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**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

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BARBARA A. WIEDEMEIN  
CLERK OF COMMON PLEAS COURT  
CLERMONT COUNTY, OH

**BANK OF AMERICA, N.A.,** :  
Plaintiff : **CASE NO. 2015 CVE 00266**  
vs. : **Judge McBride**  
**BRUCE E. BOTTS, ET AL.,** : **DECISION/ENTRY**  
Defendants :

Lerner, Sampson & Rothfuss, Adam J. Turer and Tammy E. Stickley, counsel for the substitute plaintiff U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, 120 East 4th Street, Suite 900, Cincinnati, Ohio 45202.

Cozmyk Law Offices LLC, Peter Cozmyk, counsel for the defendants Bruce E. Botts and Lynne M. Botts, 6100 Oak Tree Boulevard, Suite 200, Independence, Ohio 44131.

This cause is before the court for consideration of a motion for summary judgment filed on July 22, 2016 by the substitute plaintiff U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust. Following the lifting of a subsequently placed stay on this case, the court scheduled and held a hearing on the motion for summary judgment on October 13, 2017. At the conclusion of the hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

## **FACTS OF THE CASE AND PROCEDURAL BACKGROUND**

On December 15, 2004, the defendants Bruce E. Botts and Lynne E. Botts executed a promissory note ("Note") in favor of Aegis Wholesale Corporation in the amount of \$223,500 regarding property located at 933 Paxton Lake Cove, Loveland, Ohio 45140.<sup>1</sup> Contemporaneously with the execution of the Note, the defendants granted a mortgage ("Mortgage") to Aegis Wholesale Corporation to secure payment of the Note.<sup>2</sup>

Thereafter, Aegis Wholesale Corporation assigned the Note to Aegis Mortgage Corporation.<sup>3</sup> Aegis Mortgage Corporation then assigned the Note to Treasury Bank, N.A.<sup>4</sup> Next, Treasury Bank, N.A. indorsed the Note in blank.<sup>5</sup> The substitute plaintiff alleges that Bank of America, N.A. (hereinafter referred to as "Bank of America") possessed the Note indorsed in blank as of March 3, 2015.

On January 14, 2015, Mortgage Electronic Registration Systems, Inc. (hereinafter referred to as "MERS"), as nominee for Aegis Wholesale Corporation, assigned the

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<sup>1</sup> A. Salyers Aff., ¶ 5; Sub. Pls. Ex. A.

<sup>2</sup> A. Salyers Aff., ¶ 6, Sub. Pls. Ex. B.

<sup>3</sup> Sub. Pls. Ex. A.

<sup>4</sup> Sub. Pls. Ex. A.

<sup>5</sup> Sub. Pls. Ex. A; A. Salyers Aff., ¶ 7.

mortgage to Bank of America, N.A.<sup>6</sup> This first Mortgage assignment was recorded on January 20, 2015.<sup>7</sup>

The defendants stopped making payments under the Note and Mortgage beginning August 1, 2014.<sup>8</sup> In a notice dated September 15th, Bank of America sent a notice of default to the defendants via first class mail.<sup>9</sup>

On March 2, 2015, Lerner, Sampson & Rothfuss (hereinafter referred to as "LSR") mailed a letter to the defendants, on behalf of Bank of America, indicating that the defendants had 30 days from their receipt of the letter to notify the firm in writing if the debt was disputed.<sup>10</sup> If so, then LSR would obtain verification of the debt and mail a copy of the verification to the defendants.<sup>11</sup> The defendants could also request the name and address of the original creditor.<sup>12</sup>

On March 3rd, Bank of America filed a complaint in foreclosure against the defendants, also naming as defendants Citibank, Federal Savings Bank; Ohio Homeowner Assistance LLC; Ohio Receivables, LLC; and the Paxton Lake Homeowners Association. Attached to the complaint was the Note with an allonge,<sup>13</sup> which was indorsed in blank, the Mortgage, the first Mortgage assignment, and a Clermont County Property Description Approval Form. The complaint alleged that the defendants were in

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<sup>6</sup> A. Salyers Aff., ¶ 8; Sub. Pls. Ex. C.

<sup>7</sup> A. Salyers Aff., ¶ 8; Sub. Pls. Ex. C.

<sup>8</sup> A. Salyers Aff., ¶ 10; Sub. Pls. Ex. G.

<sup>9</sup> A. Salyers Aff., ¶ 11; Sub. Pls. Ex. E.

<sup>10</sup> Defs. Ex.; B. Botts Aff., ¶ 4.

<sup>11</sup> Defs. Ex.

<sup>12</sup> Defs. Ex.

<sup>13</sup> An allonge, as in the one attached to the defendants' Note, is a paper attached to an instrument that becomes an extension or part of that instrument. *CitiMortgage v. Davis*, 12th Dist. Warren No. CA2013-09-088, 2014-Ohio-3292, ¶ 19, citing *U.S. Bank Natl. Assn. v. Mitchell*, 6th Dist. Sandusky No. S-10-043, 2012-Ohio-3732, ¶ 15.

default under the terms of the Note, that Bank of America was entitled to enforce the Note which was in default and due, and that Bank of America had satisfied all conditions precedent to the filing of the foreclosure action.

On March 4th, the defendants received the March 2nd letter from LSR.<sup>14</sup> On March 10th the defendants responded to the letter via certified mail requesting verification.<sup>15</sup> On March 20<sup>th</sup>, LSR sent a verification letter to the defendants.<sup>16</sup>

The defendants answered the complaint on August 6, 2015, and included counterclaims for (1) violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, (2) violations of the Ohio Consumer Sales Practices Act ("CSPA"), R.C. 1345.02, and (3) common law fraud.

Bank of America assigned the Mortgage to the substitute plaintiff U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust on September 15, 2015.<sup>17</sup> On September 28<sup>th</sup>, the second Mortgage assignment was recorded.<sup>18</sup>

Caliber Home Loans, Inc. (hereinafter referred to as "Caliber") is the current mortgage servicer for the substitute plaintiff.<sup>19</sup> Caliber currently possesses the Note.<sup>20</sup> On May 26, 2015, Caliber sent a letter to the defendants notifying them of the transfer in servicing from Bank of America to Caliber.<sup>21</sup>

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<sup>14</sup> Botts Aff., ¶ 4.

<sup>15</sup> Botts Aff., ¶ 5.

<sup>16</sup> Defs. Ex.

<sup>17</sup> Sub. Pls. Ex. D.

<sup>18</sup> A. Salyers Aff., ¶ 9; Sub. Pls. Ex. D.

<sup>19</sup> A. Salyers Aff., ¶ 7.

<sup>20</sup> A. Salyers Aff., ¶ 7.

<sup>21</sup> A. Salyers Aff., ¶ 12; Sub. Pls. Ex. F.

On November 30, 2015, Bank of America moved the court to substitute U.S. Bank Trust as the plaintiff, as it was the current holder of the Note and Mortgage. On December 10th, the court granted an order substituting Bank of America for the substitute plaintiff.

The defendants have not made payments to bring the Note and Mortgage current to cure the default.<sup>22</sup> The substitute plaintiff has accelerated their account, making the entire balance due.<sup>23</sup> Due to the acceleration, the defendants' Note and Mortgage has a principal balance of \$202,090.11, together with an interest rate of 2.7500% per year from July 1, 2014.<sup>24</sup>

On July 22, 2016, the substitute plaintiff moved for summary judgment on all counts. On September 26th the defendants filed their motion in opposition, and on October 18th the substitute plaintiff filed its reply in support of its motion.

On September 30, 2016 the defendants moved to stay proceedings under federal law pending a loss mitigation review. The court granted the stay on October 24, 2016. Upon lifting the stay in 2017, the court heard oral arguments on the summary judgment motion on October 13, 2017, and thereafter took the motion under advisement.

## **LEGAL STANDARD**

The court must grant summary judgment as requested by a moving party when:

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

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<sup>22</sup> A. Salyers Aff., ¶ 13.

<sup>23</sup> A. Salyers Aff., ¶ 13.

<sup>24</sup> A. Salyers Aff., ¶ 13.

against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."<sup>25</sup>

The court must view the evidence in a light most favorable to the nonmoving party.<sup>26</sup> Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.<sup>27</sup> A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."<sup>28</sup>

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?<sup>29</sup> This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."<sup>30</sup>

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.<sup>31</sup> This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in

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<sup>25</sup> *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). See *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

<sup>26</sup> *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

<sup>27</sup> *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

<sup>28</sup> *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

<sup>29</sup> *Id.* at 251-52.

<sup>30</sup> *Id.* at 250.

<sup>31</sup> *AAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

order to allow the opposing party a meaningful opportunity to respond.”<sup>32</sup> If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.<sup>33</sup>

However, if the movant satisfies this burden, then the nonmoving party has a “reciprocal burden” to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a “triable issue of fact” remains.<sup>34</sup> The duty of the nonmoving party is more than that of resisting the motion’s allegations.<sup>35</sup> Instead, this burden requires the nonmoving party to “produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial.”<sup>36</sup> The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.<sup>37</sup> It may not rely on the pleadings or unsupported allegations.<sup>38</sup>

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action.”<sup>39</sup> The trial court maintains the sound discretion to admit or exclude relevant evidence.<sup>40</sup> When a document falls outside the enumerated categories

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<sup>32</sup> *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

<sup>33</sup> *Id.* See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

<sup>34</sup> *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

<sup>35</sup> *Wells Fargo*, 2013-Ohio-855 at ¶ 25.

<sup>36</sup> (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; See *Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

<sup>37</sup> *Williams*, 2014-Ohio-3778 at ¶ 8. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

<sup>38</sup> *Id.*

<sup>39</sup> See *Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 (“Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.”).

<sup>40</sup> *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.<sup>41</sup>

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.<sup>42</sup> "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."<sup>43</sup> "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."<sup>44</sup> Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."<sup>45</sup>

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."<sup>46</sup> Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).<sup>47</sup>

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents

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<sup>41</sup> *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

<sup>42</sup> Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

<sup>43</sup> *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

<sup>44</sup> *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

<sup>47</sup> *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

referenced in the affidavit "must be attached to the affidavit."<sup>48</sup> If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."<sup>49</sup>

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.<sup>50</sup> Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.<sup>51</sup>

## I. EVIDENTIARY ISSUES

In their response in opposition, the defendants move to strike the affidavit of Alyssa Salyers, which the substitute plaintiff submitted in support of its motion for summary judgment. Salyers' affidavit had attached to it all of the loan documents that the substitute plaintiff has submitted for the court's review for summary judgment purposes. The determination of a motion to strike is within the trial court's broad discretion.<sup>52</sup>

As discussed above, under Civ.R. 55(E), summary judgment affidavits must be made on personal knowledge. As explained, an affiant's statement in the affidavit that it

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<sup>48</sup> *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

<sup>49</sup> *Id.* at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. See *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

<sup>50</sup> *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

<sup>51</sup> *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

<sup>52</sup> *Wells Fargo Bank v. Maxfield*, 2016-Ohio-8012, 75 N.E.3d 864, ¶ 32 (12th Dist.), citing *Bank of Am., N.A. v. Jackson*, 12th Dist. Warren No. CA2014-01-018, 2014-Ohio-2480, ¶ 9.

is based on personal knowledge generally is sufficient to satisfy Civ.R. 56(E). Courts typically find such an averment satisfactory so long as there is nothing in the record that would rebut that averment.<sup>53</sup>

In examining Salyers' affidavit, she averred that she is a foreclosure document specialist for Caliber, which is the substitute plaintiff's attorney in fact and servicing agent for the defendants' loan; that her affidavit was based upon personal knowledge obtained from her review of Caliber's records relating to the defendants' loan; that she had access to business records, including loan documents and loan account records maintained by Caliber; and that she has knowledge of the operation of and the circumstances surrounding the maintenance and retrieval of records in Caliber's record keeping systems.

The defendants argue that Salyers cannot authenticate the loan documents because she is not an employee of the substitute plaintiff, but is instead an employee of its mortgage servicer, Caliber. However, Ohio courts, including the Twelfth District Court of Appeals, have found that document specialists from mortgage servicers can have personal knowledge regarding the loan documents involved in a foreclosure, even though the mortgage servicer is not the plaintiff.<sup>54</sup> "There exists competent authority that a loan servicing agent may properly authenticate copies of business records."<sup>55</sup> The defendants do not otherwise refer to anything in the record that rebuts Salyers' averment that she based her affidavit upon personal knowledge as a result of her position as a foreclosure document specialist at Caliber. Because the defendants have not highlighted evidence

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<sup>53</sup> *Maxfield*, 2016-Ohio-8012 at ¶ 34, citing *Jackson*, 2014-Ohio-2480 at ¶ 13.

<sup>54</sup> See *Maxfield*, 2016-Ohio-8012 at ¶¶ 35-37 (allowing mortgage servicing agent to authenticate records).

<sup>55</sup> *HSBC Mtge. Corp. v. Latona*, 10th Dist. Franklin No. 15AP-401, 2016-Ohio-3137, ¶ 13.

that rebuts Salyers' averment that she has personal knowledge of the loan documents, the court finds that her general averment as to her knowledge is sufficient, with one exception.<sup>56</sup>

As to the exception, Salyers claims that, at the time Bank of America filed the complaint, it possessed the Note. The Note had been indorsed in blank, meaning it had not been specifically indorsed to Bank of America by name through an assignment. Salyers' knowledge regarding the Note and foreclosure documents is derived from her review of them. However, because the Note was indorsed in blank, nothing about her review of it could have conveyed to Salyers that the Note, as of March 3, 2015, was physically possessed by Bank of America. Caliber was not the mortgage servicer for Bank of America, and none of the other documents attached to Salyers' affidavit indicate that Bank of America possessed the Note as of March 3, 2015. Because Salyers' knowledge came strictly from her review of the records attached to her affidavit, and none of them disclose if Bank of America possessed the note as of March 3, 2015, she could not have personal knowledge of when, if ever, Bank of America came into possession of the Note. For these reasons, the court strikes the following sentence from Paragraph 7 of Salyers' affidavit: "At the time of the filing of the complaint, the original plaintiff, Bank of America, N.A., was in possession of the original promissory Note."

The defendants offer further arguments for striking the remainder of the Salyers' affidavit based upon authentication and hearsay objections. Salyers' affidavit refers to the Note, the Mortgage, the assignment of the Mortgage from MERS to Bank of America, the assignment of the Mortgage from Bank of America to the substitute plaintiff, a notice

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<sup>56</sup> *Maxfield*, 2016-Ohio-8012 at ¶ 37.

of default letter from Bank of America to the defendants, a notice of transfer of servicing from Caliber to the defendants, and the defendants' payment history on their mortgage.

The Mortgage and the Mortgage assignments to Bank of America and the substitute plaintiff are self-authenticating pursuant to Evid.R. 902(8).<sup>57</sup> Under Evid.R. 902(8), extrinsic evidence of authenticity is not required for “[d]ocuments accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.”<sup>58</sup> Because the Mortgage and Mortgage assignments are notarized documents, they are self-authenticating.

As to the Note, payment history, and letters, these documents are not self-authenticating and thus must be authenticated in accordance with Evid.R. 901. To begin with the note, in her affidavit Salyers indicated that she was a foreclosure document specialist for Caliber, and she had personal knowledge of the operation and circumstances surrounding the maintenance and retrieval of records in Caliber's record keeping systems. She further averred that a true and accurate copy of the original Note was attached to her affidavit.

The defendants suggest in their response that the Note is suspect because the substitute plaintiff submitted a copy of the Note instead of the original. However, this suggestion does not defeat Salyers' authentication of the Note. First, the defendants never moved the court to compel the substitute plaintiffs to produce the Note. Second, “Evid.R. 1003 permits a copy of the document to be admitted into evidence to the same extent as an original unless a genuine question is raised as to the authenticity of the

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<sup>57</sup> *Maxfield*, 2016-Ohio-8012 at ¶ 38.

<sup>58</sup> Evid.R. 902(8).

original or it would be unfair to admit the duplicate in lieu of the original."<sup>59</sup> Although the defendants suggest in their response that it is suspicious that the original Note has not been produced, they have failed to raise any question as to the authenticity of the duplicate or outright challenge the fairness of admitting the duplicate Note.<sup>60</sup>

Further, the Note bears the defendants' signatures. Because the defendants have not specifically denied their signatures on the Note, their signatures are self-authenticating pursuant to R.C. 1303.36(A). R.C. 1303.36(A) sets forth, in pertinent part:

"Unless specifically denied in the pleadings, in an action with respect to an instrument, the authenticity of, and authority to make, each signature on an instrument is admitted. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the party claiming validity but the signature is presumed to be authentic and authorized \* \* \*." <sup>61</sup>

The Note also bears the same property address as the Mortgage and Mortgage assignments. The foregoing is sufficient to authenticate the Note pursuant to Evid.R. 901(B)(1)<sup>62</sup> (testimony from a witness with knowledge) and (B)(4)<sup>63</sup> (distinctive characteristics, i.e., the defendants' signatures and property address).<sup>64</sup>

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<sup>59</sup> *Vaught*, 2014-Ohio-3383 at ¶ 15, quoting *Bank of America, N.A. v. Jackson*, 12th Dist. Warren No. CA2014-01-018, 2014-Ohio-2480, ¶ 23.

<sup>60</sup> See *Vaught*, 2014-Ohio-3383 at ¶ 15.

<sup>61</sup> R.C. 1303.36(A).

<sup>62</sup> Evid.R. 901(B)(1) provides: "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: (1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be."

<sup>63</sup> Evid.R. 901(B)(4) provides: "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: \* \* \* (4) Distinctive Characteristics and the Like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

<sup>64</sup> See *Maxfield*, 2016-Ohio-8012 at ¶ 39 (finding the same information in an affidavit from a mortgage servicer sufficient to authenticate a note and note assignments).

As to the payment history and letters, these documents are business records that Salyers properly authenticated by identifying them as true and accurate.<sup>65</sup> Under Evid.R. 801(B)(10), "authentication of business records \* \* \* is governed by Evid.R. 803(6)," which is discussed further below when analyzing hearsay.<sup>66</sup>

The Note, Mortgage, Mortgage assignments, and letters to the defendants are not hearsay, as the defendants argue. Under Evid.R. 801(C), hearsay is defined as " \* \* \* a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."<sup>67</sup> The Note, Mortgage, and Mortgage assignments, however, are not offered to prove the truth of the matter asserted therein. Rather, they were offered to prove that people engaged in transactions creating legal rights and responsibilities.<sup>68</sup> The Staff Note to Evid.R. 801(C) recognizes this distinction regarding notice by providing that: "Words constituting conduct are not hearsay, e.g., words of a contract \* \* \* and the like."<sup>69</sup> Here, the Note is a contract and the Mortgage and Mortgage assignments are "like" a contract in that they all create legal rights and responsibilities.

Furthermore, even if the Mortgage, Mortgage assignments, and Note were hearsay, they would fall under an exception to the hearsay rule under Evid.R. 803(14)

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<sup>65</sup> *Maxfield*, 2016-Ohio-8012 at ¶ 39 (finding defendants' mortgage payment history and letters from loan servicer to the defendants were properly authenticated as business records when identified as true and accurate by the loan servicer).

<sup>66</sup> *Cent. Mtge. Co. v. Bonner*, 12th Dist. Butler No. CA2012-10-204, 2013-Ohio-3876, ¶ 14, quoting *Great Seneca Fin. v. Felty*, 170 Ohio App.3d 737, 869 N.E.2d 30, 2006-Ohio-6618, ¶ 9 (1st Dist.).

<sup>67</sup> Evid.R. 801(C).

<sup>68</sup> See *Maxfield*, 2016-Ohio-8012 at ¶ 40 (finding that a mortgage, note, and mortgage assignments were not hearsay, when submitted for motion for summary judgment in foreclosure, because they were not offered to prove the truth of the matter asserted).

<sup>69</sup> 1980 Staff Note, Evid.R. 801.

and 803(15) as records of documents affecting an interest in property and statements in documents affecting an interest in property.<sup>70</sup> Evid.R. 803(14) excepts from the hearsay rule the following:

"The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office."<sup>71</sup>

Additionally, Evid.R. 803(15) excepts from the hearsay prohibition the following:

"A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document."<sup>72</sup>

As to the letters to the defendants, these were offered to prove that notice had been given to the defendants, not whether the information contained in the letters was true.<sup>73</sup>

The only hearsay document referenced in the Salyers affidavit is the payment history. However, Salyers qualified the payment history as excepted from the hearsay rule as a business record under Evid.R. 803(6).<sup>74</sup> Evid.R. 803(6) excludes from the hearsay rule any:

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<sup>70</sup> See *Maxfield*, 2016-Ohio-8012 at ¶ 40 (finding that mortgage, mortgage assignments, and note qualified under exceptions to hearsay under Evid.R. 803(14) and (15)).

<sup>71</sup> Evid.R. 803(14).

<sup>72</sup> Evid.R. 803(15).

<sup>73</sup> See *Maxfield*, 2016-Ohio-8012 at ¶ 40 (finding that letter to defendants was not hearsay, as submitted in support of summary judgment motion in foreclosure, because it was submitted to show that the defendants received notice of their default).

<sup>74</sup> See *Maxfield*, 2016-Ohio-8012 at ¶ 41 (finding payment history attached to affidavit from mortgage servicer qualified as a business record).

“\* \* \* memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conduct business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided for by Rule 901(B)(10), unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness. \* \* \*”<sup>75</sup>

Despite the defendants’ arguments to the contrary, “Evid.R. 803(6) does not require the affiant to have personal knowledge of the exact circumstances of the preparation and production of the document or of the transaction giving rise to the record.”<sup>76</sup> Rather, Evid.R. 803(6) “permits exhibits to be admitted as business records of an entity even when the entity was not the maker of the records, so long as the other requirements of [Evid.R. 803(6)] are met and circumstances indicate the records are trustworthy.”<sup>77</sup>

Here, Salyers averred that she is a foreclosure document specialist for Caliber, that she has access to the loan documents maintained by Caliber, that she knows the maintenance and retrieval of Caliber’s records in its records keeping system, that loan documents are compiled as part of Caliber’s regularly conducted business activity, that loan documents are kept, maintained, and relied upon by Caliber in the course of its ordinary and regularly conducted business activity, that she has personal knowledge based on her review of the loan records, and that the payment history is a true and

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<sup>75</sup> Evid.R. 803(6).

<sup>76</sup> (Internal citation omitted.) *Maxfield*, 2016-Ohio-8012 at ¶ 41, quoting *Jackson*, 2014-Ohio-2480 at ¶ 12.

<sup>77</sup> *Bonner*, 2013-Ohio-3876 at ¶ 16, quoting *Ohio Receivables, L.L.C. v. Dallariva*, 10th Dist. Franklin No. 11AP-951, 2012-Ohio-3165, ¶ 20.

accurate copy. As such, the court finds that Evid.R. 803(6) is satisfied and the payment history of the defendants' loan is admissible hearsay.

In sum, the court finds that the various documents attached to the Salyers affidavit were either self-authenticating or authenticated by Salyers' affidavit testimony. Moreover, the documents are either not hearsay or are excepted from the hearsay rule. Therefore, Salyers' reliance on the documents in framing her affidavit was proper. Accordingly, aside from striking the above-mentioned sentence in Paragraph 7 of the Salyers affidavit, the court will not strike the remainder of the Salyers affidavit.

## II. SUMMARY JUDGMENT ON THE SUBSTITUTE PLAINTIFF'S CLAIMS

Actions in foreclosure normally progress by way of a legal action against the maker of a note who has defaulted on payments, together with an equitable action on the mortgage to force a sale of the property.<sup>78</sup> The two actions proceed concurrently, with "judgment on the note provid[ing] the evidence needed to permit the secured party to foreclose and force a sale of the property to collect the amount of deficiency from the equity in the real estate."<sup>79</sup>

"A party seeking to foreclose on a mortgage must establish execution and delivery of the note and mortgage; valid recording of the mortgage; it is the current holder of the note and mortgage; default; and the amount owed."<sup>80</sup> As a condition precedent to filing

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<sup>78</sup> *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 5.

<sup>79</sup> *Id.*

<sup>80</sup> See *Maxfield*, 2016-Ohio-8012 at ¶ 46, quoting *BAC home Loans Servicing, L.P. v. Kolenich*, 194 Ohio App.3d 777, 2011-Ohio-3345, 958 N.E.2d 194, ¶ 17 (12th Dist.). See *Bank of Am. v. Eten*, 12th Dist. Butler No. CA2013-05-087, 2014-Ohio-987, quoting *BAC Home Loans Servs.*,

the foreclosure action, the plaintiff must have complied with the notice-of-default provision in the promissory note.<sup>81</sup>

But before a trial court can consider the merits of a foreclosure action, the claimant must establish standing to proceed.<sup>82</sup> Whether a claimant has standing is a question of law.<sup>83</sup> Because it is a jurisdictional requirement, a party may raise the issue of standing at any time.<sup>84</sup> A party's " \* \* \* failure to prove itself as the real party in interest creates a genuine issue of material fact that precludes summary judgment."<sup>85</sup>

Article IV, Section 4(B) of the Ohio Constitution provides: "The court of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law."<sup>86</sup> Part of making a justiciable case, such that the trial court's

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*L.P. v. Kolenich*, 194 Ohio App.3d 777, 2011-Ohio-3345, ¶ 17 (12th Dist.) ("Specifically, as to foreclosure claims, '[a] party seeking to foreclose on a mortgage must establish execution and delivery of the note and mortgage; valid recording of the mortgage; it is the current holder of the note and mortgage; default; and the amount owed.").

<sup>81</sup> See *Maxfield*, 2016-Ohio-8012 at ¶ 46, citing *HSBC Mtge. Servs. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 22. See *Fifth Third Mtge. Co. v. Wizzard*, 12th Dist. Butler No. CA2012-11-226, 2013-Ohio-3084, ¶ 27, quoting *First Financial Bank v. Doellman*, 12th Dist. Butler No. CA2006-02-029, 2007-Ohio-222, ¶ 20 ("Where prior notice of default and/or acceleration is required by a provision in a note or mortgage instrument, the provision of notice is a condition precedent.").

<sup>82</sup> *Eten*, 2014-Ohio-987 at ¶ 9, citing *JP Morgan Chase Bank, N.A. v. Carroll*, 12th Dist. Clinton No. CA2013-04-010, 2013-Ohio-5273, ¶ 14. See *Maxfield*, 2016-Ohio-8012 at ¶ 46, citing *M & T Bank v. Johns*, 12th Dist. Clermont No. CA2013-04-032, 2014-Ohio-1886, ¶ 8.

<sup>83</sup> *Maxfield*, 2016-Ohio-8012 at ¶ 46, citing *Johns*, 2014-Ohio-1886 at ¶ 8. See *Eten*, 2014-Ohio-987 at ¶ 9, citing *Fifth Third Mtge. Co. v. Bell*, 12th Dist. Madison No. CA2013-02-003, 2013-Ohio-3678, ¶ 13.

<sup>84</sup> *Bank of Am. v. Vaught*, 12th Dist. Clermont No. CA2013-11-085, 2014-Ohio-3383, ¶ 10, citing *Bank of New York Mellon v. Blouse*, 12th Dist. Fayette No. CA2013-02-002, 2013-Ohio-4537, ¶ 7.

<sup>85</sup> *U.S. Bank, N.A. v. Coffey*, 76 UCC Rep.Serv.2d 945, 2012-Ohio-721, ¶ 27 (6th Dist.), citing *First Union Natl. Bank v. Hufford*, 146 Ohio App.3d 673, 679-680, 767 N.E.2d 1206 (3d Dist. 2001). See *HSBC Mtge. Servs, Inc. v. Edmon*, 6th Dist. Erie No. E-11-046, 2012-Ohio-4990, ¶ 25, citing *First Natl. Bank v. Hufford*, 146 Ohio App.3d 673, 679-680, 767 N.E.2d 1206 (3d Dist. 2001) ("The failure to prove itself as the real party in interest creates a genuine issue of material fact that precludes summary judgment.").

<sup>86</sup> Ohio Constitution, Article IV, Section 4(B).

jurisdiction is invoked, requires that the claimant have standing to sue.<sup>87</sup> Standing is a “\* \* party’s right to make a legal claim or seek judicial enforcement of a duty or right.”<sup>88</sup>

Whether a party has standing depends upon whether the claimant has a “sufficient personal stake in the litigation to obtain a judicial resolution of the controversy.”<sup>89</sup> To establish standing, the claimant must show that it “suffered (1) an injury that is (2) fairly traceable to the defendant’s allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.”<sup>90</sup>

In cases of foreclosure, a claimant must have standing at the time it commences suit.<sup>91</sup> However, the claimant can submit proof of standing subsequently to filing the complaint.<sup>92</sup> If a claimant does not have standing at the filing of the complaint, the court must dismiss the case without prejudice.<sup>93</sup> In such an instance, because the court has not adjudicated the case on the merits, a “\* \* \* dismissal has no effect on the underlying duties, rights, or obligations of the parties.”<sup>94</sup> As mentioned, the claimant must have standing at the time it files its complaint in foreclosure, and as such receiving an assignment of a promissory note and mortgage from the real party in interest after the action is filed, but before the court enters judgment, does not cure the lack of standing.<sup>95</sup>

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<sup>87</sup> *Holden*, 2016-Ohio-4603 at ¶ 20, quoting *Federal Homes Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 12, 2012-Ohio-5017, 99 N.E.2d 1214, ¶ 21.

<sup>88</sup> *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637, ¶ 8.

<sup>89</sup> *Holden*, 2016-Ohio-4603 at ¶ 20, citing *Schwartzwald*, 2012-Ohio-5017 at ¶ 21.

<sup>90</sup> *Holden*, 2016-Ohio-4603 at ¶ 20, quoting *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22.

<sup>91</sup> *Horn*, 2015-Ohio-416 at the syllabus. See *Eten*, 2014-Ohio-987 at ¶ 10, citing *BAC Home Loan Servicing, L.P. v. Mapp*, 12th Dist. Butler No. CA2013-01-001, 2013-Ohio-2968, ¶ 12 (“\* \* \* [S]tanding is to be determined as of the filing of the complaint.”).

<sup>92</sup> *Horn*, 2015-Ohio-416 at ¶ 12.

<sup>93</sup> *Schwartzwald*, 2012-Ohio-5017 at ¶ 40, citing *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 958, ¶ 51.

<sup>94</sup> *Schwartzwald*, 2012-Ohio-5017 at ¶ 40.

<sup>95</sup> *Id.* at ¶ 3.

To show that a claimant has standing in a foreclosure action, the claimant must be entitled to enforce the promissory note.<sup>96</sup> And, as discussed, because the claimant must have standing when the suit is filed, this means that the claimant must have been entitled to enforce the promissory note when the foreclosure action was filed. The substitute plaintiff has argued that, in order to establish standing, Bank of America only needed to have *either* possessed the Note *or* had the Mortgage assigned to it at the time that Bank of America filed the complaint in foreclosure. Indeed, this was the law of the Twelfth District Court of Appeals for several years, as well as at the time the parties briefed this motion.<sup>97</sup> However, in July of 2016 the Ohio Supreme Court issued a decision that required the Twelfth District Court of Appeals to change its position on this issue.

In *Deutsche Bank National Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, the Ohio Supreme Court clarified the issue of standing in foreclosure cases. The court reexamined *Federal Homes Loan Mortgage Corporation v. Schwartwald*, 134 Ohio St.3d 12, 2012-Ohio-5017, 99 N.E.2d 1214, which had been the case that the Twelfth District Court of Appeals, and numerous other districts, had relied upon in finding that standing only required the claimant to have either possession of the note or have the mortgage assigned to it at the time of filing the complaint. The Court

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<sup>96</sup> *Holden*, 2016-Ohio-4603 at ¶ 33.

<sup>97</sup> See *Bank of America, N.A. v. Davidson*, 12th Dist. Clermont No. CA2014-04-029, 2015-Ohio-479, ¶ 14, citing *SRMOF 2009-1 Trust v. Lewis*, 12th Dist. Butler Nos. 2012CA-11-239, CA2013-05-068, 2014-Ohio-71, ¶ 15 (Internal citations omitted. Emphasis original.) (“In regard to standing to bring a foreclosure action, ‘a party may establish that it is the real party in interest with standing to invoke the jurisdiction of the common pleas court when at the time it files its complaint of foreclosure, it either (1) has had a mortgage assigned *or* (2) is the holder of the note.”); *Eten*, 2014-Ohio-987 at ¶ 10, quoting *Mapp*, 2013-Ohio-2968 at ¶ 13 (Emphasis original.) (“In addition, this court has recognized that a party only needs to establish ‘an interest in either the note *or* the mortgage at the time the complaint is filed in order to have standing to prosecute a foreclosure claim.”); *Davis*, 2014-Ohio-3292 at ¶ 11, citing *Eten*, 2014-Ohio-987 at ¶ 11 (holding same).

clarified that *Schwartzwald* “did not define what documents are necessary to establish standing.”<sup>98</sup> The Court expounded that the “or” language that appellate courts found instructive was simply “a description of the particular facts in that case rather than a statement about the requisites of standing.”<sup>99</sup> Instead, to receive a judgment in foreclosure, the claimant must be able to prove that it is the party entitled to enforce the promissory note.<sup>100</sup>

In light of *Holden*, the Twelfth District Court of Appeals has altered its position on the issue of standing as well. In *Wells Fargo Bank v. Maxfield*, 2016-Ohio-8012, 75 N.E.3d 864 (12th Dist.), the court acknowledged that standing in a foreclosure action requires that the plaintiff be entitled to enforce the note.<sup>101</sup> Thus, it is no longer the case that a court can find that the claimant has standing in a foreclosure action if the claimant possessed *either* the note or the mortgage at the time the foreclosure action is filed.

Since the claimant must have a right to enforce the promissory note in order to have standing, the issue becomes a question of who can enforce a promissory note. The substitute plaintiff claims that it is entitled to enforce the Note because the Note was indorsed in blank and possessed by Bank of America when it filed this action, and thereafter Bank of America transferred possession to the substitute plaintiff.

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<sup>98</sup> *Holden*, 2016-Ohio-4603 at ¶ 30.

<sup>99</sup> *Id.* at ¶ 31. See *Mapp*, 2014-Ohio-2005 (Internal citations omitted.) (in finding that a party has standing when it is either the holder of the note or has been assigned a mortgage, the Twelfth District Court of Appeals assigned significance to the Ohio Supreme Court’s use of the word “or” in *Schwartzwald*: “\* \* \* the Ohio Supreme Court’s deliberate decision to use the disjunctive word ‘or’ as opposed to the conjunctive word ‘and’ when discussing the interest the [plaintiff] was required to establish at the time it filed the complaint is significant.”).

<sup>100</sup> *Holden*, 2016-Ohio-4603 at ¶ 33.

<sup>101</sup> *Maxfield*, 2016-Ohio-8102 at ¶ 47, citing *Holden*, 2016-Ohio-4603 at ¶ 33.

Ohio's version of the Uniform Commercial Code governs who may enforce a note.<sup>102</sup> Pursuant to R.C. 1303.31, the holder of a promissory note can enforce it.<sup>103</sup> R.C. 1303.31 states: "(A) 'Person entitled to enforce' an instrument means any of the following persons: (1) The holder of the instrument \* \* \*."<sup>104</sup> In turn, a "holder" is defined in R.C. 1301.201 as the "person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession \* \* \*."<sup>105</sup>

Under R.C. 1303.25(B), "[w]hen indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone."<sup>106</sup> Further, an instrument that was made " \* \* \* payable to an identified person may become payable to bearer if it is indorsed in blank \* \* \*."<sup>107</sup>

To synthesize the above provisions, a person in possession of an instrument, such as the Note, indorsed in blank is the holder of the instrument, and as such that person is entitled to enforce the instrument. An instrument may have been payable to an identified person at one point, but the current holder can transfer it to another by indorsing it in blank and transferring possession.

In their response in opposition, the defendants claim that the substitute plaintiff has not offered evidence that it or Bank of America possesses or possessed the Note, and therefore Bank of America was not a holder of the Note when it filed this action, and the substitute plaintiff is not a holder now. The Note has been indorsed in blank, so whoever possesses it has the right to enforce it.

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<sup>102</sup> *Coffey*, 2012-Ohio-721 at ¶ 15, citing R.C. 1301.01 *et seq.*

<sup>103</sup> *Holden*, 2016-Ohio-4603 at ¶ 22.

<sup>104</sup> R.C. 1303.31(A)(1).

<sup>105</sup> R.C. 1301.201(21)(a).

<sup>106</sup> R.C. 1303.25(B).

<sup>107</sup> R.C. 1303.10(D).

To have standing, Bank of America must have held the note when it filed this case, and the substitute plaintiff must currently hold the Note now. However, the record does not contain evidence that Bank of America possessed, and therefore held, the Note when it filed this complaint. Although Salyers averred in her affidavit that Bank of America held the Note when it filed the complaint, the court struck that portion of her affidavit for want of personal knowledge. Because the court struck that portion of the affidavit, the court cannot now rely on it.<sup>108</sup> As such, there exists a genuine issue of material fact as to whether Bank of America possessed and held the Note at the time it filed the case at bar.

The substitute plaintiff alternatively argued that the fact that Bank of America attached the Note to the complaint demonstrates that it possessed and held the Note at the time it filed the complaint. However, the substitute plaintiff has not provided legal support for this proposition, nor has the court been able to locate case law so holding. Because the Note was indorsed in blank, the holder of the Note was the party in possession of it, and nothing from the face of the Note indicates what entity was the holder. Although the court has located a case in which the court, during summary judgment, found that standing was proven from the note attached to the complaint, that case involved a note that had special indorsement, not a blank indorsement such as in the present Note.<sup>109</sup> Accordingly, the court finds that summary judgment on the substitute plaintiff's complaint in foreclosure should be denied.

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<sup>108</sup> See *Jackson*, 2014-Ohio-2480 at ¶ 11, citing *Cent. Mtge. Co. v. Bonner*, 2013-Ohio-3876 ("When considering evidence supporting a motion for summary judgment, a trial court may disregard information in affidavits that is not based on personal knowledge and does not fall under any of the permissible exceptions to the hearsay rule.").

<sup>109</sup> See *Eten*, 2014-Ohio-987 at ¶¶ 11-12 (finding that "it was clear from the documents attached to the complaint that BAC held both the note and mortgage prior to the filing of the complaint \* \* \*", but involving a note that had an allonge that had a special indorsement to BAC).

### **III. SUMMARY JUDGMENT ON THE DEFENDANTS' COUNTERCLAIMS**

The substitute plaintiff also moved for summary judgment on the defendants' three counterclaims: (1) violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, (2) violations of the Ohio Consumer Sales Practices Act, R.C. 1345.02, and (3) common law fraud.

#### **A. VIOLATIONS OF THE FDCPA, 15 U.S.C. § 1692, ET SEQ.**

In their response, the defendants identify the portion of the FDCPA that they claim Bank of America violated, that being 15 U.S.C. § 1692g(b), which provides:

"If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector."<sup>110</sup>

Thus, if a consumer requests the debt collector to verify the debt or to provide the name and address of the original creditor, 15 U.S.C. § 1692g(b) requires the debt collector to cease collection of the debt until the requested information is mailed to the consumer.

"To state a claim under the FDCPA, a plaintiff must show that a defendant violated one of the substantive provisions of the FDCPA while engaging in debt collection

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<sup>110</sup> 15 U.S.C. § 1692g(b).

activity."<sup>111</sup> However, "[t]here can be no violation of § 1692g(b) where a debt collector has 'ceased collection activities."<sup>112</sup> "[T]he FDCPA's time sequence is quite clear: (1) the consumer disputes the debt; (2) the debt collector ceases collection; and (3) must continue to cease collection until the debt collector verifies the debt and mails a copy of the verification letter to the consumer."<sup>113</sup> Therefore, although the consumer has 30 days to request verification of the debt, before the consumer makes such a request the debt collector is "perfectly free to sue within thirty days" so long as it ceases efforts during the interval between being asked for the verification of the debt and mailing the verification of the debt to the debtor.<sup>114</sup>

Here, the defendants have not alleged, much less submitted evidence, in support of their claim that Bank of America continued collection activities between the time of March 4, 2015, when the defendants sent their letter requesting verification, and March 20th, when Bank of America sent a verification letter. The complaint in foreclosure was filed on March 3rd, and therefore was not a violation of the FDCPA. The record does not disclose any activity by Bank of America during that time period. Accordingly, the defendants' claim under the FDCPA fails as a matter of law.

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<sup>111</sup> *Clark v. Lender Processing Services*, 562 Fed.Appx. 460, 465-466 (6th Cir. 2014), citing *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 459-460 (6th Cir. 2013).

<sup>112</sup> *Savage v. Hatcher*, 109 Fed.Appx. 759, 762 (6th Cir. 2004), citing *Smith v. Transworld Sys. Inc.*, 953 F.2d 1025, 1031-1032 (6th Cir. 1992). For example, in *Savage* the court dismissed a claim for a violation of 15 U.S.C. § 1692g(b) where the plaintiff did not allege that the defendant's collection activities continued after he requested verification of the debt).

<sup>113</sup> *McDaniel v. South & Assoc., P.C.*, 325 F.Supp.2d 1210, 1217 (D. Kan. 2004), quoting *Spencer v. Hendersen-Webb, Inc.*, 81 F.Supp.2d 582, 593 (D. Md. 1999).

<sup>114</sup> *McDaniel*, 325 F.Supp.2d at 1217-1218.

## B. OHIO CONSUMER SALES PRACTICES ACT, R.C. 1345.02

The substitute plaintiff has also moved for summary judgment on the defendants' claim made under the CSPA, R.C. 1345.02. The CSPA has been characterized as remedial in nature since it is designed to compensate for incomplete consumer remedies found in common law.<sup>115</sup> The defendants allege that the substitute plaintiff's debt collection practices are unfair and deceptive, particularly because it made a false representation that the defendants owed a legal obligation to the substitute plaintiff.

R.C. 1345.02 provides: "(A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction."<sup>116</sup> Thus, the CSPA is limited in application to consumer transactions. In turn, the CSPA defines a consumer transaction as follows:

"Consumer transaction' means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. 'Consumer transaction' does not include transactions between persons, defined in sections 4905.03 and 5725.01 [financial institution defined] of the Revised Code, and their customers, except for transactions involving a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code and transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers \* \* \*."

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<sup>115</sup> *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, 989 N.E. 997, ¶ 9.

<sup>116</sup> (Emphasis added.) R.C. 1345.02(A).

As the definition of consumer transaction states, real estate transactions with certain financial institutions, including those delineated in R.C. 5725.01, are not consumer transactions.<sup>117</sup> A financial institution, as defined in R.C. 5725.01, includes both national banks and banks, banking associations, trust companies, savings and loan associations, savings banks, and other banking institutions incorporated and organized under the laws of any states.<sup>118</sup> As financial institutions, the real estate transactions between Bank of America and the substitute plaintiff with the defendants are not within the ambit of a consumer transaction under the CSPA.<sup>119</sup>

Furthermore, Caliber's interactions with the defendants is also outside the purview of the CSPA. Managing a borrower's mortgage payments or a borrower's defaulting loans is part of a land transaction, as opposed to a consumer transaction.<sup>120</sup> In *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933, 989 N.E. 997, the Ohio Supreme Court had to decide whether mortgage servicing fell within the ambit of consumer transactions. The Court concluded that the servicing of a borrower's residential mortgage loan is not a consumer transaction.<sup>121</sup> This is so because " \* \* \* one essential element of R.C. 1345.01(A) is not met; there is no sale, lease, assignment,

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<sup>117</sup> *Anderson*, 2013-Ohio-1933 at ¶ 10, citing R.C. 1345.01(A). See *Powers v. Green Tree Servicing, L.L.C.*, 8th Dist. Cuyahoga No. 102753, 2015-Ohio-3355, ¶ 9.

<sup>118</sup> R.C. 5725.01(A) provides: "(A) 'Financial Institution' means: (1) A national bank organized and existing as a national bank association pursuant to the 'National Bank Act,' 12 U.S.C. 21; (2) A federal savings association or federal savings bank that is chartered under 12 U.S.C. 1464; (3) A bank, banking association, trust company, savings and loan association, savings bank, or other banking institution that is incorporated or organized under the laws of any state \* \* \*."

<sup>119</sup> See *Floyd v. Bank of Am., N.A.*, N.D. Ohio No. 1:13-CV-2072, 2014 WL 3732591, \*7 (July 25, 2014) (finding that Bank of America, N.A. is an exempt financial institution within the meaning of R.C. 5725.01 and therefore was outside of the purview of the CSPA). Cf. *Powers*, 2015-Ohio-3355 at ¶¶ 15-16 (finding that Green Tree Servicing's mortgage with the plaintiffs did fall within the ambit of a consumer transaction because it was a nonbank mortgage lender and therefore was not part of the exception in CSPA for financial institutions).

<sup>120</sup> *Anderson*, 2013-Ohio-1933 at ¶ 18.

<sup>121</sup> *Id.* at ¶ 11.

award by chance, or other transfer of a service to a consumer."<sup>122</sup> The " \* \* CSPA does not apply to 'collateral services that are solely associated with the sale of real estate and are necessary to effectuate a 'pure' real estate transaction," and mortgage servicing is a collateral service.<sup>123</sup> Further, " \* \* transactions between mortgage-service providers and homeowners are not 'consumer transactions' within the meaning of the CSPA because there is no 'transfer of an item of goods, a service, a franchise, or an intangible, to an individual."<sup>124</sup>

Because the CSPA does not apply to transactions between mortgage servicers, like Caliber, and consumers, any actions Caliber had with the defendants likewise falls outside of the reach of the CSPA. Accordingly, the defendants' claim of a CSPA violation fails as a matter of law, and summary judgment on this claim is appropriate.

### C. COMMON LAW FRAUD

Under Ohio law, a claim for fraud contains six elements: "(1) a representation (or concealment of a fact when there is a duty to disclose), (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with the intent of misleading another into relying upon it, (5) justifiable reliance, and (5) resulting injury proximately caused by the reliance."<sup>125</sup>

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<sup>122</sup> *Id.* at ¶ 12.

<sup>123</sup> *Id.* at ¶ 14, quoting *U.S. Bank v. Amir*, 8th Dist. No. 97438, 2012-Ohio-2772, ¶¶ 42-43.

<sup>124</sup> *Anderson*, 2013-Ohio-1933 at ¶ 15, quoting R.C. 1345.01(A).

<sup>125</sup> *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 27, citing *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69, 73, 491 N.E.2d 1101 (1986). See *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984), quoting *Friedland v.*

The substitute plaintiff posits that it must be granted summary judgment because the defendants' allegations of fraud are largely based on the proposition that the substitute plaintiff, and previously Bank of America, were not entitled to enforce the Note or Mortgage. However, as discussed in Section II, there remain genuine issues of material fact as to whether the substitute plaintiff, and previously Bank of America, have the right to enforce the Note and Mortgage. Accordingly, the summary judgment cannot be granted on the defendants' common law fraud claim.

### CONCLUSION

For the foregoing reasons, the court grants the substitute plaintiff's motion in part and denies it in part. It is granted on the defendants' counterclaims for violations under the Fair Debt Collection Practices Act and the Ohio Consumer Sales Practices Act. It is denied as to the substitute plaintiff's complaint in foreclosure and as to the defendants' counterclaim for common law fraud.

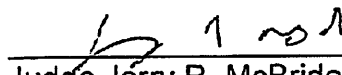
Counsel shall conference and call Rosemary at 732-7108 with five days of the filing of this Decision/Entry in order to schedule a case management/trial setting conference which shall be held within 14 days thereafter.

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*Lipman*, 68 Ohio App.2d 255, 429 N.E.2d 456 (8th Dist. 1980), paragraph one of the syllabus (holding same); *Nguyen v. Chen*, 12th Dist. Butler No. CA2013-10-191, 2014-Ohio-5188, ¶ 24, quoting *Foods, Inc. v. Duenas*, 12th Dist. Clermont No. CA2012-01-002, 2013-Ohio-450, ¶ 36 (holding same).


IT IS SO ORDERED.

DATED: 5-19-18

  
\_\_\_\_\_  
Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent on this 14<sup>th</sup> day of May 2018 2016 by e-mail to Matthew I. McKelvey, at [matt.mckelvey@lsrlaw.com](mailto:matt.mckelvey@lsrlaw.com), Kimberlee Rohr, at [kimberlee.rohr@lsrlaw.com](mailto:kimberlee.rohr@lsrlaw.com), and Adam J. Turer, at [adam.turer@lsrlaw.com](mailto:adam.turer@lsrlaw.com), Attorneys for the Plaintiff, to Peter Cozmyk, Attorney for the Defendants Bruce E. Botts and Lynne M. Botts, at [pcozmyk@cozmyklaw.com](mailto:pcozmyk@cozmyklaw.com), to Elliot B. Garvey, Attorney for the defendant Ohio Receivables LLC, at [echeeklaw@echeeklaw.com](mailto:echeeklaw@echeeklaw.com), and by regular U.S. Mail to Citibank Federal Savings Bank, Defendant, 1000 Technology Drive, Mailstop 730, O'Fallon, Missouri 63368-2240, to Ohio Homeowner Assistance LLC, Defendant, c/o John F. Kukura III, Statutory Agent, 88 East Broad Street, Suite 1800, Columbus, Ohio 43215, and to Paxton Lake Homeowners Association, c/o Amy Schott Ferguson, Statutory Agent, 10655 Springfield Pike, Cincinnati, Ohio 45215.

  
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Judicial Assistant to Judge McBride