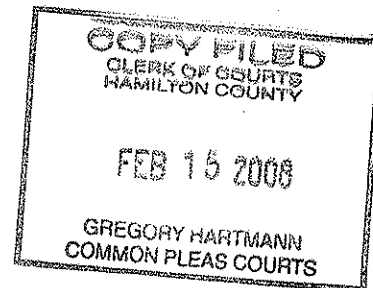


IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



DEUTSCHE BANK NATIONAL
TRUST CO.,

Plaintiff,

v.

TELISA BARNES, et al.

Defendants.

) CASE NO. A0705631

) JUDGE RUEHLMAN

) DEFENDANT STATE OF OHIO'S
) OBJECTIONS TO THE
) MAGISTRATE'S DECISION

The Defendant State of Ohio objects, by and through the undersigned counsel, to the Magistrate's Decision rendered on February 1, 2008, denying the State of Ohio's Motion to Dismiss. In denying the State of Ohio's Motion to Dismiss, the Court failed to find that it is without jurisdiction to hear the case at bar. The Court further failed to find that the Plaintiff is not the real party in interest and did not have standing to bring this action.

BACKGROUND

Plaintiff, Deutsche Bank National Trust Company, as Trustee for the Registered Holders of Soundview Home Loan Trust 2006 EQ2 Asset-Backed Certifications Series 2006-EQ2, filed a Complaint in foreclosure on June 25, 2007. In the Complaint, Plaintiff alleged that it was the holder of the Note and Mortgage. (Plaintiff's Complaint ¶¶ 1-2). Plaintiff attached a Note to the Complaint in the name of the original lender, Equifirst Corporation. (Plaintiff's Complaint Exhibit A). Plaintiff also attached a copy of the original Mortgage in the name of the original lender, Equifirst Corporation. (Plaintiff's Complaint Exhibit B). Plaintiff filed for Default Judgment against Telisa Barnes and the City of Cincinnati on September 21, 2007. The Court granted Default Judgment against

Telisa Barnes on October 25, 2007. The State of Ohio filed an Answer claiming an interest in the case on October 9, 2007. The State of Ohio then filed a Motion to Dismiss the case for lack of jurisdiction, or in the alternative, because Plaintiff was not the real party in interest on December 6, 2007. On December 14, 2007, the Court granted both of the entries proposed by the State of Ohio in its Motion to Dismiss. In response, Plaintiff filed an Amended Complaint, attached thereto was an Assignment of the Mortgage from Mortgage Electronic Registration Systems, Inc. (MERS) to Deutsche Bank National Trust Company, as Trustee for the Registered Holders of Soundview Home Loan Trust 2006 EQ2 Asset-Backed Certifications Series 2006-EQ2, which was executed on July 5, 2007. (Plaintiff's Amended Complaint Exhibit C). On January 4, 2008, the Court granted an Entry vacating the judgments entered on December 14, 2007 because they were entered in error. (Magistrate's Decision pg. 2, fn. 3). An oral argument was conducted before Magistrate Michael Bachman in the Hamilton County Court of Common Pleas on January 24, 2008. A Magistrate's Decision was issued on February 1, 2008, which was filed with the Clerk on February 4, 2008. The State of Ohio objects to the Magistrate's Decision for the reasons fully explained below. The State of Ohio further relies on its previously filed Motion to Dismiss, its supplemental memorandum filed in support of the Motion to Dismiss, and urges the Court to review and consider such pleadings in ruling on these objections.

LAW AND ARGUMENT

A. The State of Ohio Does Not Have a Conflict of Interest.

The Department of Taxation's interests are best preserved by assuring that the parties to the action are the proper parties. According to the Supreme Court of Ohio "a

judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*.” *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 70, 518 N.E.2d 941. As a result, if the Court were to enter judgment without jurisdiction or without the proper parties, the State of Ohio would be prejudiced by having to participate in judicial proceedings to set aside the sale and then relitigate the entire foreclosure. Moreover, the State of Ohio maintains that the interests of the Department of Taxation are better served by allowing homeowners to stay in their homes in order to build equity, which will result in a greater likelihood of payment on tax liens. Evicting homeowners and allowing the Plaintiffs to take judgment will inevitably result in the State’s inability to collect on its tax liens, which do not have priority over all other secured creditors with liens.

B. The Court Must Grant the State of Ohio’s Motion to Dismiss Because the Court Does Not Have Jurisdiction to Hear the Case at Bar.

1. The Magistrate’s Decision improperly merges the State of Ohio’s jurisdictional argument with the alternative Civ. R. 17(A) argument.

The jurisdictional and real party in interest claims asserted by the State of Ohio are alternative arguments that must be considered separately. The State of Ohio does not contend that Civ. R. 17(A) is jurisdictional in nature. Rather, the State of Ohio is making a standing argument that is jurisdictional in nature because there is no actual controversy between the parties to the suit. As discussed in the State of Ohio’s original Motion to Dismiss, Article III, Section (4)(B) of the Ohio Constitution requires an actual controversy to exist in order for there to be a justiciable issue. Without such a controversy, Plaintiff does not have standing. Without standing, the Court does not have jurisdiction to hear the case at bar.

The State of Ohio's argument relating to Civ. R. 17(A) was submitted to this Court as an alternative argument to the standing and jurisdiction argument it advanced in Section I of its initial Motion to Dismiss and Memorandum in Support. Civ. R. 17(A) would have enabled Plaintiff to submit documents to this Court to demonstrate that Plaintiff was the holder of the Note and Mortgage at the time the case was filed. However, we now know that Plaintiff could not do that because a valid assignment of the Note and Mortgage still does not exist. Furthermore, in the event the Court finds it is a valid assignment, Plaintiffs admit that they only first acquired an interest in those instruments **after** the Complaint was filed. (Plaintiff's Amended Complaint Exhibit C). Therefore, Civ. R. 17(A) would not help Plaintiff in this case. Civil Rule 17 assumes that the Plaintiff is the real party in interest at the time the complaint is filed, and allows Plaintiff to substitute another party when they transfer or sell their interest in the claim after the suit is filed. It is not intended to allow parties to file a lawsuit to recover on a claim for which they have no valid interest.

2. The Court improperly relied on the recording statutes rather than the law that requires assignments of interests in real estate to be in writing.

The Court misconstrued the application of the recording statutes in Ohio to the jurisdictional question before this Court. The recording statute was referenced merely as supportive authority for the undeniable conclusion that Ohio law requires transfers of interests in real property to be in writing; it was not for the proposition that they must all be recorded in order to effectuate a transfer of a property interest. *See* R.C. § 1335.04; R.C. § 5301.25.

However, the Magistrate's Decision seems to focus on the discretionary nature of recording. (Magistrate's Decision pp 5-7). The Magistrate's Decision correctly concludes that a Note does not need to be recorded. (Magistrate's Decision p. 6). This is for the very

simple reason that a Note is a negotiable instrument. *Buckeye Federal Sav. & Loan Ass'n v. Guirlinger* (1991), 62 Ohio St. 3d 312, 315 (stating “promissory notes are negotiable instruments under R.C. § 1303.03(A)”). According to the Ohio Revised Code, in order for a negotiable instrument to be properly transferred, it must be negotiated. R.C. § 1303.21(B). Negotiation includes not only the physical transfer of the instrument but also indorsement by the holder to the transferee, which of course, must be in writing. *Id.*; R.C. § 1303.22. In this case, Plaintiff submitted an Assignment of the Mortgage with its Amended Complaint, which allegedly transferred the Note from Mortgage Electronic Registration Systems, Inc. (hereinafter “MERS”) to Plaintiff. However, there is no evidence, and it is not alleged that Equifirst Corporation ever negotiated the Note to MERS; therefore, MERS was not a rightful holder in order to negotiate the Note to Plaintiff. Nor is there any indication that Equifirst Corporation negotiated the Note directly to Plaintiff. The Magistrate’s Decision fails to acknowledge the missing link of negotiation of the Note at issue. Furthermore, although R.C. § 1303.31 and R.C. § 1303.38 allow for a non-holder to enforce a negotiable instrument under certain circumstances, there is no indication that the circumstances contemplated by those statutory provisions are present in this action.

The State also agrees with the conclusion reached in the Magistrate’s Decision that recordation of a mortgage is not required to transfer an interest in the property, but is merely required for perfection of the lien in order to give constructive notice to other parties that may potentially bring suit. (Magistrate’s Decision p. 7). However, missing from the Decision is a more important conclusion that a written assignment is required to validly **transfer** a Mortgage (R.C. § 1335.04 and §§ 5301.01, et seq.); whereas,

recordation is only required for **perfection of the lien**. While it is true that an unrecorded mortgage can be an effective transfer; the assignment must be executed in writing prior to filing the Complaint before the Plaintiff can establish that it has standing to invoke the jurisdiction of the Court.

3. The allowance of notice pleading is not related to a party's lack of standing to bring a lawsuit.

The Magistrate's Decision incorrectly assumes that notice pleading does not require the Complaint to establish that the Plaintiff has a cognizable interest in the case. (Magistrate's Decision p. 7). The Court should recognize that notice pleading only applies to the nature of the claims and defenses thereto (*Bourke v. Carnahan* (2005), 163 Ohio App.3d 818, 824; *State Farm Mut. Auto Ins. Co. v. Loken*, 5th Dist. No. 04-CA-40, 2004 Ohio 5074, at ¶17); it does not pertain to establishing the standing of the parties. The purpose of notice pleading is to put the defendant on notice of the claims and actions which are brought against him/her. "One of the basic purposes of notice pleading is to insure, 'that the adverse party will receive fair notice of the claim and an opportunity to prepare his response thereto.'" *Scassa v. Dye*, 7th Dist. No. 02CA0779, 2003 Ohio 3480, at ¶26 (quoting *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 83, 455 N.E.2d 1344). However, this does not eliminate the requirement that the Plaintiff must have standing at the time of filing in order to bring such claims. Standing is a necessary prerequisite to establish a court's jurisdiction to hear a case. *Cain v. Calhoun* (1979), 61 Ohio App. 2d 240, 242 fn. 2 (citing *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St. 2d 176). Therefore, the appropriate time to establish that the Plaintiff is the holder of the Note and Mortgage is at the time of filing the Complaint, not at the time of judgment rendered on the Complaint.

On the face of the Complaint at issue, Plaintiff has alleged an injury from the Defendant's failure to make payments in accordance with the terms of a promissory note. However, there is no document attached to the Complaint, or even any specific allegation that directly or indirectly connects the Plaintiff to the Defendant. In fact, the original Note is in the name of Equifirst Corporation. (Plaintiff's Complaint Exhibit A). The promissory note represents the duty to pay the lender. In the case at bar, the documents attached to the Complaint show that the Defendant may owe some obligation to some other lender named in the Note (e.g. Equifirst Corporation), but not to the Plaintiff named in the Complaint. (*Id.*). Merely alleging that it is the holder of the Note is insufficient when there is no written proof of the alleged interest in the Note.

The Assignment submitted by the Plaintiff in its Amended Complaint also fails to establish the necessary link between the original lender and the Plaintiff. (Plaintiff's Amended Complaint Exhibit C). Rather, the Assignment is from MERS to Plaintiff. (*Id.*). However, there is no evidence of any transfer from the original lender, Equifirst Corporation, to MERS, nor has any document been produced granting authority to MERS to negotiate the Note on behalf of the original lender. MERS is never mentioned in the Note, yet MERS still attempted, albeit unsuccessfully, to assign the Note to the Plaintiff by the language "together with any and all notes and obligations therein described or referred to, the debt respectively secured thereby, and all sums of money due and to become due thereon." (Plaintiff's Amended Complaint Exhibit C). Based upon the record before the Court in this case, Plaintiff has failed to establish that MERS was the lawful holder and owner of the Note at the time it allegedly assigned the Note and Mortgage to Plaintiff or that it had any authority to act on behalf of the lawful owner and holder. Therefore, MERS

could not, and thus did not, transfer any legal interest in the Note to Plaintiff. Moreover, Plaintiff also failed to establish that it is the rightful holder of the Mortgage.

MERS has assigned the Mortgage “as nominee for Equifirst Corporation, its successors and assigns” (Plaintiff’s Amended Complaint Exhibit C). Yet, the term “nominee” is specifically defined as “one designated to act for another in his or her place.” Black’s Law Dictionary 1050 (6th ed. 1990). The definition goes on to explain that the term nominee “has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another.” *Id.* Nominee has been further defined as “the delegation of authority . . . in a representative or nominal capacity only, and does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him” *Winters National Bank and Trust Company v. Saker, et al* (1979), 66 Ohio App.2d 31, 35 (emphasis added).

The Court should also find direction from a decision in the Delaware County Court of Common Pleas “[t]he Court agrees that the Plaintiff must establish the link between the original lender . . . and the Plaintiff.” *Franklin Credit Management Corp. v. Neill*, (Delaware Cty. CP Feb. 5, 2008), Case No. 07 CV E 09 1163, at *1 (Attached as Exhibit A). In that case, the Plaintiff provided an Assignment of the Mortgage from MERS to the Plaintiff, but the Court found that this failed to establish a link between the original lender and the Plaintiff. *Id.* For this same reason, this Court should find that it lacks jurisdiction to proceed in a case where Plaintiff has not established a sufficient link between its alleged loss and the Defendant’s conduct.

Having failed to establish that it holds an interest in the Note and/or Mortgage, the Plaintiff has failed to show that it suffered an injury in fact; therefore, Plaintiff does not

have standing to bring this action. A person lacking any right or interest to protect may not invoke the jurisdiction of a court. *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St. 2d 176, 178, 298 N.E.2d 515. Therefore, having failed to show that it is the holder of the Note and/or Mortgage, Plaintiff's action should be dismissed because this Court lacks jurisdiction.

4. Civ. Rule 10(D) requires that the Plaintiff own the Note and Mortgage that it is required to attach to the Complaint.

In the Magistrate's Decision, the Court inexplicably holds that it is overly burdensome to require the Plaintiff to attach relevant documents to the complaint, although it is required to attach the original Note and Mortgage. (Magistrate's Decision p. 9). Quite to the contrary, the Civil Rule 8 notice pleading provisions, when read in conjunction with Civil Rule 10(D), clearly must be read to require the Plaintiff to attach the note and mortgage that it owns, not just any note and mortgage. Otherwise, this would permit a complete stranger to any cause of action to file suit and obtain a judgment just because they may have an intention to acquire an interest in the claim at some undefined time in the future. This is precisely why a party must establish that it has standing at the outset of the case. In this case, as previously discussed, the Plaintiff was not the owner or holder of the Note and Mortgage at the time this action was filed.

5. The federal case law is persuasive

There are now four applicable federal court decisions, which should be considered persuasive authority for the issues before this Court. See *In re Foreclosure Cases* (N.D. Ohio Oct. 31, 2007), 2007 U.S. Dist. Lexis 84011 and *In re Foreclosure Cases* (S.D. Ohio Nov. 15, 2007), 2007 U.S. Dist. Lexis 84569; *In Re Foreclosure Cases* (N.D. Ohio Nov. 14, 2007) (Attached as Exhibit B); *In re Foreclosure Cases* (S.D. Ohio Dec. 12, 2007), 2007

U.S. Dist. LEXIS 95673. The Magistrate's Decision misinterprets those decisions to find that they were based on the question of diversity jurisdiction. (Magistrate's Decision p. 9). The well written opinion of Judge Holshuh, specifically explained that this is not a diversity issue; rather, it is solely a jurisdictional issue of standing:

Plaintiffs are correct that every case presented to this Court involves the preliminary question of whether the plaintiff is the one who suffered the injury. This is why standing is considered a "qualifying hurdle." This question, however, **is separate from the question of whether diversity jurisdiction exists.** The § 1332 requirements (diversity of citizenship and an amount in controversy exceeding \$75,000) says absolutely nothing about the Article III standing requirements of injury in fact, causation, and redressability. The doctrine of standing would become a nullity in diversity cases if simply satisfying the requirements of § 1332 sufficed to establish standing. Furthermore, the constitutional standing question of whether Plaintiffs actually suffered an injury in fact at the time these respective cases were filed is distinct from the element of Plaintiffs' claims requiring them to hold the note in order to enforce it.

Id. at *8 (emphasis added). The federal courts have dismissed the cases cited above on the Plaintiffs' lack of standing because the Plaintiffs failed to establish that they were holders of the Notes and Mortgages prior to filing suit. Judge Holshuh held:

the Court finds that Plaintiffs have not established that they in fact owned the notes and mortgages in question at the time these respective complaints were filed. Because Plaintiffs apparently did not own the notes and mortgages at the time the complaints were filed, Plaintiffs suffered no injury in fact from the debtors' default. Plaintiffs thus do not have standing to bring these actions, and these cases should be dismissed for lack of standing.

Id. at *13. Since the same jurisdictional issues are presented in state court, this Court should find the federal court decisions persuasive and directly on point, leading to the same conclusion that foreclosure actions should be dismissed if the Plaintiffs fail to establish that they had standing to bring the actions at the time the cases are filed.

C. The Magistrate's Decision Incorrectly Concluded that Plaintiff is the Real Party in Interest.

1. Civ. Rule 17(A) does not apply to parties who are not the real party in interest at the time the complaint is filed.

The Magistrate's Decision appears to have sanctioned Plaintiff's attempt to use Civil Rule 17 as a sword rather than a shield. Civil Rule 17 was designed to allow for substitution of the real party in interest within a reasonable time when/if the real party in interest changed during the course of litigation. However, Plaintiff is attempting to employ Civil Rule 17(A) in complete reverse. Plaintiff filed suit and then asked for reasonable time to **become** the real party in interest. The Complaint was filed on June 25, 2007, but the alleged Assignment of Mortgage was not executed until July 5, 2007.

Allowing the Plaintiff to establish that it became the real party in interest after the Complaint was filed is a misapplication of Civil Rule 17. Although the Magistrate looked to the Federal Civil Rule 17 for support (Magistrate's Decision p. 8), the Decision ignores the fact that federal courts have dismissed complaints and held that the corrective provision does not give a plaintiff *carte blanche* to correct the pleadings when the plaintiff made no showing of confusion or honest mistake as to the real party in interest. *See e.g., Wulff v. CMA, Inc.*, 890 F.2d 1070, 1074-1075, (9th Cir. 1989); *Metal Forming Technologies, Inc. v. Marsh & MacLennon, Co.*, 224 F.R.D. 431, 436-437 (S.D. Ind. 2004) (citing *Wieburg v. GTE Southwest, Inc.*, 272 F.3d 302, 308 (5th Cir. 2001)).

In this case, Deutsche Bank has neither shown nor suggested that its incorrect Complaint was due to confusion or honest mistake. Rather, Plaintiff has merely supplied a faulty Assignment of the Mortgage in an attempt to correct the pleading and the Note, which was never indorsed or properly transferred. Civil Rule 17 cannot be used to correct such defects.

2. The Magistrate's Decision is inconsistent with prior rulings of this Court.

The Magistrate's Decision fails to incorporate prior rulings of this Court on identical issues. In fact, both Judge Martin **and Magistrate Bachman** have ruled in favor of the State's position within the past two months. In *Wells Fargo Bank v. Byrd*, Judge Martin dismissed the case because the plaintiff was "not the real party in interest when this case was filed." *Wells Fargo Bank v. Byrd* (Hamilton Cty. CP December 12, 2007), Case No. A0700643, at *1. In accordance with the *Byrd* decision, Magistrate Bachman also dismissed a case where the complaint was filed on October 30, 2007, and an assignment of the mortgage was not filed until November 26, 2007. *LaSalle Bank Midwst, N.A. v. Bybee* (Hamilton Cty. CP February 1, 2008), Case No. A0709782, at *1 (Attached as Exhibit C). In an ironic twist, on the exact same day that Magistrate Bachman rendered a decision in the case at bar, in *Bybee*, he dismissed the case because "the court finds the plaintiff was not the real party in interest at the time the complaint was filed." *Id.* Similarly, in a more detailed decision, in *DLJ Mortgage Capital, Inc. v. Bazy*, the Montgomery County Court of Common Pleas also granted the defendant's motion to dismiss on the basis that the plaintiff was not a real party in interest. *DLJ Mortgage Capital, Inc. v. Bazy, et al.* (Montgomery Cty. CP May 16, 2003), Case No. 02-4316, *5.

In *Bazy*, just as in this case, the Plaintiff filed a Complaint and attached a Note in the name of the original lender, which was different than the name of the Plaintiff that appeared in the Complaint. *Id.* at p. 2. Later, after the defendant had already contested the Plaintiff's standing, the Plaintiff filed an Assignment of the Mortgage, which Plaintiff asserted also assigned the Note. *Id.* Just as in this case, the Assignment was executed and

dated after the date on which the Complaint was filed. *Id.* The Court dismissed the case, finding that the Plaintiff was not the real party in interest on the date the action was filed. The Court noted that at the time the Complaint was filed, the Plaintiff was not the real party in interest because it was not the true holder of the Note. *Id.* at p. 3. The Court also reasoned that because the Plaintiff had not obtained an interest in the Note and Mortgage until almost four (4) weeks after the Complaint was filed, even if the Plaintiff was afforded additional time to amend its Complaint, there was no way the Plaintiff could produce any document that could establish that it was the lawful holder of the Note and Mortgage on the date the Complaint was filed. *Id.* at 4-5.

Nearly identical to the *Byrd*, *Bybee* and *Bazzy* cases, in the case at bar, the Complaint was filed on June 25, 2007, but the Mortgage (and allegedly the Note as well) was not assigned (assuming for the sake of discussion that the Assignment validly transferred the lender's interest in the Note and Mortgage) until July 5, 2007. Furthermore, as previously established, the Assignment from MERS is invalid. This is because MERS has not, and has never been, a valid holder and owner of the Note and/or Mortgage; therefore, production of the Assignment does not establish that Plaintiff was the real party in interest at the time the case was filed or even today. This Court should not ignore precedent from this very Court in a nearly identical case.

C. Conclusion

For the reasons described above, and based on the case law previously submitted to this Court in the State of Ohio's Motion to Dismiss and accompanying memoranda, the Defendant, State of Ohio respectfully asks this Court to sustain these objections to the Magistrate's Decision and to grant the Motion to Dismiss.

Respectfully submitted,

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Attorney General of Ohio



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Counsel for Defendant State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Objections to the Magistrate's Decision was served upon the following via ordinary U.S. mail, postage pre-paid this 15th day of February 2008.

Telisa Barnes
4316 Virginia Avenue
Cincinnati, Ohio 45223

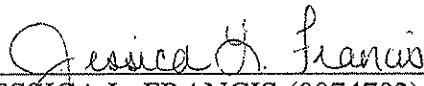
John Doe, name unknown, spouse of
Telisa Barnes
4316 Virginia Avenue
Cincinnati, Ohio 45223

Hamilton County Treasurer
c/o Lawrence C Baron
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202

City of Cincinnati
c/o Thomas O Beridon
801 Plum Street, Room 226
Cincinnati, Ohio 45202

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Cleveland, Ohio 44113

Counsel for Plaintiff



JESSICA L. FRANCIS (0074703)
Assistant Attorney General

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO

FRANKLIN CREDIT MANAGEMENT :
CORP, :

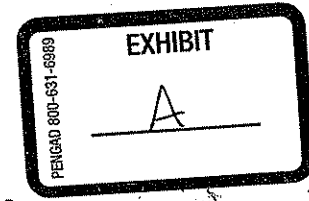
Plaintiff, :

-vs- :

TAMARA NEILL, :

Defendant. :

Case No. 07 CV E 09 1163.



JAN ANTONOPLOS
CLERK

2008 FEB -5 AM 9:16

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED

JUDGMENT ENTRY

This case is before the Court on Defendant, State of Ohio's Motion To Dismiss. Plaintiff filed a Brief in Opposition, and Defendant, State of Ohio filed a Reply thereto, as well as a Notice of Supplemental Authority.

Defendant, State of Ohio brings its motion pursuant to Civil Rule 17, on the basis that this Court lacks jurisdiction to hear this matter and the Plaintiff has failed to establish that it is the real party in interest. Plaintiff asserts; however, that in its Brief in Opposition it supplemented the assignment of the mortgage at issue, and therefore, the case can proceed. Defendant, State of Ohio, disputes that although Plaintiff has attached the assignment of the mortgage from Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Mila, Inc. to Franklin Credit Management Corporation, Plaintiff has failed to establish a link between the original lender, Mila, Inc. and the Plaintiff.

The Court agrees that Plaintiff must establish the link between the original lender, Mila, Inc. and the Plaintiff. Nonetheless, Plaintiff's failure to provide the

assignment does not in itself merit dismissal of this action. Therefore, Defendant, State of Ohio's Motion To Dismiss is DENIED, and Plaintiff has until Monday, March 31, 2008 to provide the necessary assignments of the mortgage at issue in this case.

Dated: February 4, 2008.



W. DUNCAN WHITNEY, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by Regular Mail, Mailbox at the Delaware County Courthouse, Facsimile transmission

KIMBERLY L BORCHERT, 323 WEST LAKESIDE AVE STE 200, CLEVELAND, OH, 44113, Attorney for Plaintiff
MICHAEL J. SCHULER, ASSISTANT ATTORNEY GENERAL, 30 EAST BROAD STREET, 14TH FLOOR, COLUMBUS, OH 43215, Attorney for Defendant
MARCIA J. MACON-BRUCE, SECTION CHIEF, COLLECTIONS ENFORCEMENT, 150 EAST GAY STREET, 21ST FLOOR, COLUMBUS, OH 43215, Attorney for Defendant



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

	:	Case Nos. 1:07cv1007	1:07cv2660
	:	07cv1059	07cv2677
IN RE FORECLOSURE ACTIONS	:	07cv1060	07cv2776
	:	07cv1122	07cv2789
	:	07cv1252	07cv2797
	:	07cv1367	07cv2826
	:	07cv1515	07cv2951
	:	07cv1827	07cv2961
	:	07cv1872	07cv2963
	:	07cv1936	07cv2993
	:	07cv1981	07cv3022
	:	07cv1985	07cv3039
	:	07cv1992	07cv3143
	:	07cv2010	07cv3259
	:	07cv2257	07cv3306
	:	07cv2636	
	:	07cv2643	
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	:	JUDGE KATHLEEN M. O'MALLEY	
	:		
	:	<u>ORDER</u>	

Section I of the United States District Court for the Northern District of Ohio's *Fifth Amended General Order No. 2006-16* (October 10, 2007), captioned "The Complaint and Service," outlines specific filing requirements applicable to the numerous private foreclosure actions being filed in federal court. Specifically, Section 1.2.5 of that order provides:

1.2 The complaint must be accompanied by the following:

1.2.5 An affidavit documenting that the named plaintiff is the owner and holder of the note and mortgage, whether the original mortgagee or by later assignment, successor in interest or as a trustee for another entity.

Fifth Amended General Order No. 2006-16 (October 10, 2007) (Emphasis added).¹ A foreclosure plaintiff, therefore, especially one who is not identified on the note and/or mortgage at issue, must attach to its complaint documentation demonstrating that it is the owner and holder of the note and mortgage upon which suit was filed. In other words, a foreclosure plaintiff must provide documentation that it is the owner and holder of the note and mortgage as of the date the foreclosure action is filed.

It is reasonably clear from Section 1.2.5 that an affidavit alone, in which the affiant simply attests that the plaintiff is the owner and holder of the note and mortgage, is insufficient to comply with Section 1.2.5's "documentation" requirement. To the extent a note and mortgage are no longer held or owned by the originating lender, a plaintiff must appropriately document the chain of ownership to demonstrate its legal status *vis-a-vis* the items at the time it files suit on those items. Appropriate "documentation" includes, but is not limited to, trust and/or assignment documents executed before the action was commenced, or both as circumstances may require.

In this case, the plaintiff is not identified on the note and mortgage as the original owner/holder, and has either: (1) not timely filed adequate documentation demonstrating that it was the owner and holder at the time it filed suit; or (2) filed documentation indicating that an assignment or execution of trust interest occurred, but occurred after the filing of the complaint. ²

¹ None of the amendments to the order altered Section 1.2.5. That section has remained the same. Regardless, by its express terms, the *Fifth Amended General Order No. 2006-16* (October 10, 2007) applies to all then-pending and new foreclosure actions.

² The Court is only concerned with the date on which the documents were executed, not the dates on which they were recorded (if recorded) with the county recorder's office.

Accordingly, the plaintiff's complaint does not comply with Section 1.2.5 of the Court's *Fifth Amended General Order No. 2006-16* (October 10, 2007).³ This case is **DISMISSED without prejudice. Pursuant to the Court's local rules, if re-filed, this case shall be marked as related and reassigned to the undersigned.**⁴

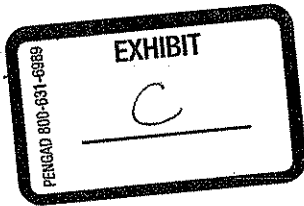
IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Dated: November 14, 2007

³ As of October 10, 2007 when it was issued, the Court's *Fifth Amended General Order No. 2006-16* automatically granted plaintiffs in then-pending foreclosure actions thirty (30) days to amend their pleadings to conform with, among other things, the order's owner/holder "documentation" requirement(s). As of November 9, 2007, the automatic thirty-day period in which to cure pleading defects in then-pending actions expired.

⁴ Because it was dismissed for failure to comply with the Court's *Fifth Amended General Order No. 2006-16*, if this case is re-filed and ultimately proceeds to judgment, the Court will not award in a subsequent action any fees or expenses incurred in connection with this case (*i.e.*, the dismissed case).



M

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

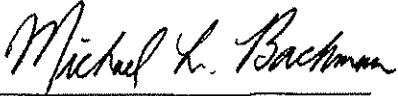
LASALLE BANK MIDWEST, N.A., : Case No. A0709782
 Plaintiff, : Judge Martin
 v. :
 JOHN L. BYBEE, SR., et al., : MAGISTRATE'S DECISION
 Defendants. :

RENDERED THIS 15th DAY OF FEBRUARY, 2008.

This case is before the court upon plaintiff's motion for default judgment. The complaint was filed on October 30, 2007. The assignment of the mortgage was not executed until November 26, 2007.¹ Plaintiff does not aver that it was the real party in interest *at the time the complaint was filed*.² The court finds that plaintiff was not the real party in interest at the time the complaint was filed.³

DECISION

The case is DISMISSED without prejudice.


 MICHAEL L. BACHMAN,
 MAGISTRATE
 COURT OF COMMON PLEAS

¹ / Notice of Filing of Assignment of Mortgage, Ex. A.

² / Aff. as to Real Party in Interest, Jan. 11, 2008.

³ / See *Wells Fargo Bank, N.A. v. Gloria Byrd, et al.*, A0700643, Amended Judgment Entry, Dec. 12, 2007.

NOTICE

Objections to the Magistrate's Decision must be filed within fourteen days of the filing date of the Magistrate's Decision. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING DECISION HAVE BEEN SENT BY ORDINARY MAIL TO ALL PARTIES OR THEIR ATTORNEYS AS PROVIDED ABOVE.

Date: 2-4-08 Deputy Clerk: 