, 268 Wis.2d 571, 676 N.W.2d 849. As a result, in order to prevail on a foreclosure claim, a mortgagee must first prove it has the right to enforce the note. *See PNC Bank, N.A. v. Bierbrauer,* 2013 WI App 11, ¶ 10, 346 Wis.2d 1, 827 N.W.2d 124." *Dow Family, LLC v. PHH Mortg. Corp*., 838 NW 2d 119, 2013 WI App 114, Wisconsin Court of Appeals (August 6, 2013).

3. A party entitled to enforce a note or mortgage is not presumed to be entitled to enforce the other instrument because a mortgage is merely security for a debt and there is no statute involving the entitlement to enforce a mortgage

Appellant's merit brief on page 19 admits that there is "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)." Summary judgment pleadings and affidavits are all about rebutting presumptions. Appellant Deutsche Bank could not rely upon presumptions of a transfer when it moved for summary judgment. Instead Appellant Deutsche Bank was required to establish that no material fact existed regarding its claims and Appellant failed to do so.

The assignment of Appellees' mortgage did not state that it was transferring an interest in the note. (Complaint, Exhibit C). Due to this missing language in the assignment of mortgage, as well as the fact that the note in any of the terms proffered by the Appellant does not list MERS as ever having any interest in Appellee Glenn Holden's note, there could not be a nonholder in possession argument for foreclosure in Appellees' case. A nonholder in possession of a note must still have the rights of a holder to be able to enforce the note. See R.C. §1303.31(A)(2)

A mortgage assignment does not transfer a negotiable instrument such as a note – the mortgage follows the negotiable instrument as an incident to the debt. *See Washer v. Tontar*, 128 Ohio St. 111, 190 N.E. 231 (1934); *Edgar v. Haines*, 109 Ohio St. 159, 164, 141 N.E. 837 (1923).

Appellant Deutsche Bank could not obtain the rights of a holder from the assignment of mortgage from MERS because the assignment expressly did not transfer an interest in the note and even if it did MERS had no interest in the note to transfer. (Complaint, Exhibits A, B. and C).

In *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, 280 P.3d 328 the Supreme Court of Oklahoma analyzed this exact issue and determined that Wells Fargo did not have standing because the note was unindorsed and the bank could not become the holder through an assignment of mortgage when the assignment did not purport to assign the note and only assigned the mortgage:

> The assignment of mortgage to Appellee does not also purport to assign the note. It only assigns the mortgage. An assignment of the mortgage is not an assignment of the note. In Oklahoma, "[p]roof of ownership of the note carried with it ownership of the mortgage security." *Engle v. Federal Nat. Mortg. Ass'n*, 1956 OK 176, ¶7, 300 P.2d 997, 999. The opposite is not true. Therefore, *Everhome* is not persuasive to the disposition of the present case.
>
> *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, 280 P.3d 328, ¶ 11.

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, Oregon Supreme Court 2013.

The Court in the New York case *Bank of N.Y. v. Silverberg*, 86 AD3d 274 reasoned that the plaintiff lacked standing and that the complaint should be dismissed when the MERS assigned the mortgage but had no interest in the note:

> because MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the corrected assignment of mortgage is a nullity, and MERS was without authority to assign the power to foreclose to the plaintiff. Consequently, the plaintiff failed to show that it had standing to foreclose.
>
> *Bank of N.Y. v. Silverberg*, 86 AD3d 274, 283 (June 7, 2011).

The Restatement (Third) of Property; Mortgages § 5.4 reasons that "a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise." Restatement § 5.4(b). In Appellees Glenn and Ann Holden's case the parties to the transfer did agree otherwise. The assignment of mortgage makes no reference to transferring the note. *See Complaint, Exhibit C*. Therefore, when Appellant Deutsche Bank argued in its opposition to Appellees' motion to dismiss the Complaint and in its motion to dismiss the counterclaims that Appellant obtained an interest in the note due to the assignment of the mortgage that was not accurate. The presumption that the note and mortgage were transferred together was rebutted by the language in the assignment and by the unindorsed copy of the note attached to the Complaint.

The Ninth District Court of Appeals properly determined that a material issue of fact remained for trial.

4. Appellant Deutsche Bank did not have standing to file a complaint for foreclosure and was not entitled to a judgment of foreclosure

"When the right of enforcement of the note and the mortgage are split, the note becomes, as a practical matter, unsecured." Restatement Cmt. a.

Appellant Deutsche Bank filed a Complaint with a note payable to non-party Novastar Mortgage, Inc. and an assignment of mortgage from MERS that expressly assigned only the mortgage and did not transfer any interest in the note. *See Complaint, Exhibits A and C*. While Appellant Deutsche Bank argued that Chase had possession of the original note indorsed in blank since 2005 a factual issue remained for trial on that issue because the note attached to the Complaint stated that it was a "true and accurate copy of the original" and the note did not have an indorsement in blank. (Complaint, Exhibit A). Appellant Deutsche Bank also filed a motion for relief from stay in Appellees' bankruptcy case and the motion for relief from stay contained a note that did not have an indorsement in blank. Appellant also never mentioned that the note attached to the Complaint was not accurate when Appellant filed an opposition to Appellees' motion to dismiss. Appellant never sought leave to amend the complaint with the so-called correct version of the original note. The lack of personal knowledge of Appellant's corporate representative Frank Dean and the affiant Megan Theodoro also raised material issues of fact for trial. These factual issues in the *Holden* case were enough to rebut the presumption that the note and mortgage were transferred together.

D. The Ninth District Court of Appeals correctly reversed the trial court decision

In *Deutsche Bank Natl. Trust Co. v. Holden*, 2014-Ohio-1333 the Ninth District Court of Appeals reversed summary judgment based on a material issue of fact due to different versions of the note:

> 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.

The Restatement explains why both the note and the mortgage are necessary:

> "[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).

In *BAC Home Loans Servicing, L.P. v. Blythe*, 2013-Ohio-5775 the Seventh District Court of Appeals reversed summary judgment when the Plaintiff was assigned the mortgage from MERS, but the note was not indorsed to the Plaintiff:

> The note in this instance, unlike the note in Marcino, is not bearer paper: it is payable to a specific entity and Appellee is not that entity. Countrywide Bank FSB, not Appellee, is the holder of the note filed in this action. "The current holder of the note and mortgage is the real party in interest in foreclosure actions." Id. at ¶32. "Where a party fails to establish itself as the current holder of the note and mortgage, summary judgment is inappropriate." Id.
>
> *BAC Home Loans Servicing, L.P. v. Blythe*, 2013-Ohio-5775, ¶ 19.

By analysis, the note attached to Appellant Deutsche Bank's Complaint had the specific payee Novastar Mortgage, Inc. (Complaint, Exhibit A). Deutsche Bank was not the holder of the note attached to the Complaint.

After *Schwartzwald* when the cases *CitiMtge., Inc. v. Loncar*, 2013-Ohio-2959 and *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894 analyzed the "note or mortgage" issue the "or" that the Courts focused on was the note, on the basis that the Plaintiff had the note and an equitable assignment of mortgage. Prior to *Schwartwald* some courts had reversed judgments when the assignment of mortgage had not been executed until after the filing of the complaint. *See Wells Fargo Bank, N.A. v. Jordan*, 2009-Ohio-1092; *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603. *Loncar* and *Patterson* merely recognized that a recorded assignment of mortgage may not always be necessary because there could be an equitable assignment of the mortgage. The Courts also relied upon an equitable assignment of mortgage in *Bank of N.Y. Mellon Trust Co. N.A. v. Herres*, 2014-Ohio-1539, ¶ 29, *U.S. Bank Natl. Assn. v. Gray*, 2013-Ohio-3340, and *Bank of New York Mellon v. Burke*, 2013-Ohio-2860.

The Eighth District Court of Appeals requires both the note and mortgage in order to obtain a decree of foreclosure and held that "While a party who demonstrates it possesses the mortgage may have standing to seek foreclosure, in order to succeed, that party must also demonstrate rights to enforce the note." *HSBC Bank USA, Natl. Assn. v. Surrarrer*, 2013-Ohio-5594, ¶17 (reversed summary judgment because there was no credible evidence in the record that HSBC was a nonholder in possession of the note when Wells Fargo possessed the note).

The Eleventh District Court of Appeals denied a motion to vacate in *Fed. Home Loan Mtge. Corp. v. Koch*, 2013-Ohio-4423, ¶ 34 because "appellee expressly alleged in its complaint that it was the present holder of the promissory note between appellants and Park View Federal. Given that appellants never filed an answer to the complaint, they admitted appellee's allegation as to the note for purposes of this action."

The cases *HSBC Bank USA v. Sherman*, 2013-Ohio-4220 and *Bank of New York Mellon v. Matthews*, 2013-Ohio-1707 relied on a nonholder in possession argument due to a transfer of the note from the assignment of mortgage.

If this Court chooses to clarify what interest is required for standing to file a foreclosure complaint this Court's ruling on the "note or mortgage" vs. "note and mortgage" issue for standing to file a complaint will not result in a reversal of the decision in *Holden* because an interest in both is still required to obtain a judgment of foreclosure and the material issue of fact on the summary judgment motion would still be unresolved.

> In a residential foreclosure action, the court is faced with two distinct, but related issues. *Metro. Life Ins. v. Triskett Illinois, Inc.*, 97 Ohio App.3d 228, 234, 646 N.E.2d 528 (1st Dist.1994). The first issue presents the legal question of whether the mortgagor has defaulted on the note. *Id.* The second issue entails an inquiry into whether the mortgagor's equity of redemption should be foreclosed. *Id.*
>
> *Bank of Am. v. Smith*, 2014-Ohio-2845, ¶8 (reversed summary judgment when the note and mortgage were not properly authenticated).

McFerren is a summary judgment decision that requires the note and mortgage and cites the Restatement for analysis of the legal issues surrounding a severance of the note and mortgage. On summary judgment when there are different notes a factual issue remains for trial as to possession of the original note at the time of filing the complaint, and the appearance of the note if it is possessed. The mortgage alone can never 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. The assignment did not transfer the note but assigned the mortgage to Appellant Deutsche Bank and a

material issue of fact existed for trial as to whether Deutsche Bank had possession of the original note when the Complaint was filed.

According to the "true and accurate copy" of the note attached to the Complaint the note remained payable to Novastar Mortgage, Inc. *See Complaint, Exhibit A*. Wells Fargo Bank, N.A. is the custodian identified in the Pooling and Servicing Agreement for the trust. (Deposition of Frank Dean, pages 34-39). However, the note was allegedly possessed by Chase with an indorsement in blank since 2005. *See Affidavit of Megan Theodoro*. Yet even after Appellant was challenged by Appellees' motion to dismiss due to the unindorsed note attached to the Complaint, the Appellant argued in its opposition that an indorsement was not necessary. (Appellant's opposition filed on December 12, 2011). When the trial denied Appellees' motion to dismiss the trial court stated, "Deutsche Bank argues that the assignment of the mortgage and its status as current holder of the Note, even though not indorsed to Deutsch Bank, is sufficient for it to enforce the note." (Order dated February 21, 2012).

The trial court found that Appellant Deutsche Bank was not arguing in 2011 that the original note was indorsed in blank. (Order dated February 21, 2012). Appellant also argued that it became a holder through the assignment of mortgage, not an indorsement on the note. (Appellant's Motion to Dismiss Counterclaims).

A material issue of fact remains for trial as to when the indorsement in blank was stamped onto the note and whether Appellant Deutsche Bank had possession of the original note when the complaint was filed.

> "The bank's argument fails. The bank does not dispute that its witness could offer no proof as to when the blank indorsement was placed on the note. No testimony was offered that the blank indorsement was on the note on the date suit was filed. To the extent the bank is traveling on the status of a holder of a blank indorsed note, the core element of possession was proven, but the core element concerning to whom the note was payable on the date suit was filed was not proven. Evidence of

> possession of the note since 2007 does not establish that the note was endorsed in blank prior to suit being filed."
>
> *Rodriguez v. Wells Fargo Bank, NA*, Fla Dist. Court of Appeals, 4th Dist. 2015 (Conner, J. concurring specially).

In *Fannie Mae v. Trahey*, 2013-Ohio-3071 the Ninth District Court of Appeals reversed summary judgment when there were two different notes filed in a Complaint and Amended Complaint and reasoned:

> The inconsistencies between the indorsements contained in the two copies of the promissory notes raises a genuine issue of material fact. In reviewing the record, we cannot determine what the status of the note was at the time the complaint was filed. Because there is a genuine issue of material fact as to whether Fannie Mae was a holder of the promissory note at the time the complaint was filed, the court erred in granting Fannie Mae's motion for summary judgment.
>
> *Fannie Mae v. Trahey*, 2013-Ohio-3071, ¶12.

The Ninth District Court of Appeals correctly reversed the decision in *Holden* on the basis that the inconsistencies in the note and Appellant's failure to explain these inconsistencies raised a material issue of fact for trial.

E. The Tenth District Court of Appeals was correct to cite Holden *and to reverse summary judgment*

The Tenth District Court of Appeals cited to *Holden* and reversed summary judgment in *FV-I, Inc. v. Lackey, 2014-Ohio-4944*, 2014 Ohio App. LEXIS 4812 (Ohio Ct. App., Franklin County Nov. 6, 2014) when the plaintiff filed a different note with its summary judgment motion:

> appellee did not offer any explanation of the different versions of the Note. McCloskey's affidavit in support of the motion for summary judgment attests that appellee had possession of the Note and Mortgage prior to the filing of the complaint and addresses the assignment history of the Mortgage, but fails to address the two versions of the Note. Further, each version of the Note in this case contains endorsements, but the endorsements are different between the two versions. Absent any explanation for the discrepancy between the two versions of the Note, and construing the evidence in favor of appellant as the party opposing summary judgment, it appears that there is a genuine issue of material fact as to whether appellee was entitled to enforce the Note.

FV-I, Inc. v. Lackey, 2014-Ohio-4944, 2014 Ohio App. LEXIS 4812 (Ohio Ct. App., Franklin County Nov. 6, 2014)

The Sixth District Court of Appeals decision in *U.S. Bank, N.A. v. McGinn*, 2013-Ohio-8, 2013 Ohio App. LEXIS 2, 2013 WL 56157 (Ohio Ct. App., Sandusky County Jan. 4, 2013) also reversed summary judgment when a different note had been filed with the motion for summary judgment and reasoned:

> Appellants argued in the trial court, as they do here, that the inconsistency creates a genuine issue of material fact. Specifically, appellants contend that the additional special endorsement on the second copy of the note calls into question whether U.S. Bank was in possession of the note at the time the complaint was filed, since the copy it attached to the complaint did not include the additional special endorsement.

In response, U.S. Bank points to a second affidavit made by Knapp, which U.S. Bank attached to its reply brief In Knapp's second affidavit, he explains the reason for the difference between the two copies of the note, and states:

> > Based on the circumstances of this case and my personal knowledge of how foreclosure counsel obtain copies of notes, earlier versions of the notes, not identical to the actual original Note held in the custodial vault, are in GMACM's computer system and are sometime[s] printed out and inadvertently attached to foreclosure complaints. I believe that is what happened with the copy of the Note which was attached to the Complaint in this case, and is the reason the Note attached to the Complaint was not a copy of the actual original Note.
>
> U.S. Bank argues that Knapp's second affidavit resolves any issue concerning the difference in the original note and the copy that was attached to the complaint. However, the language of that affidavit is indecisive. Rather than providing a definitive explanation for the additional endorsements on the original note, Knapp states that he believes that the wrong copy of the complaint was inadvertently attached to the foreclosure complaint. However, Civ.R. 56(E) requires personal knowledge. Indeed, believing something to be true is different that knowing something is true.
>
> While it may be true that U.S. Bank met its initial burden of demonstrating that no genuine issue of material fact existed, appellants responded by showing that a genuine issue of material fact did exist by pointing to the inconsistency in the two notes. The difference in the two notes calls into question whether U.S. Bank actually possessed the original note prior to filing the complaint. If U.S. Bank did not, it was not a holder and, thus, lacked standing to bring the foreclosure action in the first place. Construing the evidence in a light

> most favorable to appellants, we conclude that the trial court erred when it granted U.S. Bank's motion for summary judgment. Accordingly, appellants' assignment of error is well-taken.
>
> *U.S. Bank, N.A. v. McGinn*, 2013-Ohio-8, 2013 Ohio App. LEXIS 2, 2013 WL 56157 (Ohio Ct. App., Sandusky County Jan. 4, 2013)

The United States Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals reversed summary judgment when there were two different copies of the note:

> The debtor Allana Baroni commenced an adversary proceeding against Nationstar Mortgage LLC challenging Nationstar's proof of secured claim, and the bankruptcy court granted summary judgment in favor of Nationstar. The bankruptcy court determined that there was no genuine factual dispute that Nationstar possessed the original promissory note indorsed in blank, so Nationstar qualified as a person entitled to enforce the note and hence had standing to file the proof of claim. Allana asserts that Nationstar demonstrated neither that it had a right to enforce the note and the deed of trust nor that it had an agency relationship with someone else who did.
>
> Our resolution of this appeal largely hinges on our answer to a single question: when a creditor, in the process of supporting a proof of claim based on a promissory note, presents the bankruptcy court with two materially different copies of the indorsements supposedly accompanying the note, can the court on summary judgment correctly determine that there is no genuine dispute that the note has been duly indorsed in blank? We answer this question in the negative. While the bankruptcy court's summary judgment against Allana on one of Allana's four claims for relief can be affirmed on alternate grounds, summary judgment on the other three claims for relief must be reversed
>
> *In re Baroni* (BAP No. CC-14-1578 Ninth Circuit Nov. 10, 2015).

The Ninth District Court of Appeals in *Holden* correctly reversed the trial court decision that granted summary judgment to Appellant Deutsche Bank since there were two different versions of the note in the record. "A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." Civ.R. 56(c).

Appellant Deutsche Bank is incorrect on page 27 of its merit brief because *Schwartzwald did not* answer the question directly by its use of the phrase "note or mortgage."

Paragraph 3 of *Schwatzwald* indicates the Court was focused on the note and mortgage, since both are required for standing and a judgment of foreclosure. This Court held "receiving an assignment of a promissory note and mortgage from the real party in interest subsequent to the filing of an action but prior to the entry of judgment does not cure a lack of standing to file a foreclosure action." *Schwartzwald*, ¶ 3.

This Court's choice in paragraph 3 to use the word "and" when describing what someone could obtain from the real party in interest means that both the note and the mortgage are required for judgment.

CONCLUSION

In order to obtain a judgment of foreclosure a plaintiff needs to demonstrate an interest in both the note and the mortgage. The Ninth District Court of Appeals correctly reversed the judgment because a material issue of fact existed for trial as to whether Appellant Deutsche Bank had possession of the original note when the Complaint was filed. Appellees Glenn and Ann Holden respectfully request that this Court affirm the decision of the Ninth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2015 a true and accurate copy of the foregoing document was served by ordinary U.S. Mail to the following:

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