

EXHIBIT F
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**In The Court of Common Pleas
Delaware County Ohio**

Countrywide Home Loans

March 27, 2009

Plaintiff

Case No. 08-CVE-08-1170

vs

Judge: Everett H. Krueger

Dana J. Miller

Defendant

COMMON PLEAS COURT
DELAWARE COUNTY OHIO
FILED
2009 MAR 30 AM 11:25
JAN ANTONOPLOS
CLERK

DEFENDANTS MOTION TO DISMISS

**NO RATIFICATION OF COMMENCEMENT PER OHIO
CIVIL RULE 17(a)**

**Comes now the Defendant, Dana J. Miller, who respectfully moves this Court to
dismiss this action for the reasons stated herein.**

- A) There is no evidence of ratification of commencement of this action per Federal and Ohio Civil Rule 17. The real party at interest is the only one entitled to make a valid claim.
- B) In Ohio Rule 17 the genuine issues of material fact as to whether Plaintiff is the holder of promissory note and mortgage, and whether another entity not joined in the



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action is the holder of the note and mortgage, precludes summary judgement for the Plaintiff in a mortgage foreclosure action. Plaintiff might not be the real party in interest, and an indispensable party might not have been joined in the action. The task of determining and designating the priority mortgage holder is clearly an unascertained issue of material fact before the court and where Plaintiff has not established itself as a real party of interest, the court errs in granting **Summary Judgement**. *First Union Natl. Bank v. Hufford* (Ohio App. 3 Dist., 09-25-2001) 146 Ohio App.3d 673, 767 N.E.2d 1206, 2001-Ohio-2271. Plaintiff through submission of a XEROX COPY of promissory note and mortgage as well as affidavits in support does not suffice as evidence of being the true party at interest to bring this action. An affidavit from an agent of the bank or MERS who looks at a screenshot is wholly inadequate to create standing and wholly inadequate to make a proof of claim. The real party at interest producing the original physical signature note and mortgage is the only one entitled to make a claim which would constitute ratification of commencement under Civil Rule 17(a). A XEROX COPY of the note does not prove the Plaintiff is the current holder of said note because it leaves the issue open for the real party of interest who holds the actual note with original physical signature to bring it into court for a future claim against the Defendant. It is wholly unfair and irregular to be compelled to pay a claim based on a xerox or screenshot copy of the note and mortgage.

- C) **Defendant contradicts the evidence presented by Plaintiff in support of their standing to bring this action for Summary Judgement and does, in fact, exert his right to challenge Plaintiff's Capacity to Sue.** *Provident Bank v. Taylor* (Ohio

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App. 5 Dist., Delaware, 05-23-05) No. 04CAE05042, 2005-Ohio_2573, 2005 WL 1227900, Unreported. Judgment 185.3(15). The Defendant objects to the contention by Plaintiff that it has standing to bring this action, See also *Damp Trusts v. European Health Spa, Inc.*, 1978 U.S. Dist. LEXIS 18299 (W.D. Penn. 1978)(holding that "[a]lthough some courts view a party's lack of capacity to sue as a defect in subject matter jurisdiction, the weight of authority, and the better view, is that such a defect can be waived"); *Ashton Properties v. Overton*, 107 P.3d 1014, 1017 (Col. App. 2004)("Subject matter jurisdiction and capacity are different legal doctrines . In contrast to subject matter jurisdiction, which concerns the court's ability to consider a question capacity to sue concerns a party's right to maintain any action . The two doctrines are independent of each other, and a party's capacity to sue or lack thereof does not affect the jurisdiction of the court. Capacity to sue is not jurisdictional, and unlike subject matter jurisdiction, an objection to it may be waived if not timely asserted")(citing *Moore's Federal Practice* § 17.20[4] (3d ed. 2003)). Accordingly, this Court should deny Defendant's Motion to Dismiss because the Defendant can, and has, waived its challenge to Plaintiff's capacity to sue. The phrase "by specific negative averment" means "that a party must raise lack of capacity to sue in an appropriate pleading or amendment to avoid waiver." *Wagner Furniture Interiors, Inc v. Kemner's Georgetown Manor*, 929 F.2d 343, 345 (7th Cir. 1991). if the issue of lack of capacity is not raised timely and in compliance with Rule 9(a), the issue is waived. See *Howerton v. Designer Homes by Georges, Inc.*, 950 F.2d 281 (5th Cir. 1992)(holding that the issue of capacity is subject to waiver if not specifically raised by negative averment); *NAACP Labor Comm. v. Laborers'*

Int'l Union of North America, 902 F. Supp. 688, 699 (W.D. Va. 1995)(holding that the defendants waived their right to challenge a representatives capacity to sue, even though each defendant generally denied plaintiff's allegation that she was the personal representative); *Young v. Partridge*, 40 F.R.D. 376, 378-379 (N.D. Miss. 1966)(holding that the defendant waived issue of plaintiff's capacity when he waited for more than seven months after second amended complaint and more than three months after answer on merits were filed before making his motion to dismiss based on lack of capacity to sue).

- D) According to Rule 17(a) real parties of interest (see *Rakestraw v. Rodrigues* (1972) 8 Cal. 3d 67,73, and cited on page 1135 of Black's 5th Ed. (1979)) under the word "ratification" it is found that the word "ratification" means that only a physical signature can be considered ratification. This impacts many of the documents submitted by Plaintiff. They would be deemed to have no force and effect. Many of the court documents received or observed by Defendant seem to have questions of pedigree, force, and effect.

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SUMMARY AND CONCLUSION

Because the Plaintiff has not produced original physical signature note and mortgage documents in this matter to demonstrate interest or standing required under Federal and Ohio Civil Rule 17(a), Defendant moves the court to dismiss Plaintiff's claim for lack of Ratification of Commencement under Federal and Ohio Civil Rule 17(a). Defendant does not see how the court could obtain proper jurisdiction to render summary judgement for the plaintiff and case should properly be dismissed for lack of jurisdiction.

This document prepared and submitted by: Dana J. Miller
Dana J. Miller Pro Se

On this 30th day of March 2009 Dana J. Miller did appear before me and authenticate this document for the purposes so stated.

[Signature] Notary Signature



AZA H. BITTINGER JR.
Notary Public, State of Ohio
My Commission Expires Jan. 11, 2014

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