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IN THE SUPREME COURT OF OHIO

STATE OF OHIO *EX REL.* MICHAEL DEWINE, ATTORNEY GENERAL, *et al.*,	:	Case No. 2011-0890
Petitioners,	:	On Review of Certified Questions from the United States District Court for the Northern District of Ohio
vs.	:	
GMAC Mortgage, LLC, *et al.*,	:	
Respondents.	:	U.S. District Court Case Nos. 3:10-cv02537, 1:10-cv-02709

MERIT BRIEF OF RESPONDENTS
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QUESTIONS CERTIFIED BY OHIO SUPREME COURT

1. Does the servicing of a borrower's residential mortgage loan constitute a "consumer transaction" as defined in the Ohio Consumer Sales Practices Act, R.C. § 1345.01(A)?

2. Does the prosecution of a foreclosure action by a mortgage servicer constitute a "consumer transaction" as defined in the Ohio Consumer Sales Practices Act, R.C. § 1345.01(A)?

3. Is an entity that services a residential mortgage loan, and prosecutes a foreclosure action, a "supplier . . . engaged in the business of effecting or soliciting consumer transactions" as defined in the Ohio Consumers Sales Practices Act, R.C. § 1345.01(C)?

STATEMENT OF THE CASE AND FACTS

Ohio courts have never held that the Ohio Consumer Sales Practices Act ("CSPA") applies to commercial transactions between two business entities, even where there may be some incidental benefit to a consumer. Ohio courts have never held that the CSPA applies to pure real estate transactions. Additionally, Ohio courts have never held that the CSPA applies to the filing of foreclosure actions and the execution of affidavits and other documents used in foreclosure actions.

Yet, that is just what the Petitioners and their amici ask this Court to do. Specifically, the Petitioners—the Ohio Attorney General, and a group of individual borrowers who failed to pay back their loans, led by Lois Blank—ask this Court to allow borrowers to sue their mortgage servicers under the CSPA for mortgage servicing activity arising out of a real estate transaction and done pursuant to a commercial agreement entered into with others. They also ask this Court to allow borrowers to sue their mortgage servicers under the CSPA for actions taken in the prosecution of real estate foreclosure actions pending in Ohio trial courts. The CSPA, by definition, covers sales, leases, assignments, awards by chance, or other transactions between suppliers of those types of consumer-oriented items—goods, services, franchises, and intangibles—and their customers. The CSPA, as its title indicates, was intended to regulate the sales practices of suppliers of goods and services to customers. To go where the Petitioners want this Court to go would stretch the CSPA far beyond the consumer sales practices arena it was enacted to cover.

The servicing of a borrower's mortgage is commercial in nature. Servicing is undertaken by a servicer to benefit the owner of the loan. Petitioners and their amici acknowledge this. The servicing relationship arises out of a servicing agreement, pooling and servicing agreement, or

flow sale and servicing agreement entered into between a mortgage servicer and the owner of the note and mortgage, or a mortgage selling and servicing contract between a lender and a Government Sponsored Enterprise ("GSE") like Fannie Mae or a commercial investor which establishes the contractual relationship between the lender and the GSE or the commercial investor and sets forth the terms and conditions of the sale of the mortgages while retaining the mortgage servicing rights. No obligations run to the borrower and nothing is transferred or provided to the borrower. Rather, the mortgage servicer has two main responsibilities: ensuring repayment of the loan and preserving the owner's collateral. In these circumstances, it is abundantly clear that the servicing of a mortgage is not subject to the CSPA.

Also, the servicing of a borrower's mortgage arises solely out of a real estate transaction. In other words, absent a conveyance of a mortgage interest in real property in a real estate transaction, there is no mortgage servicing. The CSPA does not apply to the servicing of a mortgage for this reason as well.

The specific conduct described in the Petitioners' Complaints against respondents Ally Financial, Inc. ("Ally") and GMAC Mortgage, LLC ("GMACM") focuses on the direct prosecution by GMACM of real estate foreclosure actions pending before an Ohio Common Pleas Court judge. Affidavits and assignments of mortgage were filed in those foreclosure actions as support for default and summary judgment motions. It cannot be disputed that foreclosure actions arise directly out of a real estate transaction. Thus, to allow a CSPA claim to be premised on litigation conduct in a foreclosure proceeding would be an unprecedented expansion of the CSPA into pure real estate transactions and transfer of title disputes, and would usurp the authority and jurisdiction of Ohio Common Pleas Court judges charged with managing their dockets.

It is no secret that mortgage servicers have been under attack as part of the so-called "foreclosure crisis" that has affected Ohio along with the nation. When potential issues about the execution of affidavits filed in foreclosure cases came to light, GMACM halted all foreclosures in Ohio. GMACM conducted a comprehensive review of its practices and procedures relating to foreclosure proceedings generally, and reviewed individual affidavits filed in court cases in Ohio. GMACM has addressed any deficiencies in its prior procedures. Importantly, this review included confirmation of the substantive borrower-specific factual information set forth in these affidavits. GMACM's review has confirmed that no foreclosure action was commenced against a borrower who was not in default under the terms of their note and mortgage. As Ally has publicly stated: "Through our review to date, Ally has not found any instance where a homeowner was foreclosed upon without being in significant default." See Ally Financial Statement on Mortgage Servicing Consent Order (April 13, 2011) (Appendix at Exhibit A). The fact is, the foreclosure defendants in these cases are in default of their payment obligations, and neither Petitioners nor their amici allege otherwise.

Just as importantly, these cases are not about wrongful foreclosures. None of the Blank plaintiffs allege he or she was not in default. The Attorney General does not contend that the borrowers for whom he is seeking redress were not in default. This is the true backdrop to the underlying Complaints in these cases. Rather than offer convincing legal arguments, Petitioners and their amici instead make an emotional appeal and attempt to generate sympathy for homeowners who, for whatever reason, have not kept their promise to pay back the money loaned to them in the real estate transaction. This Court should not be swayed to apply an unprecedented interpretation of the CSPA by this naked bid for sympathy.

With respect to the instant proceeding, the U.S. District Court for the Northern District of Ohio consolidated the cases brought by the Attorney General and the Blank plaintiffs, and certified to this Court three questions of Ohio law on the scope of the CSPA.[1] These questions are: whether the servicing of a borrower's residential mortgage loan constitutes a "consumer transaction"; whether the prosecution of a foreclosure action by a mortgage servicer constitutes a "consumer transaction"; and whether an entity that services a residential mortgage loan, and prosecutes a foreclosure action, is a "supplier . . . engaged in the business of effecting or soliciting consumer transactions." As is set forth in more detail below, GMACM submits that the clear and unequivocal answer to all three questions certified by this Court is "no."

ARGUMENT

I. Response to First Certified Question:

The Servicing Of A Residential Mortgage Is Not A "Consumer Transaction" As Defined In The CSPA.

The first certified question is whether the servicing of a residential mortgage loan constitutes a "consumer transaction" as defined in the CSPA. It is appropriate that this question is the first one certified because the definition of a "consumer transaction" is the linchpin for defining the general scope of the CSPA.

A "consumer transaction" is a *sine qua non* for determining whether an act or practice is subject to regulation under the CSPA. Unless the underlying transaction constitutes a "consumer transaction," it matters not whether a person is a "supplier" or whether an unfair, deceptive or unconscionable act or practice occurred "in connection with" the transaction. See R.C. §§

[1] This Court accepted the same three certified questions in a companion case, Anderson v. Barclays Capital Real Estate, Inc., S. Ct. Docket No. 2011-908. The Court stayed briefing in the Anderson case and held it pending the decision in this case. Nonetheless, the plaintiff in that case, Sondra Anderson, filed an amicus brief in this proceeding.

1345.01(C) (generally defining a "supplier" as a "person engaged in the business of effecting or soliciting *a consumer transaction*") (emphasis added); 1345.02(A), 1345.03(A) (proscribing unfair, deceptive and unconscionable acts or practices by a supplier "in connection with *a consumer transaction*") (emphasis added) (Appendix at Exhibit B). As explained below, the CSPA definition of a "consumer transaction" does not encompass mortgage servicing transactions.

A. Mortgage Servicing is Not A Service That Is Sold or Otherwise Transferred to An Individual Primarily for Consumer Purposes

1. The First Certified Question Must Be Resolved in Relation to the Statutory Text, Which Requires that There Be a Transaction Consisting of a Sale or Other Transfer of a Service to an Individual Primarily for Consumer Purposes

As its name indicates, the CSPA was intended to protect consumers from unfair, deceptive or unconscionable *sales* practices. Subject to various exceptions, the CSPA defines a "consumer transaction" to mean:

> *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. . . .

R.C. § 1345.01(A) (emphasis added).[2] In relevant part, the CSPA definition of a "consumer transaction" thus plainly requires that there be a transaction consisting of "a sale . . . or other transfer of . . . a service . . . to an individual" primarily for consumer purposes.

[2] The remainder of the "consumer transaction" definition consists of exclusions for certain transactions and two exceptions to the exclusions for transactions between public utilities (R.C. § 4905.03), financial institutions, dealers in intangibles, insurance companies (R.C. § 5725.01) and their customers. R.C. § 1345.01(A). These exemptions require a factual record to determine their applicability or inapplicability to a particular entity. The applicability or inapplicability of a particular exemption in a particular situation is not presented to this Court in these certified questions.

The first certified question therefore must be resolved in relation to this unambiguous statutory language because "a primary rule of statutory construction" is that "we must apply a statute as it is written when its meaning is unambiguous and definite." Portage Cty. Bd. of Commrs. v. Akron (2006), 109 Ohio St. 3d 106, 116. As this Court has recognized, to do otherwise would be tantamount to rewriting the statute. See id. (noting that "[a]n unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and *a court cannot simply ignore or add words.*") (emphasis added).

2. The Mortgage Servicing Arguments of Petitioners and their Amici Disregard the Statutory Requirement that the Service Be One that is Sold or Otherwise Transferred to an Individual

Although the Attorney General suggests that GMACM will "attempt to twist the CSPA's straightforward language," AG Br. at 2, it ironically is he who has advanced an unsupported mortgage servicing argument that would require this Court to "simply ignore or add words." The Attorney General's conclusory argument that mortgage servicing is a "consumer transaction" disregards the statutory language requiring that the service involved be one that is sold or otherwise transferred to an individual primarily for consumer purposes. As a result, the Attorney General fails to account for the nature of the sale of the service at issue.

This failure is fundamental. The statute itself is described as a "*Sales* Practices Act," as the definition of a "consumer transaction" requires a "transaction" consisting of a sale, lease, assignment or other transfer of a good or a service to an individual. By failing to acknowledge the need to examine the nature of the mortgage servicing transaction and the servicing agreement that evidences it, the Attorney General effectively eliminates the threshold "transaction" requirement from the CSPA. Indeed, rather than address the statutory requirement that there be a sale or other transfer of a service to an individual, the Attorney General simply asserts that

mortgage servicing is a service to an individual. In so doing, the Attorney General reads the "sale" out of the "Consumer Sales Practices Act."

This conclusory argument, which is the sum and substance of the Attorney General's mortgage servicing argument, is fatally flawed. That the statutory definition of a consumer "transaction" can not be applied without inquiring as to the nature of the sale at issue. See R.C. § 1345.01(A) (referring to "a *sale . . . or other transfer of . . . a service . . .* ***to*** an individual . . . ") (emphasis added); ; see Akron, 109 Ohio St. 3d at 116 ("a court cannot simply ignore or add words"); Graham v. United States, 96 F.3d 446, 450 (9th Cir. 1996) (Kozinski, J., dissenting) (statutory "interpretation . . . is the process whereby we figure out the meaning of the words that actually are there; interpreting the sounds of silence is a euphemism for rewriting"). As previously explained, see Section I.C. infra, a mortgage servicing agreement is an agreement pursuant to which a servicer (or a sub-servicer) agrees to service a residential mortgage loan on behalf of the owner of the loan (or a master servicer). The right to service the loan is sold by the owner of the loan (or a master servicer) to the servicer (or to a sub-servicer) pursuant to a servicing agreement that is wholly commercial in nature. Under a servicing agreement, the servicer agrees to service the loan on behalf of the owner of the loan.

The fundamental flaw in the mortgage servicing argument of the Attorney General is mimicked by the Blank Petitioner and the Amici. Petitioner Blank emphasizes the word "services," and lists a variety of services performed by a mortgage servicer, but like the Attorney General, conspicuously omits from her servicing argument the statutory requirement that the service be one that is sold or otherwise transferred to an individual, and quotes only a portion of the definition in advancing her conclusory servicing argument. Blank Br. at 10-11. Like the Attorney General, the Legal Services amici fail to identify a transaction involving the sale of a

servicing "service" to the borrower. Similarly, amicus Sondra Anderson merely quotes the definition of a "consumer transaction" and asserts that a mortgage servicer "is clearly performing labor for the benefit of the consumer, which constitutes providing 'services' as referenced in R.C. § 1345.01(A)." Anderson Amicus Br. at 11-12. Ms. Anderson makes no attempt, however, to explain the basis for her conclusory assertion that a servicer performs those services for the benefit of the consumer.

It is self-evident that a "service" is "the performance of labor for the benefit of another." OAC § 109:4-3-01(C)(2). The question is whether the services performed by a mortgage servicer are performed on behalf of the borrower or on behalf of the owner of the loan who retained the mortgage servicer to service the loan and compensates the servicer for doing so. Moreover, the definition of a "service" should not be read myopically and divorced from the statutory context in which the term is used. It must be read, rather, in relation to the statutory requirement that the "service" be one that is sold or otherwise transferred to an individual. Like the other Amici and the Petitioners whom they support, Ms. Anderson does not address the threshold statutory requirement that the service be one that is sold or otherwise transferred to an individual and, thus, fails to discern that mortgage servicing is a service that is performed on behalf of the owner of the loan.

3. A Mortgage Servicing Transaction Is Not a Sale or Other Transfer of a Service to an Individual Primarily for Consumer Purposes

Because Petitioners and their Amici failed to focus on the statutory requirement that the transaction at issue be "a sale . . . or other transfer of . . . a service . . . to an individual" primarily for consumer purposes, they have not analyzed the nature of transactions involving the sale of mortgage servicing rights and the threshold question of whether a mortgage servicer services the

loan on behalf of the mortgagor or, alternatively, on behalf of the owner of the loan (or a master servicer).

This question cannot be answered in the abstract. It must be answered, rather, in the context of the contractual agreements pursuant to which mortgage servicers acquire or retain the right to service residential mortgage loans. See 24 C.F.R. § 3500.21 (a) (RESPA regulation defining a "master servicer" as "the owner *of the right to perform servicing*, which may actually perform the servicing itself or may do so through a subservicer" and a "subservicer" as "a servicer who does not own *the right to perform servicing*, but who does so on behalf of the master servicer") (emphasis added); see also Legal Services Amici Br. at 5 ("Loan Servicing is Separate from Loan Origination"). These agreements memorialize the mortgage servicing transactions that are implicated directly by the first certified question -- the sale to the servicer, or the retention by the lender, of the right to service the loan. Pursuant to such mortgage servicing agreements, the mortgage servicer (or subservicer) undertakes to service the loan on behalf of the owner of the loan (or a master servicer) in exchange for a servicing fee. See Anderson Amicus Br. at 4 (noting that a mortgage servicer "receives payment for its loan administration and other services from the payment stream generated by the consumers' residential mortgages").

Apparently without fully appreciating their relevance to the certified question, Petitioners and their Amici allude in various instances to the fact there is a robust commercial market in mortgage servicing rights that often results in transfers of mortgage servicing and changes in mortgage servicers:

- "homeowners do not choose their servicers" (Legal Services Amici Br. at. 7.)
- "To be sure, the homeowner does not willingly seek out GMAC as his servicer." (AG Merit Br. at 8.)

- "In today's market, loans and the rights to service them often are bought and sold. In many cases, the company you send your payment to is not the company that owns your loan." (Legal Services Amici Br. at 6 (quoting FTC consumer education brochure entitled "Mortgage Servicing: Making Sure Your Payments Count")).

- "A sale [of the loan] might result in a change in the . . . 'Loan Servicer' . . .. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note." (Legal Services Amici Br. at 5 (quoting OHIO-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3036)).

- "In each and every Ohio case in which GMAC serviced loans either owned by GMAC, or a as a servicer or sub-servicer on behalf of the note owner." (Blank Merit Br. at 10).

The transfers of mortgage servicing rights to which they allude are so commonplace that the federal Real Estate Settlement Procedures Act ("RESPA") and its implementing Regulation X impose: (i) a disclosure requirement for mortgage loan applicants regarding whether the servicing of the loan may be assigned, transferred or sold to a different loan servicer; and (ii) notification requirements for borrowers when the servicing of the loan is assigned, sold or transferred.[3] See 12 U.S.C. § 2605(a)-(c); 24 C.F.R. § 3500.21(b), (c); 24 C.F.R. Part 3500, Appendix MS-1 (Servicing Disclosure Statement), Appendix MS-2 (Notice of Assignment, Sale or Transfer of Servicing Rights).

It is evident from, and in some instances implicit in, the foregoing that a sale of mortgage servicing rights is not a sale or other transfer of a service to a consumer. Mortgage servicing typically is performed pursuant to a servicing agreement between the servicer and the owner of the loan or, in the case of sub-servicing, the master servicer. The mortgage servicing agreement can take the form of a Pooling and Servicing Agreement, a Flow Sale and Servicing Agreement or a variation of one or the other. A servicing or subservicing agreement sets forth the rights and

[3] The Servicing Disclosure Statement and the Notice of Assignment, Sale or Transfer of Servicing Rights contained in Regulation X Appendices MS-1 and MS-2 are included in Petitioner's Appendix as Exhibits C and D.

obligations of the servicer and the owner of the loans or the master servicer, delineates what the servicer can and cannot do in connection with respect those loans, and prescribes how the servicer is to be compensated by the owner for servicing the loan. These mortgage servicing rights have substantial commercial value and, as is evident from the aforementioned RESPA servicing transfer disclosure and notification requirements, are regularly sold and transferred. See also AG Merit Br. at 8 n.3 (it is the lender who agrees to "sell" the servicing rights to GMACM).

Although there are variations on the theme, an agreement for the sale or transfer of mortgage servicing rights is a commercial agreement between the owner (or master servicer) of a pool of residential mortgage loans and the entity that is servicing (or subservicing) the loans on behalf of that owner or master servicer. Likewise, an agreement (such as a pooling and servicing agreement or a mortgage selling and servicing agreement) whereby mortgage loans are sold by an originating lender to a Government Sponsored Enterprise or commercial investor, in which the lender retains the mortgage servicing rights and the lender is contractually obligated to service the mortgage loans on behalf of the Government Sponsored Enterprise or commercial investor as the lender-servicer, is a commercial transaction between the lender-servicer and the Government Sponsored Enterprise or commercial investor and the servicing of the loans is on behalf of the Government Sponsored Enterprise or commercial. In the context of the sale of mortgage loans to a Government Sponsored Enterprise, the fact that the servicing is performed on behalf of the Government Sponsored Enterprise is underscored by the fact that the Government Sponsored Enterprise reserves the right to transfer the servicing to another servicer notwithstanding the retention of the servicing rights by the lender.

It is pursuant to agreements of this nature that a mortgage servicer performs the types of functions noted by Petitioners and their Amici. It is evident, however, from the nature of these agreements and their terms that:

- a mortgage servicing transaction involves a sale or assignment by the owner of the loan of the contractual right to service the loan;
- the person to whom the servicing right is sold or assigned is the master servicer (or servicer) who will service the loan on behalf of the owner directly, or will engage a sub-servicer to service the loan on behalf of the master servicer (or servicer), for the benefit of the owner pursuant to one or more commercial agreements; and
- the master servicer, mortgage servicer or sub-servicer (as applicable) agrees to service the loan for the benefit of the owner of the loan, thus selling its services to the owner of the loan

No service is sold or otherwise transferred from the servicer to the mortgagor. Neither Petitioner nor their Amici have contended otherwise nor could they. The mortgagor is not a party to the mortgage servicing agreement nor is he or she likely knowledge about its terms. Simply stated, the mortgage servicer purchases the servicing rights from the owner of the loan, or retains the servicing rights when it sells the loan to the owner, and is compensated by the owner of the loan for servicing the loan on its behalf. See Anderson Amicus Br. at 4 (noting that the servicer "receives payment for its loan administration and other services from the payment stream generated by the consumers' residential mortgages").

The Walton loan referenced in the amici brief of Ohio Legal Services Programs is a case in point. It is part of a pool of loans the servicing of which is governed by an extensive, 57 page "Flow Sale and Servicing Agreement" dated June 1, 2002 between the Lehman Brothers Bank, FSB (designated as the "Initial Owner" or "Owner") and GMAC Mortgage Corporation[4] (designated as the "Company"). See Appendix at Exhibit E.

[4] "GMAC Mortgage Corporation" is the former name of "GMAC Mortgage, LLC."

The terms of the agreement make clear that GMACM services the loans for the benefit of the owner of the note and mortgage. For example, the first sentence of Article IV of the Flow Sale and Servicing Agreement, governing the administration and servicing of the mortgage loans, provides as follows:

> The Company, as independent contract servicer, shall service and administer the Mortgage Loans for the benefit of the Owner in accordance with the terms of this Agreement and in conformity with Customary Servicing Procedures.

Id. at § 4.01, pg. 27 (emphasis added). While the agreement authorizes GMACM to make minor adjustments to mortgagor obligations, significant modifications must be approved by the Owner:

> [T]he Company shall, and is hereby authorized and empowered to . . . waive, modify, or vary any term of any Mortgage Loan or consent to the postponement of strict compliance with any such term or in any manner grant indulgence to the related Mortgagor if in the Company's reasonable and prudent determination such waiver, modification, postponement or indulgence is not materially adverse to the interests of the Owner and is not prohibited by the Policy; provided, however, that the Company may not, unless it has obtained the consent of the Owner, permit any modification with respect to any Mortgage Loan that would vary the Mortgage Interest Rate, defer or forgive the payment of interest or of any principal, reduce the outstanding principal amount (other than as a result of its actual receipt of payment of principal on) or extend the final maturity date of such Mortgage Loan.

Id. at § 4.01, pg. 28.

Similarly, several provisions in the Flow Sale and Servicing Agreement require GMACM to take actions in the best interests of the owner. For example, Section 4.02, governing liquidation of loans and foreclosure, provides as follows:

> If any payment due under any Mortgage Loan and not postponed pursuant to Section 4.01 is not paid when the same becomes due and payable, or if the Mortgagor fails to perform any other covenant or obligation under the Mortgage Loan and such failure continues beyond any applicable grace period, the Company shall take such action, including action relating to delinquency loss management, loss mitigation and foreclosure, as is required by or consistent with the [Federal Housing Agency or Veterans Affairs] Regulations and as it shall deem to be in the best interests of the Owner.

Id. at § 4.02, pg. 29 (emphasis added).

The Agreement also requires GMACM to transmit payments received from borrowers to the Owner, thereby further demonstrating that the servicing function is meant to benefit the holder of the note and mortgage:

> On each Remittance Date the Company shall remit by wire transfer of immediately available funds to the Owner or its designee the sum of (a) all amounts deposited in the Custodial Account as of the close of business on the Determination Date (net of charges against or withdrawals from the Custodial Account pursuant to Section 4.05), plus (b) all amounts, if any, which the Company is obligated to deposit into the Custodial Account pursuant to Section 5.03, plus (c) the aggregate amount of any Prepayment Interest Shortfall existing as of such Remittance Date, minus (i) any amounts attributable to Principal Prepayments received after the immediately preceding Prepayment Period and (ii) any Insurance Proceeds, Liquidation Proceeds or FHA/VA Claim Proceeds received after the immediately preceding Prepayment Period, and (iii) any Monthly Payment received by the Company during any Due Period in addition to the Monthly Payment due on such Due Date, intended by the related Mortgagor to be applied on a subsequent Due Date (the sum of (i), (ii) and (iii), the "Amount Held for Future Distribution"), all of which amounts shall be remitted on the next succeeding applicable Remittance Date.

Id. at § 5.01, pg. 39.

Similarly, the Blank loan is part of a pool of loans the servicing of which is governed by a "Servicing Agreement" dated November 1, 2001 between UBS Warburg Real Estate Securities Inc. (designated as "Owner") and GMAC Mortgage Corporation (designated as "Servicer"). See Appendix at Exhibit F. The Servicing Agreement provides that the loans are serviced under the Servicing Agreement for the benefit of the Owner. See id. at § 2.02, pg. 10. Additionally, significant modifications to the loans must be approved by the Owner, see id. at § 4.01, pg. 15, and payments received by GMACM are to be remitted to the Owner, see id. at § 5.01, pg. 26.

The Flow Sale and Servicing Agreement governing the pool of loans that includes the Walton loan, and the Servicing Agreement governing the pool of loans that includes the Blank loan, are typical of the agreements that GMACM enters into with trusts or other entities that own

residential mortgage loans serviced by GMACM. The terms of these servicing agreements make clear that GMACM performs its mortgage servicing functions for the owner of the note and mortgage, not for the mortgagors. They thus underscore the fact that there is no sale or other transfer of a service to a consumer pursuant to these agreements.

In sum, Petitioners and the Amici supporting their position have failed to address the statutory requirement that a "consumer transaction" consist of the sale or other transfer of a service to an individual primarily for consumer purposes. The specimen servicing agreements discussed herein confirm that the "service" of mortgage servicing is not something that is sold, assigned or otherwise transferred to an individual.

4. The Statutory Requirement That The Service Involved Have Been Sold or Otherwise Transferred to an Individual is Not Satisfied By An Incidental Mortgagor Benefit, Assuming Arguendo That One Exists

Petitioners also appear to argue that mortgage servicing is a "consumer transaction" because homeowners benefit from mortgage servicing performed for the owner of their loans. Even assuming arguendo that mortgagors could be said to benefit incidentally from a mortgage servicing agreement between a loan servicer and the owner of the loan, any such incidental benefit does not alter the nature of the contractual relationship between them. The mortgage servicer is performing contractually-defined services for the owner of the loan, not the mortgagor.

It has been held that incidental benefits flowing to a consumer from a contract between two commercial entities do not constitute the transfer of a service to the consumer. See Flex Homes, Inc. v. Ritz-Craft Corp. of Michigan (N.D. Ohio 2010), 721 F. Supp. 2d 663, 675. In Flex Homes, the court dismissed a CSPA claim because the consumer plaintiffs had not alleged the existence of a transaction between them and the defendant.

Flex Homes, a home builder, entered into a Builder Agreement with Ritz-Craft for the sale of pre-fabricated home components. Flex Homes planned to sell the constructed homes to consumers. Defendant Citadel entered into a separate "Set Crew Agreement" with Ritz-Craft, under which Citadel agreed to "set" the pre-fabricated homes bought by Flex Homes on a foundation and assemble their component parts. Id. at 667. Flex Home sold a pre-fabricated home to the Greens, who subsequently alleged a CSPA claim against Citadel for defects in the construction and installation of the home. The Greens did not allege that they had entered into a contract with Citadel, asserting instead that they were third-party beneficiaries of the setting and assembly services that Citidel had performed for Flex Homes under its Builder Agreement with Ritz-Craft and for Ritz-Craft under its Set Crew Agreement with Ritz-Craft. Id. at 675.

In rejecting the Greens' argument that the setting and assembly services Citidel had performed for others amounted to a "consumer transaction" between the Greens and Citadel, the court noted that the Builder Agreement was a contract between Ritz-Craft and Flex Homes that did not provide that the services to be furnished thereunder were to be performed for the ultimate benefit of the homebuyer. The court also held that the Greens were not third-party beneficiaries of the Set Crew Agreement between Citidel and Ritz-Craft. The court noted that, although the home that the Greens subsequently bought was set on its foundation pursuant to the Set Crew Agreement, that agreement was "a contract between Ritz-Craft and Citadel such that Citadel's performance provides a service to Ritz-Craft, not the Greens," and "the terms of the Set Crew Agreement confirm[ed] a simple payment-for-service relationship between Ritz-Craft and Citadel." Id. Accordingly, the court held that the Greens had not alleged the existence of a "consumer transaction" under the CSPA. See id.

As in Flex Homes, even assuming arguendo that the mortgagors benefit incidentally from loan servicing functions that a mortgage servicer performs on behalf of the owner of the loan, the existence of any such incidental benefit is of no consequence given the statutory requirement that the service at issue must be one that is sold or otherwise transferred to an individual. As explained previously, see Section I.A.3, supra, the contract pursuant to which the loan servicing "service" was sold is a contract between the mortgage servicer and the owner of the loan being serviced or is a contract between the servicer and one or more other business entities on behalf of the owner.

The Ohio Attorney General effectively admits as much, acknowledging: (i) that GMACM acts as servicer or sub-servicer for trustees: (ii) that the only agreements of the mortgagor are those reflected in his or her note and mortgage agreement with the lender; (iii) that the mortgagor does not choose the mortgage servicer; and (iv) that it is the owner of the loan who agrees to "sell" the servicing rights to GMACM. See AG Merit Brief at 3 & 8 n.3. Neither the Attorney General nor the Blank plaintiffs contend that the mortgagors are third-party beneficiaries of the servicing agreement, nor could they. See, e.g., Flow Sale and Servicing Agreement (Appendix at Exhibit E); Servicing Agreement (Appendix at Exhibit F). The fact that GMACM may have characterized mortgagors as its customers in a document discussing its "loss mitigation" services does not alter the nature of its servicing agreements with the owners of loans, or with other business entities for the benefit of the owners of the loans, or the fact that the losses it seeks to mitigate are those that would be sustained by the owners of loans that it services.

5. The Fact That a "Supplier" Need Not Have Dealt Directly with the Consumer is Irrelevant Because the "Supplier" Definition Assumes The Existence of an Underlying "Consumer Transaction"

The Attorney General states that a mortgagor "enters into a mortgage agreement with a lender, and the lender then sells the servicing rights over the mortgage to GMAC." AG Merit Br. at 8 n.3. He then attempts to sidestep the absence of mortgage servicing agreement between the loan servicer and the mortgagor by asserting that the absence of one is irrelevant "because 'the CSPA does not require privity of contract between the supplier and the consumer 'as a prerequisite to damages.'" Id. (citations omitted).

The portion of the CSPA "supplier" definition to which the Attorney General alludes provides as follows:

> "Supplier" means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting *consumer transactions*, *whether or not the person deals directly with the consumer. . . .*

R.C. § 1345.01(C) (emphasis added). Accordingly, while a supplier (such as an advertising agency) need not necessarily deal directly with the consumer, the assertion that privity is not required misses the point. The notion that the CSPA does not require privity between a consumer and a supplier assumes the existence of an underlying consumer transaction. Id. § 1345.01(C) (a "supplier" must effect or solicit "consumer transactions"). Accordingly, the Attorney General's argument that a "supplier" need not deal directly with the consumer is of no consequence because, for the reasons explained previously, mortgage servicing is not a "consumer transaction."

6. Mortgage Servicing is Not a Service that is Sold or Otherwise Transferred Primarily for Consumer Purposes

As explained previously, see Section I.A.3, supra, mortgage servicing is not a service that is sold primarily for consumer purposes. Mortgage servicing is performed pursuant to a servicing agreement that business entities enter into for commercial purposes.

In determining whether a transaction is commercial or personal, Ohio courts have routinely considered the objective manifestations of the purchaser of the goods or services at the time the purchaser and seller enter into a binding agreement: "When deciding whether a consumer transaction exists, courts look to the point in time when the parties have entered a binding agreement. Courts then examine the objective manifestations that the purchaser made during that time period regarding how he intended to use the purchased item." Giffin v. Crestview Cadillac, 10th Dist. No. 09AP-278, 2009-Ohio-6569, ¶ 22 (internal citations omitted). The seller's objectives are also pertinent: "[T]he determination as to whether or not a consumer transaction has been entered into between the parties 'will be based upon the objective manifestations of the parties, as set forth by the totality of the circumstances surrounding the transaction' at the time the parties entered into a binding agreement." Gugliotta v. Morano, 9th Dist. Nos. 22077 & 22095, 2005-Ohio-2570, ¶ 35 (quoting Tomes v. George Ballas Leasing (Sept. 30, 1986), 6th Dist. No. L-85-359, 1986 Ohio App. LEXIS 8463, at *5). The primary focus is on whether the buyer of the goods and services intends to use them for personal, family, or household purposes.

Applying this standard to mortgage servicing agreements, it clear that it is the objective manifestations of the purchaser (the owner of the loan) and the seller (the servicer) of the service at issue indicate that transaction is commercial in nature. The purchaser/owner and the seller/servicer are both commercial entities. The borrower has no role in this business

transaction. The nature of that transaction is unquestionably commercial: the sale of a service involving the collection and remitting of mortgagor payments, administration of the payment of taxes and insurance, enforcing the repayment obligation, and protecting the collateral. The mortgagor's perspective is irrelevant given that the agreement at issue is the servicing agreement and purpose of the transaction is determined when the time the parties enter into a binding agreement. Again, any incidental "benefit" to the borrower does not change the fundamental commercial nature of the work performed by the loan servicer. See Flex Homes, 721 F. Supp. 2d at 675.

7. The Rule That Remedial Statutes Are to Be Construed Liberally Does Not Authorize Rewriting Them or Obviate the Need to Determine The Extent of Their Reach

Petitioners and their amici rely heavily on the fact the CSPA is a remedial statute that is to be construed liberally. This Court has held, however, "there is no need to liberally construe a statute whose meaning is unequivocal and definite." State ex rel. Auglaize Mercer Cmty. Action Comm'n v. Ohio Civil Rights Comm'n (1995), 73 Ohio St. 3d 723, 727. Although the CSPA is a remedial statute, courts have refused to stretch its scope beyond the parameters established by its text. See Colburn v. Baier Realty & Auctioneers, 2003 Ohio 6694 (noting that the CSPA is a remedial statute but concluding that the statute does not apply to auction services in connection with real estate).

Other courts have recognized the primacy of unambiguous statutory text interpretation to focus on the text, and cautioned against the need to guard against inadvertently altering legislative policy determinations by effectively rewriting statutory text: "We have serious doubts about the wisdom of displacing the statutory text in favor of a judicial rewrite with no roots in the language [the legislature] enacted." First Health Group Corp. v. BCE Emergis Corp. (7th Cir.

2001), 269 F.3d 800 (Easterbrook, J.). "[T]he essential question is not which way the statute points but how far it directs one to go...." Neal v. Honeywell Inc. (7th Cir. 1994), 33 F.3d 860, 862 (Easterbrook, J.) (citations omitted) ("[n]o principal of statutory construction says that after identifying the statute's accommodation of competing interests, the court should give the favored party a little extra), abrogated on other grounds, Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson (2005), 125 S. Ct. 2444. This Court agrees, even when a statute is remedial: "[A] court may not read into a statute a result that the language does not reasonably imply." Thomas v. Board of Education (1994), 71 Ohio St. 3d 251, 256.

B. Mortgage Servicing Is Part and Parcel of the Underlying Real Estate Transaction, and the CSPA Does Not Apply To It

1. Transactions Involving the Transfer of a Property Interest Are Not Subject to the CSPA.

The CSPA does not apply to mortgage servicing for another reason: it is part and parcel of an underlying real estate transaction. Over twenty years ago, in Brown v. Liberty Clubs, Inc., this Court held "that the Consumer Act has no application in a 'pure' real estate transaction." Brown v. Liberty Clubs, Inc. (1989), 45 Ohio St.3d 191, 193. Ohio courts following Brown have held explained that "[r]eal estate is not a 'consumer transaction' because it does not fall within the definition of a good, service, franchise or intangible as provided by the statute." Elder v. Fischer (1st Dist. 1998), 129 Ohio App. 3d 216-17. See also Ruschau v. Monogram Props., 12th Dist. No. CA2004-10-121, 2005-Ohio-6560, ¶29 ("The Ohio Supreme Court held that this definition [of consumer transaction] evidences the General Assembly's desire to exclude real estate from the scope of the act"). Under Ohio law, the conveyance of any interest in real estate is

not a service or a good. See Elder, 129 Ohio App. 3d at 17 ("A residential lease is a conveyance of an interest in real estate and, therefore, not a service").

Applying this exclusion, Ohio courts have held that collateral services arising out of the transfer of an interest in real estate are not subject to the CSPA. For example, the Eleventh District Court of Appeals has held that the CSPA did not apply to escrow services provided by a title agency because the services were "collateral to the real estate transaction." Hurst v. Enterprise Title Agency (8th Dist.), 157 Ohio App. 3d 133, 2004-Ohio-2307, ¶35. See also Colburn v. Baier Realty & Auctioneers, 11th Dist. No. 2002-T-0161, 2003-Ohio-6694, ¶16 (holding that CSPA did not apply to auction services because the auction was for the sale of real property).

Federal courts, also following Brown, have held that the signing of a note and conveyance of a residential mortgage is a "pure real estate" transaction, and that neither those acts nor the services provided by a lender at closing are subject to the CSPA. See Hanlin v. Ohio Builders & Remodelers, Inc. (S.D. Ohio 2002), 212 F. Supp. 2d 752, 757 (Sargus, J.) (granting mortgage lender summary judgment on borrowers' CSPA claims because loan was pure real estate transaction not subject to CSPA and "closing services" provided by lender were "part and parcel of the real estate transaction," so the lender could not be held liable under the CSPA for actions performed in rendering those services); see also Smith v. ABN AMRO Mortg. Group, Inc. (S.D. Ohio Mar. 27, 2007), 2007 U.S. Dist. LEXIS 26585, *35 (Barrett, J.) (dismissing plaintiffs' CSPA claim against various defendants, including mortgage lenders, based on alleged loan "flipping" scheme, because allegations related to pure real estate transaction).

The pure real estate transaction exclusion necessarily applies to general mortgage servicing conduct as well. A mortgage servicer acts on the onwer's behalf by enforcing the

repayment obligation arising from the loan and protecting the collateral (the real property securing the mortgage). The loan arises solely out of the transfer of an interest in real property: the borrower's conveyance of a security interest in real property to secure the loan with the lender, which enables the purchase or refinance. The mortgage servicing is required only because of the real estate transaction. In other words, the mortgage servicing is part and parcel of the underlying pure real estate transaction.[5]

2. There is No Blended Transaction.

Petitioners do not dispute the direct relationship between mortgage servicing activity and the underlying real estate transaction. Instead, the Attorney General suggests that mortgage servicing is not part of a pure real estate transaction. The Attorney General argues that the real estate transaction and the related servicing are part of a "blended" transaction. See Merit Brief of Ohio Attorney General at 9. Ohio courts have distinguished between transactions that are purely real estate, and blended transactions that have both real estate and non-real estate components. In the former situation, Ohio courts have held that the CSPA does not apply; in the latter, courts have held that the CSPA may apply to the non-real estate component.

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[5] Ohio's CSPA is modeled on the Uniform Consumer Sales Practices Act, published by the National Conference of Commissioners of Uniform State Laws. In addition to Ohio, Utah and Kansas have adopted versions of the Uniform CSPA. See Legislative Fact Sheet – Consumer Sales Practices available at http://www.nccusl.org/LegislativeFactSheet.aspx?title=Consumer%20Sales%20Practices (Appendix at Exhibit G). In contrast to Ohio, the Utah and Kansas versions of the CSPA apply to real estate transactions. See Utah Code Ann. §13-11-3(2) (defining consumer transaction to include transfer of "property, both tangible and intangible") (Appendix at Exhibit H); see also Wade v. Jobe (S. Ct. Utah 1991), 818 P.2d 1006, 1014 (holding that real property qualifies as tangible property under the statute); Kan. Stat. Ann. §50-624 (defining consumer transaction to include "disposition for value of property" and specifying that "'property' includes real estate") (Appendix at Exhibit I). Ohio's adoption of the CSPA without including any reference to real property indicates a clear intent by the General Assembly to deem transactions involving real property to be outside the scope of the CSPA.

In seizing upon the latter line of cases, however, the Attorney General misconstrues the nature of the blended transaction exception. For example, in Brown v. Liberty Clubs, this Court held that the CSPA applied to the "personal property" portion of a transaction involving both the gift of personal property and a sale of real property. Brown involved the transfer of personal property—a set of steak knives—offered as a "gift" to entice consumers to visit a campground site and ultimately purchase lots at the site. See Brown, 45 Ohio St.3d 191, 193. This Court held that the CSPA applies to the "personal property or services portion of a mixed transaction involving both the transfer of personal property or services, and the transfer of real property." Id. at 195. In holding that the CSPA applied to the allegedly deceptive offer of the steak knives, the Court noted that a solicitation "offering to transfer or award goods to a consumer, will usually, in and of itself, constitute a consumer transaction for the purpose of R.C. §1345.01, regardless of the nature of the underlying transaction." Id. This is because steak knives were "goods" that were "transferred" to a "consumer." The CSPA did not apply to the portion of the transaction involving the transfer of real property. In other words, in Brown, the Court distinguished between the "consumer transaction" and the separate "real property transaction," and clearly reaffirmed that the CSPA does not apply to the pure real estate portion of the transaction.

The underlying complaints by the Attorney General and the Blank plaintiffs do not allege a "blended" transaction. There is no allegation of a separate consumer transaction involving gifts or sales of consumer goods. There is only one transaction described in the Complaints and underlying their claims: the real estate transaction that precedes each and every foreclosure action. Petitioners' failure to allege a separate consumer transaction is easily explained: the mortgage servicing work arises out of the mortgage loan and is part and parcel of that underlying real estate transaction.

The cases Petitioners cite do not compel a different result. For example, in an attempt to bolster his position that the Court is faced with a "blended" transaction in this case, the Ohio Attorney General mischaracterizes the holding of DeLutis v. Ashworth Home Builders 9th Dist. No. 24302, 2009-Ohio-1052. In DeLutis, the Ninth District Court of Appeals held that the CSPA did not apply to the sale of house because it was a pure real estate transaction. See id. at ¶16. The homebuyers had signed a contract to buy an existing home from the homebuilder, but also received a home warranty and the builder's repair agreement to fix certain items identified in the home inspection. The homebuyers had also signed a separate contract for additional improvements to the property. See id. at ¶¶2, 3. In an effort to have the CSPA apply, the homebuyers argued that the presence of the separate contract for additional improvements, and the home warranty and the builder's repair agreement, made the sale a "blended" transaction. The Ninth District court found that the homebuyers' claims were not based on the separate contract for improvements, so that agreement was inapplicable (although it may have been subject to the CSPA). The Ninth District refused to find the CSPA applicable to the home sale, because there was no authority that "a home warranty or repair agreement, executed in connection with the sale of an existing house, somehow transforms a pure real estate transaction into one that falls within the CSPA." Id. at ¶15. The Ninth District held that the cases on which the buyers relied involved warranty or repair agreements "in conjunction with the sale of goods or services, transactions that themselves fell within the CSPA." Id. Thus, the mixed or blended transaction exception is only applicable where there is a separate identifiable sale or transfer of goods or services apart from the real estate transaction.

Here, there is no separate transfer of goods or services. The mortgage servicing arises out of the real estate transaction itself. There are no separate agreements between the borrower and

the mortgage servicer, and no separate transfer of anything to the borrower. As noted, the purpose of the mortgage servicing GMACM performs is to enforce the repayment obligation created by the underlying note and mortgage in each loan, which memorialize the pure real estate transaction entered into between the borrower and the lender, and to protect the underlying real estate serving as collateral. Here there is only an integrated transaction; there is no blended transaction at all.

Nevertheless, describing the mixed transaction exemption, the Attorney General says in his merits brief:

> In other words, the CSPA applies to 'any portion of the[] agreement that involve[s] . . . provision of services,' DeLutis v. Ashworth Home Builders, Inc., 9th Dist. No. 24302, 2009-Ohio-1052, ¶ 14, even if those services are 'inextricably intertwined' with 'the sale of real estate,' Brown, 45 Ohio St.3d at 194.

See Merit Brief of Ohio Attorney General at 9. The Attorney General concedes that mortgage servicing is "inextricably intertwined" with the underlying real estate transaction. In his haste to find a way out of this fatal concession, the Attorney General has taken the DeLutis quote out of context. DeLutis actually held the opposite of what the Attorney General suggests. The complete quote from DeLutis provides:

> As noted in Brown, the CSPA still would not apply to the sale of the existing home but would only apply that portion of their agreement that involved the construction of additional structures and other provision of services by Ashworth.

DeLutis, 2009-Ohio-1052, ¶ 14 (emphasis added). Thus, when the full quote in DeLutis is considered, inclusive of the omitted portions which alter its meaning, it is clear that the court held that whatever was included as part and parcel of the real estate transaction is not subject to the CSPA. The Attorney General's implication that any agreement involving "services," even if "inextricably intertwined" with "the sale of real estate," falls under the CSPA and is not excluded

under the real estate exemption is contrary to Ohio law. It is not supported by, and it completely distorts, the holdings in DeLutis and Brown.

In the mortgage servicing context, both the origination of a mortgage loan and the later "servicing" of that loan—which are related to and contemplated by the underlying agreement between the lender and the borrower, and involve receiving and applying the payments and other actions authorized by the note and mortgage signed by the borrowers when the security interest is granted—relate solely to the transfer of the interest in the underlying real property. In other words, the mortgage loan and mortgage servicing conduct are part and parcel of the conveyance of a real property interest, and unlike in Brown, there is no separate transfer of goods or services involved that would be subject to the CSPA on its own. The Attorney General's effort to isolate the property purchase, the mortgage loan, and the servicing aspects of the pure real estate transaction is unavailing. This effort ignores the fact that the conveyance of any interest in real estate is not a service or a good, see Elder; and disregards the realities of mortgage servicing.

3. There is No Controlling or Persuasive Judicial Authority Concerning Whether Mortgage Servicing is a "Consumer Transaction" for Purposes of the CSPA

Amicus Sondra Anderson blithely asserts that "Ohio trial courts have universally held that mortgage servicing generally falls within the scope of the CSPA." Anderson Amicus Br. at 9. This assertion is misleading in that the decisions cited by Ms. Anderson consist of three decisions of federal district courts and an unreported decision by a Court of Common Pleas that merely "adopts" one of these federal district court decisions without any analysis or discussion of the issue presented. Id. (citing Munger v. Deutsche Bank (N.D. Ohio July 18, 2011), 2011 U.S. Dist. LEXIS 77790, at *24; Jent v. BAC Home Loans Servicing, LP (S.D. Ohio July 21, 2011),

No. 1:10-CV-00783, 2011 U.S. Dist. LEXIS 79652; Kline v. Mortgage Elec. Security Sys. (S.D. Ohio 2009), 659 F. Supp. 2d 940, 953; Dowling v. Litton Loan Servicing, LP (S.D. Ohio Dec. 1, 2006), No. 2:05-cv-0098, 2006 U.S. Dist. LEXIS 87098, **41–44; State v. Barclays Capital Real Estate, Inc., Docket No. 2009 CV 10136 (Common Pleas Montgomery County Sept. 16, 2010) (adopting Dowling)).

It also begs the question of why two federal district courts certified the question to this Court. The certification was made because, in the judgment of the district court, there was no controlling Ohio authority with respect to the certified questions. Accord, Jent, 2011 U.S. Dist. LEXIS 79652, at *9 (the question of whether mortgage servicers fall within the 'supplier' definition of the OCSPA is an unsettled question under Ohio law").

Petitioners and their amici rely upon several federal district court decisions in which the judges were attempting to predict whether the Ohio CSPA applies to mortgage servicers. It is noteworthy that these decisions either did not address the certified questions and/or relied on prior case law involving activities that were not conducted by residential mortgage loan servicers. For example, in Dowling v. Litton Loan Servicing, Judge Marbley only considered whether the defendant was entitled to the CSPA exception for a "financial institution.". Neither party raised, and the court did not address, the issues of whether mortgage servicing is a "consumer transaction" and whether a mortgage servicer is a "supplier." See Dowling v. Litton Loan Servicing, LP, 2006 U.S. Dist. LEXIS 87098, at **41–44 (Marbley, J.) (cited in Merit Brief of Lois Blank et al. at 16; Amicus Brief of Sondra Anderson at 8). Dowling thus has no application to the certified questions.

Likewise, Jent v. BAC Home Loans Servicing followed Dowling even though the "financial institution" exception was not at issue in Jent. Judge Spiegel provided no analysis

supporting his conclusion in this regard. See Jent v. BAC Home Loans Servicing, LP, No. 1:10-CV-00783, 2011 U.S. Dist. LEXIS 79652, at *9-10 (S.D. Ohio July 21, 2011) (Spiegel, J.). Like Dowling, Jent also failed to address the threshold question of whether mortgage servicing is a "consumer transaction". As noted previously, there can not be a "supplier" under the CSPA absent a predicate "consumer transaction." Similarly, Munger's assertion that there is a "consumer transaction" between a servicer and a mortgagor because a servicer collects a debt is flawed because the servicer does so on behalf of the owner of the loan, not the mortgagor. Munger v. Deutsche Bank, 2011 U.S. Dist. LEXIS 77790, at *30-31. Accordingly, there is no "consumer transaction."

Kline v. Mortgage Electronic Security Systems did not involve mortgage servicing. In Kline, a borrower sued a law firm that had represented a mortgage lender and sent an allegedly misleading foreclosure payoff statement to the borrower's attorney. Judge Rice held that the CSPA could apply to the law firm, noting that courts in the Southern District of Ohio have held that the CSPA applies to attorneys engaging in debt collection because "Ohio courts have held that entities engaging in the collection of consumer debts are suppliers." Kline v. Mortgage Elec. Security Sys., 659 F. Supp. 2d at 953 (Rice, J.) (emphasis added). The Ohio case referred to Kline was Celebrezze v. United Research, Inc., which did not involve mortgages or mortgage servicing.

The Blank petitioners rely on a decision from the U.S. District Court for the District of Kansas, Bethea v. Wells Fargo, to suggest that the Ohio CSPA applies to mortgage servicing activity. The comparison is a false one, because the Kansas version of the CSPA explicitly applies to real estate transactions, and Ohio's does not. Nevertheless, the court in Bethea did not hold that mortgage servicing was a consumer transaction under the Kansas Consumer Protection

Act (Kansas's version of the Uniform Consumer Sales Practices Act). Instead, the court assumed that the underlying mortgage loan was a consumer transaction, and held that Wells Fargo's actions regarding a forbearance agreement were "in connection with" the mortgage loan. See Bethea v. Wells Fargo Bank, N.A., No. 10-1264-JAR, 2010 U.S. Dist. LEXIS 124532, **14–17 (D. Kan. Nov. 23, 2010). The Kansas statute specifically applies to real estate transactions, and the only issue the Bethea court decided was whether the forbearance agreement by the mortgage servicer was "in connection with" the underlying real estate transaction. Bethea provides no guidance on the scope of the Ohio CSPA, which, as noted previously, omitted the definition including real estate as tangible property on which the Bethea court relied.

It should be noted that one court has held that the Utah version of the CSPA did not apply to activities by a mortgage servicer in connection with a residential mortgage. See Ayala v. Am. Home Mortg. Servicing (D. Utah June 8, 2011), 2011 U.S. Dist. LEXIS 85001 (Magistrate's Report and Recommendation); Ayala v. Am. Home Mortg. Servicing (D. Utah Aug. 1, 2011), 2011 U.S. Dist. LEXIS 84625 (Order Adopting Magistrate's Report and Recommendation). In Ayala, the U.S. District Court for the District of Utah rejected a borrower's attempt to sue a mortgage servicer under the Utah CSPA for servicing-related activity. The borrower had asserted a claim under the Utah CSPA against the servicer of her mortgage based on attempts to work out a loan modification. In granting the servicer's motion to dismiss, the court concluded that the mortgage loan did not fit within the Utah CSPA's definition of a consumer transaction, because it "is not a sale or disposition of the funds or of the note." See id. at *8. Although Utah's definition of "consumer transaction" is somewhat broader than Ohio's, and defines "'[c]onsumer transaction'" as "a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities

and insurance)," the Ayala court concluded that mortgage servicing was not actionable under the Utah CSPA.

C. The Attorney General Excludes Mortgage Servicing from His Advice To Businesses Regarding the Scope of the CSPA

Significantly, even the Ohio Attorney General himself acknowledges that the CSPA does not apply to mortgage servicing. In 2011, the Attorney General published a guide for companies doing business in Ohio on how to comply with the CSPA and other Ohio consumer law statutes entitled "Complying with Ohio Consumer Law: A Guide for Businesses." The purchase of a home is the largest purchase most people will ever make, and practically every person who finances the purchase of real estate interacts with a mortgage servicer on some level. Yet, the Attorney General's publication provides no guidance to mortgage servicers, and does not even mention mortgage servicing practices. In the section on the CSPA titled, "What is a consumer transaction?," the guide lists the following examples:

- A motor vehicle dealer selling a used or new vehicle to a consumer.
- A wallpaper company selling its goods online to consumers.
- A department store advertising a sale.
- A home improvement contractor soliciting consumers at their homes.
- Third party debt collectors calling consumers to collect debts.
- Salespeople making telemarketing calls to consumers.
- Credit repair companies contracting with consumers to improve their credit.

Ohio Attorney General Mike DeWine, "Complying with Ohio Consumer Law: A Guide for Business," at 3 (2011) (Appendix at Exhibit J). None of these activities even remotely approach mortgage servicing, or the foreclosure conduct at issue in this case (that is, the filing of affidavits and assignments in support of a request for judgment in a pending foreclosure action).

Without doubt, had the Attorney General believed mortgage servicing activities and filings made by a mortgage servicer in the course of real estate foreclosure litigation fell within the scope of the CSPA, there would be at least a reference in the Guide to mortgage servicing by name, inclusion of mortgage servicing and servicers in the list of examples of consumer transactions, and some specific guidance to mortgage servicers on how to comply with the CSPA. The Guide, however, is silent as to mortgage servicers. This silence speaks volumes as to the Attorney General's actual understanding of whether the CSPA applies to mortgage servicing. It does not, and the Guide appropriately omits reference to mortgage servicers.

D. The Financial Institution and Dealer in Intangibles Exemptions Are Not Implicated By The Certified Questions

The Attorney General suggests that the statutory exemptions in R.C. § 1345.01(A) are not applicable to GAMCM or Ally. This argument puts the proverbial cart before the horse. This case would only implicate the statutory exemptions to which the Attorney General refers if the conduct satisfied the statutory definition of a "consumer transaction" in the first place, which it does not. The Court need not address the Attorney General's upside-down argument regarding exemptions. Further, this issue is not implicated by the certified questions, which focus on the definition of a consumer transaction, and not on the applicability of the exemption. The factual basis for this determination remains to be presented to the federal court in which this case is pending on the merits. GMACM and Ally respectfully submit that this issue is not ripe and cannot and should not be decided in connection with the certified questions before this Court.

II. Response to Second Certified Question: The Prosecution of a Foreclosure Action Is Not a Consumer Transaction.

A. A Foreclosure Action Is Not a Consumer Transaction.

The prosecution of a foreclosure action is not a consumer transaction as that phrase is used in the CSPA. For there to be a "consumer transaction" within the meaning of the CSPA, an "item of goods, a service, a franchise, or an intangible" be transferred "to an individual" for "purposes that are primarily personal, family, or household R.C. § 1345.01(A). No reasonable construction of the CSPA can conclude that the filing of a lawsuit, and the litigation activity done in connection with the laws and rules governing litigation and lawsuits, is an item of goods or services that is somehow transferred to a consumer for primarily personal, family, or household purposes.

GMACM has filed and prosecuted foreclosure actions in Ohio after those borrowers went into default on their mortgage loans. Foreclosure is a last resort, however.[6] When foreclosure does become necessary, GMACM oversees the initiation and maintenance of foreclosure actions

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[6] Before referring a file to foreclosure, GMACM explores possible workout options for delinquent borrowers. These efforts often result in repayment plans, loan modifications, short sales, or other non-foreclosure resolutions. As of September 2011, GMACM had completed over 22,000 workout solutions for delinquent Ohio borrowers since 2008. That number is even higher now. GMACM is proud of this record, and respectfully submits it is the industry leader in this regard.

Unfortunately, despite these efforts, for various reasons, not all borrowers qualify for workout options. One example is the Walton loan—the only loan of the three described in the amicus brief of Ohio Legal Services Programs for which GMACM is the servicer. The Walton loan was the subject of loss mitigation efforts both before and after the foreclosure action was filed. Prior to the foreclosure, GMACM's loss mitigation department was in contact with the borrowers, and the borrowers submitted financial information for review for a potential loan modification. The Waltons did not qualify. Even after the foreclosure action was filed, GMACM reviewed additional information submitted by the Waltons on several occasions. Unfortunately, the Waltons have not been able to qualify for a loan modification. The Waltons, through their counsel, asserted counterclaims against GMACM to avoid foreclosure, including claims that GMACM did not consider them for loss mitigation before foreclosing. The trial court has now granted summary judgment to GMACM on both the defendants' counterclaims and GMACM's foreclosure claims, rejecting the contention that GMACM's loss mitigation was improper.

on behalf of the owner of the note and the mortgage. In order to comply with the rules of evidence and civil procedure, and local rules and the standing order of courts and individual judges, GMACM as necessary obtains assignments of mortgage, from the mortgagee or assignee to the current holder of the note, and sometimes files that assignment with the court (assignments are typically recorded in the public land records), and obtains affidavits and other evidentiary materials to support motions for default judgment (when a borrower has failed to appear or defend the foreclosure action) or motions for summary judgment (when a borrower has appeared and defended in the foreclosure action). The factual content of these affidavits is based on the information stored in GMACM's business records relating to the borrower's loan. The weight to be given that testimony rests with the judge presiding over the foreclosure action. And, of course, at all times, the borrowers can contest the facts presented in any such affidavit.

The foreclosure actions commenced and prosecuted by GMACM are adversary in nature. Nothing is transferred from the servicer to the homeowner when a foreclosure action is filed. The foreclosure action is filed for business purposes. The plain words and meaning of the CSPA exclude the prosecution of foreclosure actions from coverage under the CPSA. The Petitioners and their amici appear to admit this obvious point, as none of them seriously argues that a foreclosure action is a consumer transaction.

B. Subjecting Litigation Activity to Coverage Under the CSPA Would Usurp Trial Court Judges' Authority to Manage Their Own Dockets.

Moreover, construing the CSPA to apply to the specific foreclosure-related activity alleged in these cases, or to the prosecution of a real estate foreclosure action more generally, would usurp the power of Ohio Common Pleas judges to manage their own dockets and police evidentiary matters in cases pending before them. The power to control their own dockets is an important fundamental right of Ohio's Courts of Common Pleas. See, e.g., Americare Corp. v.

Misenko (1984), 10 Ohio St.3d 132, 134 (refusing to construe a local rule in a way that would "hinder a trial court's power to enter its judgment and hence control its own docket"). To the extent a judge in a real estate foreclosure action has concerns about litigation conduct in his or her courtroom, the judge may, if appropriate, exercise authority under Rule 56(G) of the Ohio Rules of Civil Procedure (addressing "bad faith" affidavits), under R.C. §2323.51 (addressing frivolous litigation conduct), or under the judge's inherent authority to control his or her docket.[7]

Moreover, it would conflict with longstanding Ohio law affording immunity from civil lawsuits to parties and witnesses for allegedly false testimony given or acts taken in the course of pending judicial proceedings. See, e.g., Costell v. Toledo Hospital (1988), 38 Ohio St.3d 221, 223–24 (holding that "allegations constituting perjury, subornation of perjury, and conspiracy to commit perjury . . . for public policy reasons, may not be the basis of a civil lawsuit"); see also Morrow v. Reminger & Reminger Co. LPA (10th Dist.), 183 Ohio App.3d 40, 2009-Ohio-2665, ¶11–16 (affirming dismissal on immunity grounds of suit based on conduct during the course of

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[7] Indeed, courts in states that have unfair and deceptive acts and practices ("UDAP") statutes routinely hold that litigation conduct or conduct meant to exercise contractual or legal remedies does not give rise to liability under those statutes. For example, in Florida Office of the Attorney General v. Shapiro & Fishman, LLP, a Florida Court of Appeals affirmed the quashing of the Florida Attorney General's investigative subpoena served on a law firm under Florida's Deceptive and Unfair Trade Practices Act. The subpoena targeted documents involving the law firm's representation of lenders in foreclosure cases. The court of appeals held that the alleged conduct of the law firm in prosecuting the foreclosure cases was not subject to the statute because it did not constitute trade or commerce. See Florida Office of the Attorney General v. Shapiro & Fishman, LLP (Fla. App. 2011), 59 So.3d 353, 354–57. Likewise, in Begelfer v. Najarian, the Massachusetts Supreme Court rejected a UDAP claim based on an attempt to enforce an allegedly usurious note, because the pursuit of contractual and legal remedies was not subject to the UDAP statute. See Begelfer v. Najarian (Mass. 1980), 381 Mass. 177, 189–191 (rejecting UDAP claim because defendants were pursuing their contractual and legal remedies, and therefore not engaged in trade or commerce). Despite some arguable connection of the underlying transaction to trade or commerce, these courts refused to apply the UDAP consumer protections to litigation conduct. The same rationale should apply to the CSPA at issue here, because litigation activity does not involve the transfer of a good or service as contemplated by the CSPA.

underlying litigation, "including affidavit, deposition, and trial testimony, and arguments contained in pleadings, motions, briefs, and other court filings"). The policy behind the Witness Immunity Doctrine is clear: "[W]itnesses must be at liberty to speak freely, without fear of being sued later for their testimony." Pratt v. Payne (2d Dist. 2002), 153 Ohio App. 3d 450, ¶10. Witnesses providing affidavits, just like witnesses providing testimony at trial, can be deterred from providing testimony out of fear of liability. In fact, at least one Ohio court has refused to impose liability on a defendant for allegedly defamatory statements made in an affidavit and motion filed in connection with a foreclosure proceeding. See Modler v. Modler (2d Dist.), 2000 Ohio App. LEXIS 3717, at *11-12. In Modler, the Second District affirmed a grant of summary judgment in a defamation action on the grounds that false statements made in an affidavit used in a prior foreclosure action were absolutely privileged because the statements were reasonably related to the foreclosure proceeding. Jeffery Stephan, a GMACM employee, is a named defendant in the Blank action, based primarily on statements made in affidavits he signed that were used in support of motions filed in foreclosure actions. Statements attributed to Mr. Stephan and others in affidavits and assignments are obviously reasonably related to the foreclosure proceedings. Subjecting litigants and parties in foreclosure actions to direct liability under the CSPA is contrary to Ohio law and the policy behind the witness immunity doctrine.

GMACM is not aware of any case in which this Court has suggested that actions taken by parties and attorneys in a pending court case-such as taking discovery, gathering evidence, presenting testimony, obtaining affidavits, reflecting service of process—is a consumer transaction or actionable under the CSPA. Such a finding would indeed be radical and unprecedented. In any event, courts—state and federal alike—are fully capable of policing the actions of lawyers and parties in courtrooms across Ohio without an unprecedented expansion of

the CSPA. Accordingly, this Court should not read the CSPA's definition of "consumer transaction" to cover the prosecution of a residential real estate foreclosure action.

C. Ohio Courts Are Not Embracing Petitioners' Reliance on Testimony Specific to Other Cases.

Further, like Petitioners and their amici, some borrowers have made much of information coming from other states about the execution of affidavits in individual cases in their attempts to vacate foreclosure judgments against them. Multiple Ohio courts of common pleas, when considering these or similar allegations, have held that these allegations are too speculative to entitle a borrower to relief from judgment. See, e.g., GMAC Mortgage v. Lee, Franklin County C.P. No. 10CVE02-1672, at 6–7 (Appendix at Exhibit K) (denying motion for relief from judgment and holding that defendant's arguments about "false affidavits" and sanctions in other cases "do not set forth operative facts showing that defendant in this case has a 'meritorious defense'"); Wells Fargo Bank, NA v. Piwinski, Fairfield County C.P. No. 07-CV-952, 3 (Appendix at Exhibit L) (denying motion for relief from judgment when defendant "offered only the suggestion that Plaintiff's foreclosure attorney should have known that the affidavit was fraudulent based on past dealings with Plaintiff"); Deutsche Bank Trust Co. v. Fox, No. 09 CV 0205 (Licking County C.P. May 20, 2011) (Marcelain, J.) (Appendix at Exhibit M) (relying upon the Lee and Piwinski decisions in denying the defendant's motion for relief from judgment).

D. The Prosecution of a Foreclosure Action Is Not in Connection with a Consumer Transaction.

Despite conceding that the prosecution of a foreclosure action and the litigation conduct inherent in prosecuting a foreclosure action are not themselves consumer transactions, the Attorney General tries to shoehorn these activities into the CSPA by claiming that litigation

activity is "'in connection with" a consumer transaction." Id. This purported distinction is of no avail.

For the reasons discussed above, GMACM's servicing work is not a consumer transaction. Thus, the litigation activity is not done in connection with a consumer transaction, but rather pursuant to commercial agreements between commercial entities. Moreover, the specific conduct at issue in these cases—the filing of affidavits and use of assignments in the prosecution of real estate foreclosure cases—is not sufficiently connected to any conceivable consumer transaction so as to give rise to CSPA liability. Accordingly, no rational reading of the CSPA could conclude that the CSPA applies to a foreclosure action and the litigation conduct inherent in prosecuting a foreclosure action.

1. Mortgage Servicing Is Not Linked to A Consumer Transaction.

The petitioners' position stretches the CSPA to the breaking point. Even assuming for purposes of argument that general mortgage servicing activity could be a consumer transaction, the relationship between that servicing activity and the prosecution of a foreclosure action is too remote to consider the foreclosure action "in connection with" a consumer transaction. See R.C. §§1345.02(A), 1345.03(A) (only unfair, deceptive, or unconscionable conduct "in connection with" a consumer transaction can violate the CSPA) (Appendix at Exhibit B). The word "connection" implies a "causal or logical relation or sequence" or a "contextual relation or association." Merriam-Webster Dictionary, available at www.merriam-webster.com/dictionary. That direct link is missing here.

To the extent Petitioners argue that the CSPA applies to the alleged foreclosure-related conduct because the CSPA governs unfair or deceptive conduct that occurs "before, during, or after" the consumer transaction, they miss the point. Petitioners would have the Court extend the

CSPA in perpetuity to apply to any conduct that has some arguable connection to a consumer transaction. This would be an illogical result. It would sweep up independent acts not fairly traceable to an initial consumer transaction, as well as acts based on intervening events.

The by-product of the general mortgage servicing activity performed for the owners of the loans on which Petitioners focus—responding to borrower inquiries, receiving and applying a borrower's monthly payments, and so on—does not automatically lead to the commencement of foreclosure actions and the subsequent filing of assignments and affidavits in the course of prosecuting such foreclosure actions. In fact, as noted, GMAC attempts loss mitigation and has a good success rate. Thus, when GMAC is forced to prosecute a foreclosure action, it does not do so in connection with any "services" performed for a consumer. Instead, the foreclosure action and filing of documents result from the borrower's failure to make the monthly payments he promised to make, and they occur only after other attempts to bring a borrower current and/or work out a repayment plan are exhausted. In other words, the borrower's default and the failure of any non-judicial workout options are a clear intervening event between the every day mortgage servicing conduct, and the prosecution of a foreclosure action. The foreclosure action and filing of documents is connected to the effort to secure title to the real estate when efforts to obtain repayment from the borrower have failed, not to the general servicing activity that Petitioners argue is a consumer transaction.

2. The CSPA Has Not Been Applied to Foreclosure Actions.

Moreover, Petitioners and their amici do not cite a single case applying the CSPA to conduct undertaken in the course of a foreclosure action. Instead, they rely primarily on Midland Funding LLC v. Brent, which did not involve mortgage servicing at all. Midland Funding involved the collection of consumer debt: a credit card debt written off by the card issuer and

sold to Midland Funding, a debt collector. See Midland Funding LLC v. Brent (N.D. Ohio 2009), 644 F. Supp. 2d 961, 963 (Katz, J.). In holding that Midland Funding was a supplier, and that debt collection activity was a consumer transaction, Judge Katz relied on an Ohio Court of Appeals case reasoning that debt collectors must be suppliers, because holding otherwise would entice the original suppliers to defeat the CSPA by quickly moving all debt to third party collectors. See id. at 976. The petitioners' argument that Midland Funding supports their "in connection with" argument ignores the fact that the transaction with the homeowner giving rise to the foreclosure action is a real estate transaction, while the transaction underlying the suit in Midland Funding was a consumer transaction. In addition, Munger was a direct action by the borrower, which relied heavily on Midland.

In addition, the Ohio case referred to in Midland Funding was Celebrezze v. United Research, Inc. Importantly, United Research did not involve mortgages or mortgage servicing. In United Research, the defendant was the assignee of a retail installment contract and was accused of filing collection lawsuits against consumers in a remote and inconvenient forum making defense difficult and costly. See Celebrezze v. United Research, Inc. (9th Dist. 1984), 19 Ohio App. 3d 49. Although unclear from the decision, it appears that the right to do so stemmed from an adhesion provision in the underlying retail installment contract. The retail installment contracts entered into by consumers were for the purchase of goods—encyclopedias and other educational materials not real estate. See id. at 49. The Ninth District Court of Appeals held: "Since the Consumer Sales Practices Act provides protection through all phases of the transaction, the seller cannot relieve itself of its duty to act fairly by assigning its claim to an agent or assignee and having that assignee conduct practices prohibited by the Act." Id. at Syllabus ¶3. The seller of the encyclopedias in the underlying retail installment contract was a

supplier under the CSPA, so the Ninth District concluded that "a collection agency is a 'supplier' as defined by R.C. 1345.01(C)." Id.

Nothing in United Research suggests that filing of lawsuits was a separate consumer transaction; rather, the litigation conduct was part of the underlying consumer transaction. Indeed, a fair reading of United Research suggests that what the court did was eliminate, judicially, a potential holder in due course defense. See Ohio Rev. Code § 1317.031 (allowing a buyer under a purchase money loan installment note or a retail installment contract to assert all defenses against a subsequent holder that the buyer would have against the original seller).[8] Thus, Midland Funding's reliance on United Research is misplaced, and neither United Research nor the federal decisions relying on it are persuasive here.[9]

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[8]The distinction between mortgage servicing and debt collection is important. A third-party debt collector does not have the real estate mortgage lien to foreclose to recover the debt, and thus could be considered to be initiating or soliciting a new consumer transaction—the payment of a consumer debt—that has nothing to do with real estate and is a completely separate type of arrangement than the servicing of a mortgage in real property pursuant to commercial contract. The third-party debt collector could be seen to be acting in connection with a non-real estate transaction falling under the definition of a consumer transaction.

[9] Refusing to stretch the CSPA to cover mortgage servicing does not deprive borrowers of redress for lending and servicing-related conduct. Borrowers will continue to have Ohio common law causes of action. For example, in addition to the CSPA claims, the Attorney General has alleged a cause of action for common law fraud, and the Blank plaintiffs have alleged claims for intentional infliction of emotional distress, abuse of process, fraud on the court, common law fraud, and constructive fraud. Borrowers also could avail themselves of federal causes of action, such as the Truth in Lending Act and the Fair Debt Collection Practices Act, in appropriate circumstances. Furthermore, as the amicus brief of Legal Services acknowledges by attaching the 2010 FTC Brochure, mortgage servicers are thoroughly regulated by the Real Estate Settlement Procedures Act of 1975 ("RESPA"). RESPA governs how mortgage services administer escrow accounts, what notice must be provided when servicing is transferred, when late fees can be charged after servicing is transferred, how quickly mortgage servicers must respond to written inquiries, and when payments received by mortgage servicers must be applied. 12 U.S.C. § 2605 (Appendix at Exhibit N).

III. Response to Third Certified Question: An entity that services residential mortgage loans and prosecutes foreclosure actions is not a "supplier."

Only "suppliers" may be held liable under the CSPA; The CSPA provides that no "supplier" may commit an unfair, deceptive, or unconscionable act or practice in connection with a consumer transaction. See R.C. §§1345.02, 1345.03. The CSPA defines a "supplier" as a "seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer." R.C. §1345.01(C).

A. Mortgage Servicing Does Not "Effect" or "Solicit" a Consumer Transaction.

To be a supplier, it is not enough that an entity play some role in a consumer transaction. Rather, the entity must be "engaged in the business of "effecting or soliciting consumer transactions." R.C. §1345.01(C) (emphasis added). Neither of these terms describes the alleged conduct of GMACM in this case. "Effect" means "to cause to come into being," "to bring about often by surmounting obstacles," or "to put into operation." Merriam-Webster Dictionary (available at www.merriamwebster.com/dictionary). The use of the verb "effect" implies the initiation of a consumer transaction. Similarly, "solicit" means "to approach with a request or plea." Id. The use of the verb "solicit" also implies the initiation of a consumer transaction. The statutory language clearly ties supplier status to the creation of the consumer transaction.

Neither the servicing work nor the litigation activity that forms the basis for the Petitioners' claims has anything to do with the initiation of any underlying consumer transaction. As noted, the operative transaction alleged by Petitioners and their amici is actually a commercial transaction between the servicer and the lender. Thus, GMACM is not initiating or soliciting a "consumer transaction." If the operative transaction is the underlying real estate

transaction, a servicer like GMACM has no role in initiating or soliciting it. The real estate transaction has already occurred when the servicing work begins, or a foreclosure action is filed; the servicing work and litigation conduct does not cause the consumer transaction to come into being. Thus, under the plain meaning of the statute, a servicer like GMACM is not a supplier. The Ayala court held that the loan servicer was not a supplier under the Utah CSPA, because "it [the loan servicer] was not even involved in the origination of the loan at issue." See Ayala v. American Home Mortg. Servicing (D. Utah 2011), 2011 U.S. Dist. LEXIS 85001. This holding is especially compelling because the Utah CSPA specifically includes real estate in the definition of consumer transaction. The same conclusion is warranted under the Ohio CSPA, which excludes real estate from the definition of consumer transaction.

B. Ohio Omitted "Enforcing" From the Definition of Consumer Transaction.

Ohio's definition of supplier underscores the conclusion that mortgage servicers are not suppliers. Ohio omitted language from the definition of supplier that would have brought certain types of actors into the category of supplier. The Uniform CSPA, as well as the Kansas and Utah versions of the CSPA, include enforcing consumer transactions as one of the acts that can make an entity a supplier. See Uniform CSPA §2(5) ("'supplier' means a seller, lessor, assignor, or other person who regularly solicits, engages in, or enforces consumer transactions") (Appendix at Exhibit G); Kan. Stat. Ann. §50-624(*l*) ("'Supplier' means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions") (Appendix at Exhibit I); Utah Code Ann. §13-11-3(6) ("'Supplier' means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions") (Appendix at Exhibit H). Ohio's version did not include the activity of enforcing consumer transactions in the definition of supplier. The

collection of monthly payments and the prosecution of foreclosure action is not the "effecting or soliciting" of a consumer transaction. And although mortgage servicing does not appear to enforcing a consumer transaction, even if it was, a decided stretch, enforcing a consumer transaction is not included in the Ohio CSPA's definition of supplier. The Ohio General Assembly's decision to exclude the activity of "enforcing" from the definition of supplier in the Ohio CSPA indicates that an entity that services mortgage loans or prosecutes foreclosure actions long after the real estate transaction is completed is not a "supplier" within the meaning of the statute.[10]

Petitioners and their amici simply assume that the general mortgage servicing work they allege GMACM performs is a "consumer transaction," and then assert that GMACM is a supplier. As previously discussed, Petitioners are wrong. Neither mortgage servicing conduct in general, nor the specific litigation-related conduct at issue in this case, falls within the definition of a consumer transaction. GMACM is not a "supplier" by virtue of its participation in either of these actions.

CONCLUSION

Mortgage servicing, and real estate foreclosure actions, arise out of an underlying real estate transaction, and are governed by a commercial agreement between commercial entities. Neither mortgage servicing activity in general, nor the specific foreclosure related activity at issue in this case, satisfy the definition of a "consumer transaction" under the CSPA. Similarly, an entity that services residential mortgage loans and prosecutes foreclosure cases is not a

[10] The Ohio definition of supplier also defines the extent of the "before, during, or after" aspect of potential liability under the CPSA. Enforcement refers to events after the sale, lease or other transfer has occurred. Ohio's version of the CSPA provides that entities engaged in after-the-fact enforcement are not suppliers.

"supplier" under the CSPA. Accordingly, this Court should reject Petitioners' attempt to stretch the CSPA to apply where it does not, and should answer all three of the certified questions "no."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Merit Brief Of Respondents GMAC Mortgage, LLC and Ally Financial, Inc. was served via ordinary U.S. mail, postage prepaid, this 28th day of November 2011, upon the following:

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