

IN THE SUPREME COURT OF OHIO

CITIMORTGAGE, INC.,  
successor by merger to  
ABN AMRO Mortgage Group, Inc.,

Appellant,

v.

JAMES A. ROZNOWSKI, et al.,

Appellees.

Case No. 2012-2110

On Appeal from the Stark County  
Court of Appeals, Fifth Appellate District  
Court of Appeals Case No. 2012 CV 00093

REPLY BRIEF OF APPELLANT  
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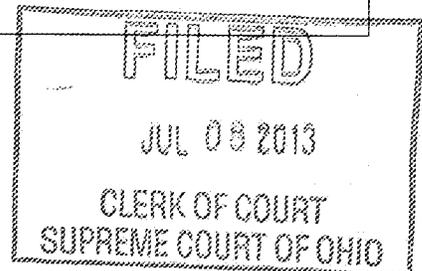
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## **RESPONSE TO APPELLEES' STATEMENT OF THE CASE AND FACTS**

In their Statement of Facts and Case, the Appellees make a number of unsupported and inaccurate factual statements, starting with the time the case was in mediation. CitiMortgage attempted to work out a loss mitigation approach that was acceptable to Appellees while the case was referred to mediation for over a year. Those efforts were unsuccessful. When the case was returned to the trial court docket, the trial court issued an "Assignment Notice" on December 13, 2010 setting a dispositive motion deadline of January 10, 2011 and a trial date of February 10, 2011. CitiMortgage thus filed its motion for summary judgment consistent with the trial court's case schedule, and not, as Appellees wrongly state, "[w]ithout asking leave." Appellees' Br. at 2; (Supp. 27). In addition, CitiMortgage requested responses to previously served discovery shortly after the case was reactivated; Appellees waited over three months to serve additional discovery, despite filing a Rule 56(F) motion on January 31, 2011. The trial court rescheduled the trial for May 3, 2011 to accommodate Appellees. There was no unfairness in the discovery schedule or the discovery-related rulings by the trial court.

Appellees also state as fact that CitiMortgage made "inconsistent statements concerning the amounts owed on the note," citing the affidavit of Appellant Steffanie Roznowski purportedly attached to their second Rule 56(F) motion. The affidavit supposedly "detail[ed] incorrect information she had received from CitiMortgage about the amounts due." Appellees' Br. at 3. But Appellees' second Rule 56(F) motion was not supported by an affidavit from Steffanie Roznowski, and the initial Rule 56(F) affidavit by Mrs. Roznowski did not identify any inaccuracies related specifically to the amounts owed under the note. Appellees similarly claim that CitiMortgage presented varying calculations of the "Total Arrears Due" in forbearance agreements proposed during mediation. Appellees' Br. at 5. It is improper to use information

from the forbearance agreements arising out of the mediation process (they are subject to Ohio R. Evid. 408). Regardless, any discrepancy is insignificant because the amounts were later confirmed in the sworn affidavit supporting CitiMortgage's summary judgment motion, and Appellees did not dispute the amounts stated in the affidavit. (Supp. 63-70).

Appellees also make the baseless claim that CitiMortgage has "to this day not been required to prove its entitlement to foreclose." Appellees' Br. at 6. This hyperbolic statement is belied by the record in this case. This Court did not certify any issue related to the propriety of the trial court's summary judgment. Thus, these assertions, and most of the other assertions in Appellees' statement of the facts, are immaterial to the two certified questions before this Court.

Noticeably absent in the Appellees' statement of the facts and case is any reference in the record to any actual attempt to redeem the property. Appellees point to nothing in the record showing that they attempted to exercise their common law right of redemption prior to the entry of the judgment. Appellees also point to nothing in the record showing that they attempted to exercise their statutory right of redemption since the entry of judgment. In fact, Appellees made no such attempt. Thus, there is nothing in the record in this case even remotely suggesting that the judgment in this case or its wording had any negative effect on the Appellees at all. Similarly, the Amicus Curiae, while discussing her redemption right, also never demonstrates that the wording of the judgment in her separate case somehow negatively affected her redemption right. There is nothing in the factual record before this Court that in any way demonstrates that the approach adopted by the majority of the Ohio courts of appeal is somehow preventing borrowers from exercising their rights to redeem.

The certified questions are whether a judgment decree in foreclosure is a final appealable order if it includes, as a part of the recoverable damages, the amounts advanced for inspections,

appraisals, property protection and maintenance, but does not include a specific itemization of those amounts in the judgment; and whether a mortgagor may contest the amounts expended by a mortgagee for inspections, appraisals, property protection and maintenance as part of the proceedings to confirm the foreclosure sale, and appeal any adverse ruling in an appeal of the order of confirmation. Nothing in the Brief of the Appellees in any way supports an answer other than “yes.”

### ARGUMENT

**I. CitiMortgage, Inc.’s Proposition of Law No. I -- A Judgment Decree in Foreclosure is a Final Appealable Order if it Includes as a Part of The Recoverable Damages The Amounts Advanced For Inspections, Appraisals, Property Protection and Maintenance, But Does Not Include a Specific Itemization of Those Amounts in The Judgment.**

Appellees exhort this Court that borrowers deserve to know how much they owe, and are entitled to know the relief the judgment awards. CitiMortgage respectfully submits that the judgment met this standard. But the real issue is whether the judgment determines the action, and Ohio law is clear that a judgment determines the action where it describes the damages awarded without itemizing them, as long as the remaining task of calculating the amounts is mechanical and ministerial. Appellees fail to explain how the judgment at issue in this case, which awarded unitemized amounts advanced for inspections, appraisals, property protection and maintenance, did not determine the action under this Court’s prior precedent and other Ohio appellate decisions. None of Appellees’ arguments make a compelling case for injecting speculation, uncertainty, and complexity into foreclosure proceedings.

**A. Appellees Cite No Authority Holding the Calculation of Amounts Advanced for Property-Related Costs Is Not a Mechanical and Ministerial Task Similar to Assessing Costs.**

Appellees wrongly cite cases that do not involve judgments that generally award damages for amounts whose calculation is merely a mechanical and ministerial task. For example, *Noble v. Colwell*, 44 Ohio St. 3d 92, 540 N.E.2d 1381 (1989), involved a car accident that killed plaintiff's decedent (Noble) and injured the defendant (Colwell). The main question in the trial court was whether Noble or Colwell was driving the car and caused the accident; Noble's complaint alleged Colwell was driving and Colwell's counterclaim alleged Noble was driving. The trial court entered judgment on the jury's verdict that Noble was the driver, and Noble appealed. On appeal, the Ohio Supreme Court held the judgment was not final and appealable, because even though the judgment decided Noble's claims, the judgment left open Colwell's share of liability and damages on his counterclaims. The trial court had not included the Rule 54(B) no just reason for delay language, so the judgment was not final and appealable. *Noble v. Colwell* has no relevance here.

Similarly, the trial court in *Harkai v. Scherba Indus., Inc.*, 136 Ohio App.3d 211, 736 N.E.2d 101 (9th Dist. 2000), entered a judgment adopting the magistrate's findings and conclusions with no separate statement of the trial court's determination of the issues and order granting relief. The Ninth District ruled the judgment was not final and appealable: "The trial court's statement that it 'affirms' the magistrate's decision is not a statement of the relief ordered for the parties to remedy the dispute between them. Accordingly, this entry is not a judgment or final order from which an appeal might lie." *Harkai*, 136 Ohio App.3d at 216, 736 N.E.2d 101. Like *Noble*, *Harkai* is inapplicable because it does not support a conclusion that the foreclosure judgment entered by the trial court in this case is not final and appealable. In fact, the

foreclosure judgment below meets the general standards discussed in *Harkai*, because it “contain[s] a statement of the relief being afforded the parties,” *see id.* at 215, and “leave[s] nothing for the determination of the court” and “determines the merits of the case and makes an end to it.” (Citations and quotations omitted.) *Id.* at 214. Thus, *Harkai* does not advance Appellees’ position.

The decision in *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, 904 N.E.2d 863, is also unhelpful here. *Walburn* addressed the narrow issue whether an order declaring only that an insured is entitled to uninsured motorist coverage is final and appealable. This Court held the order was not immediately appealable, because in the absence of a finding that the insurer is actually obligated to pay damages under the UM coverage, the order declaring coverage did not affect a substantial right within the meaning of R.C. 2505.02(A)(1). *Id.* at ¶ 4. *Walburn* is also inapplicable because it did not address unitemized amounts awarded in foreclosure judgments, and did not even address the prong of R.C. 2505.02 at issue in the certified question in this case: whether the judgment determines the action.

Appellees cite no authority contesting the well-established precedent that a judgment that does “not completely determin[e] damages” is nevertheless final and appealable “where the computation of damages is mechanical and unlikely to produce a second appeal because only a ministerial task similar to assessing costs remains.” *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 684 N.E.2d 72 (1997). Appellees also cite no cases contesting the application of *Pledger v. Bosnick*, 306 Ark. 45, 51, 811 S.W.2d 286 (Ark. 1991), where the court held the remaining “details of [class] notice and attorneys’ fees” did not make the order nonfinal; *Parks v. Pavkovic*, 753 F.2d 1397, 1402 (7th Cir. 1985), where all that remained to be done to compute damages was for the members of the class to submit receipts or other evidence

showing what they had paid or still owed to the defendants; and *State v. Threatt*, 108 Ohio St. 3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 21, where this Court held that “[w]hen a court assesses *unspecified costs* [against a convicted criminal defendant], the only issue to be resolved is the calculation of those costs and the creation of the bill . . . [which] is merely a ministerial task.” (Emphasis Added.).

The Amicus Curiae’s misplaced attempt to analogize the itemization of property-related costs with attorneys’ fees fails for the same reasons. An award of attorneys’ fees typically requires the court to hear evidence, and decide the reasonableness of the hourly rate, the time expended, and the work performed. The calculation of amounts incurred for property-related costs does not involve the same type of judicial decision-making required for approving attorneys’ fees. Rather, these costs can be calculated prior to confirmation through the mechanical and ministerial task of simply adding up what the mortgagee incurred for those amounts, with no judicial involvement at all. Similarly, this Court has recently noted that the award of prejudgment interest does not involve a ministerial task, because it “requires judicial fact-finding and the exercise of judicial discretion” to determine whether “the party required to pay the judgment failed to make a good faith effort to settle and that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case.” (Citations and quotations omitted.) *Miller v. First Int’l Fid. & Trust Bldg.*, 113 Ohio St. 3d 474, 2007-Ohio-2457, 866 N.E.2d 1059, ¶ 7.

As noted, no similar judicial decision making is required for the calculation of the amounts advanced for inspections, appraisals, property protection and maintenance, and Appellees cite no cases to the contrary. In fact, the most recent case follows this rule. The Tenth District Court of Appeals recently followed this precedent in *Bank of New York Mellon v.*

*Rankin*, 10th Dist. No. 12AP-808, 2013-Ohio-2774, holding that the calculation of sums advanced for real estate taxes, insurance premiums, and property protection “is mechanical and ministerial” and “may be addressed at a hearing on confirmation of the sheriff’s sale.” *Id.* at ¶ 41.

**B. *Queen City’s* Holding and Rationale Support CitiMortgage’s Position.**

Appellees wrongly assert that this Court’s decision in *Queen City Sav. & Loan Co. v. Foley*, 170 Ohio St. 383, 165 N.E.2d 633 (1960), is limited to lien contest cases. Appellees’ Br. at 12. This assertion ignores the facts of *Queen City* and the Court’s application of *Queen City* in subsequent cases.

To begin with, although *Queen City* arose in the context of a lien holder who was attempting to appeal the reordering of its lien due to the lien holder’s failure to timely answer, the Court’s reasoning was dependent on whether the prior default judgment was a final order that prevented an appeal from the trial court’s subsequent order. Thus, the case cannot be read as limited to circumstances involving parties seeking to contest their lien priority. In fact, this Court has applied *Queen City* more broadly. For example, in *Oberlin Sav. Bank Co. v. Fairchild*, 175 Ohio St. 311, 312, 194 N.E.2d 580 (1963), this Court applied *Queen City* and held that an entry “ordering a foreclosure sale and finding the amounts due the various claimants [was] [a] final order,” where the entry precluded the later appeal of a life tenant, who was not a party contesting the determination of her lien priority. *See also Third Nat’l Bank v. Speakman*, 18 Ohio St. 3d 119, 120, 480 N.E.2d 411 (1985) (finding judgment entry was a final and appealable order as to the appellant property owner). Thus, this Court has not interpreted *Queen City* in the narrow way suggested by Appellees.

In addition, the judgment decree in foreclosure at issue in this case contains all of the elements that made the judgment decree in *Queen City* a final and appealable order. In *Queen City*, this Court expressly stated that one of the “things of importance” that made the “Judgment and Decree for Sale” a final appealable order pursuant to R.C. 2505.02 was that it “rendered a money judgment in favor of [the mortgagee] against the owners for the full balance found to be unpaid on the note secured by the mortgage on the subject premises.” *Id.* at 385. This Court made a point to mention that the amount of the unpaid balance was a crucial element in the judgment decree, along with the determination of lien priority and the decree of sale. The judgment decree at issue here accomplished all of the noted elements the judgment decree accomplished in *Queen City*, which this Court held was sufficient to satisfy the requirements of a final appealable order under R.C. 2505.02. Namely, the judgment decree in this case 1) ordered a sale; 2) stated the unpaid balance on the note due to CitiMortgage; and 3) determined that CitiMortgage’s mortgage was the first and best lien on the property with the exception of real estate taxes. *See CitiMortgage Merit Br. Appx.* at 45-48. As such, this Court should find the judgment decree in foreclosure in this case also constitutes a final appealable order.

Moreover, the rationale of this Court in *Queen City* supports the proposition that a judgment decree in foreclosure need not, as an additional requirement, itemize the amounts awarded for property inspections, appraisals, protection and maintenance in order to constitute a final appealable order. Like the permissible “ministerial” and “mechanical” tasks which do not prevent a judgment from being final, this Court in *Queen City* similarly emphasized that future tasks which are merely “necessary to carry into effect the right settled by the order” and are “merely auxiliary to or in execution of the order of the court made on the merits” do not make an order non-final. *Id.* at 386. This Court recently confirmed that the Sheriff’s sale and

confirmation proceedings after entry of a foreclosure judgment are special proceedings in aid of execution. *Countrywide Home Loans Servicing v. Nichpor*, Slip Opinion No. 2013-Ohio-2083. Notwithstanding the fact that amounts advanced for property-related expenses are generally incomplete and often not even known at the time of the entry of judgment, these amounts are merely auxiliary to the judgment on the note and mortgage, and incurred in execution of that order. Thus, the failure to itemize these amounts does not make the judgment non-final.

**C. This Court In *Nichpor* Recently Held A Default Judgment Decree In Foreclosure That Did Not Itemize The Amounts Awarded For Property-Related Expenses Was A Final Appealable Order.**

This Court, in *Countrywide Home Loans Servicing v. Nichpor*, Slip Opinion No. 2013-Ohio-2083, recently dealt with a Default Judgment Decree in Mortgage Foreclosure that included similar language to the Fifth District judgment at issue in this case. In *Nichpor*, this Court held that a foreclosure action cannot be voluntarily dismissed under Rule 41(A)(1)(a) after the trial court enters a judgment decree in foreclosure because Rule 41(A)(1)(a) only pertains to pending cases. The Judgment Decree in Foreclosure entered by the trial court in *Nichpor*, which had concluded the case, provided in pertinent part:

The Court further finds that there is due . . . *all advances* made for the payment of real estate taxes and assessments and insurance premiums, and *all costs and expenses incurred* for the enforcement of the Note and Mortgage.

(Emphasis added.) Merit Brief of Appellants Michael P. Nichpor and Joann M. Nichpor, *Countrywide Home Loans Servicing v. Nichpor*, Sup.Ct. No. 2012-0578 at Appx. 46-49 (Aug. 8, 2012). The *Nichpor* default judgment did not specifically itemize the amounts of the advances awarded, but like the judgment in *Queen City* and the judgment in this case, it ordered a sale, stated the unpaid balance due on the Note, and determined the priority of liens. *Id.* Accordingly,

this Court implicitly recognized that the lack of itemized property-related costs and expenses did not make the order non-final. As the Court noted:

All that remained in this case were *administrative matters* finalizing the result of the sheriff's sale and *giving the mortgagors the opportunity to exercise their equitable right of redemption*. These actions can be classified as proceedings to aid in execution of the judgment.

(Emphasis added.) *Id.* at ¶ 6. This Court further acknowledged that the foreclosure decree was a “final” judgment, and that allowing the plaintiff-lender to dismiss the case voluntarily at that late date would allow the “untenable result” of enabling mortgagees to unfairly game the system and undermine the judicial interest in finality of foreclosure judgments and the finality of judicial sales in aid of execution in reliance on those judgments. *Id.* at ¶ 7. This Court was aware of the wording of the foreclosure judgment entered in *Nichpor*, but recognized it as final and appealable, and as ending the case subject to further special proceedings in aid of execution. This Court should reaffirm that decision in this case as well.

**D. *NovaStar* Was Overruled, Is Unpersuasive, And Has Been Rejected By Ohio Courts.**

The cornerstone of Appellees’ argument is a decision from the Eleventh District, *NovaStar Mtg., Inc. v. Akins*, 11th Dist. No. 2007-T-0111, 2008-Ohio-6055. Appellees cite *NovaStar* for the proposition that a foreclosure judgment that does not specify the actual amounts advanced for taxes, insurance premiums, costs, and property protection is “void for vagueness,” and tout *NovaStar*’s approach as the “even-handed” rule. But the Eleventh District has reversed *NovaStar*, and other Ohio appellate courts have either explicitly or implicitly rejected the *NovaStar* approach. This Court should do likewise.

In *NovaStar*, the court held that the judgment decree in mortgage foreclosure entered in that case was “void for uncertainty,” because it did not allow the borrower to “determine her

obligations as they existed at the time of the decree with reasonable certainty.” *NovaStar*, 2008-Ohio-6055, ¶ 57. The Eleventh District subsequently backed away from a broad reading of *Novastar* in *Geauga Sav. Bank v. McGinnis*. 11th Dist. No. 2010-T-0052, 2010-Ohio-6247. In *McGinnis*, the Eleventh District held:

[W]e take this opportunity to overrule that opinion to the limited extent this court utilized improper nomenclature. In *NovaStar*, the October 22, 2007 judgment entry should have been deemed erroneous and voidable, but not “void for uncertainty.” The distinction between “void” and “voidable” is crucial. For example, a void judgment is considered a legal nullity and may be attacked collaterally. On the other hand, a voidable judgment, although imposed irregularly or erroneously, has the effect of a proper legal order unless it is successfully challenged on direct appeal. *GMAC v. Greene*, 10th Dist. No. 08AP-295, 2008-Ohio-4461, at ¶ 26-27; *see, also, State v. Biondo*, 11th Dist. No. 2009-P-0009, 2009-Ohio-7005, at ¶ 20-26, exploring void versus voidable in the criminal context.

*Id.* at ¶ 18. In other words, the Eleventh District clarified that a judgment like the one entered in *NovaStar* was not void, but merely “voidable,” and was final and appealable. Accordingly, the Eleventh District reaffirmed that a judgment decree in foreclosure that awards certain categories of damages but does not itemize them, is a final and appealable order, and has the effect of a proper legal order unless successfully challenged in a direct appeal. *Id.*; *see also, e.g., State v. Montgomery*, 6th Dist. No. H-02-039, 2003-Ohio-4095, ¶ 9 (“A voidable judgment is subject to direct appeal, R.C. 2505.03(A), Article IV, Section 3(B)(2), Ohio Constitution”).

In addition, at least one Ohio court of appeals has rejected the *NovaStar* approach proffered by Appellees. The Twelfth District, in *Washington Mut. Bank, F.A. v. Wallace*, 12th Dist. 194 Ohio App.3d 549, 2011-Ohio-4174, *rev'd on other grounds, Wash. Mut. Bank, F.A. v. Wallace*, 134 Ohio St. 3d 359, 2012-Ohio-5495, 982 N.E.2d 691 (2012), faced the same issue present here: whether the failure to specify the amounts awarded for advances for taxes, insurance and other expenses impairs the right to redeem. The court noted that the Eleventh

District in *McGinnis* had “modified” *NovaStar*, “stating that vagueness in a judgment entry in foreclosure actions merely renders the judgment voidable, not void.” *Id.* at ¶ 46. The *Wallace* court then held “that the trial court's judgment entry was not void for vagueness and did not render the trial court's judgment entry as being not final and appealable.” *Id.* ¶ 49. No Ohio appellate courts have followed *NovaStar*, and many have implicitly rejected its requirements. *See* CitiMortgage Merit Br. at 12-15. For this same reason, *NovaStar* is also contrary to *Queen City* and its progeny. Accordingly, *NovaStar* does not provide any basis for affirming and adopting the Fifth District’s decision and approach in this case. The Court should not adopt a rule for all Ohio courts that has already been rejected.

Moreover, the approach adopted by the *NovaStar* court and advocated by Appellees is itself unworkable. Appellees concede that mortgagees cannot accurately itemize all amounts for property-related expenses at the time of the judgment entry and decree in foreclosure, because all recoverable costs have not been incurred at that time. They nevertheless urge adoption of an approach that would require the mortgagee to state the amounts then known. But as CitiMortgage noted in its Merit Brief, these amounts continue to accrue, and listing them results in a judgment amount that is likely outdated and incorrect virtually upon its entry. Appellees never address this flaw in their argument or provide a sensible alternative to an approach that has already been rejected by the overwhelming majority of Ohio courts. *See, e.g., First Horizon Home Loans v. Sims*, 12th Dist. No. CA2009-08-117, 2010-Ohio-847 (“[I]t would be impractical to require appellee to state with specificity the total amount due for the additional charges in its affidavit in support of summary judgment”); *LaSalle Bank Natl. Assn. v. Smith*, 7th Dist. No. 11 MA 85, 2012-Ohio-4040, ¶21 (“To find that the judgment entry is nonfinal because it [] does not compute future costs would mean that no judgment of foreclosure and sale would ever be final”).

In any event, requiring indisputably non-final amounts to be stated in the foreclosure judgment, and allowing amendment of that judgment to account for subsequent amounts as suggested by the Fifth District, only creates inefficiency and opportunities for frivolous appeals. *See* CitiMortgage Merit Br. at 20-24. This Court should not create such a novel, unnecessary prerequisite to a final and appealable order.

**E. The Right of Redemption Is Not Jeopardized.**

Appellees appear to argue the amounts of property-related expenses are not “easily ascertainable” because the source of the information is the lender. Appellees also contend that a borrower’s right to redemption will be jeopardized because borrowers will be forced to “ask the mortgagee” for these components of the redemption amount, and the mortgagee cannot be trusted to provide accurate information of these costs. Appellees’ argument is incorrect as a matter of fact and law.

First, there are no facts or evidence in the record indicating that the Appellees tried to exercise either their common law or statutory right to redemption. Thus, there is nothing suggesting that the information supplied by CitiMortgage about any of the amounts awarded by the trial court for inspections, appraisals, property protection and maintenance was incorrect, excessive, or unreasonable. Appellees’ assertions about discrepancies in the adjustable rate interest rates and amounts due provided by CitiMortgage are simply not evidence. The interest rates and amounts information came from informal pay-off statements provided in the context of confidential mediation information; the amounts included in the judgment were based on information provided in a sworn affidavit supporting summary judgment that was not directly contradicted by Appellees.

Second, a borrower is in no way left at the mercy of a mortgagee should there be any potential issues or concerns about these property-related costs, because there is judicial supervision at every step. Any questions about or objections to the amounts demanded by the lender can be raised with the trial court at any time. This is true both prior to judgment in connection with the common law redemption right, and after judgment and before confirmation of sale in connection with the statutory redemption right. Thus, there is judicial review and scrutiny over these amounts. Appellees' claim of a denial of due process is untrue. Regardless, the lender advances these amounts, so whether they are included in the judgment or not, they must necessarily come from the lender. Trial judges retain substantial discretion to control the proceedings in their courts, both before and after judgment is entered, and during the course of special proceedings in aid of execution, such as the foreclosure sale process. As noted in CitiMortgage's Merit Brief, the redemption statute expressly provides that the trial judge has discretion to "stay[] the confirmation of the sale to permit a property owner time to redeem the property or for any other reason that it determines is appropriate." R.C. 2329.31. The discretion to allow a property owner extra time to redeem necessarily includes the discretion to determine the correct amount required to redeem. Any concern about unfettered misconduct by lenders in the redemption context is simply unfounded.

Third, there is no evidence whatsoever that mortgagees are misusing the long-standing practice of not itemizing specific amounts for inspections, appraisals, property protection and maintenance in the judgment entry to "rip-off" borrowers and thwart redemption, as suggested by Appellees. There is no readily apparent motivation on the part of mortgagees for such underhanded dealing, and Appellees provided none. The vast majority of the redemption amount is made up of the unpaid principal balance and interest, which is specified in the judgment.

Property-related advances are relatively small, and obviously are not profit centers for lenders dealing with defaulted loans and foreclosed homes. This is particularly true in today's real estate environment of diminished home values where the total amount owed on the loan is often substantially more than the resale value of a foreclosed property. Lenders often do not recover the principal and interest owing through a foreclosure sale, let alone the comparatively small amounts for advances for property-related expenses, and taxes and court costs are paid first in any event. If a borrower in good faith came forward with the redemption amount (or even something close), most mortgagees would jump at the chance to allow redemption. It is unrealistic to believe that a borrower, who has cash in hand in the amount of the unpaid principal balance, accrued interest, taxes, and court costs, to either offer the lender or to deposit with the court, would be deterred from exercising the right of redemption because the relatively minimal costs of property-related advances were not listed in the judgment and had to come from the lender. Appellees' reference to excess proceeds being payable to the debtor, while true, is an unlikely outcome in today's economy, but also subject to judicial oversight. The Amicus Curiae's argument that borrowers will be "deprived" of their property before the borrower knows the itemized amounts advanced and has the opportunity to redeem, making the right a "nullity," is wrong for the same reasons. There is no impairment of the right of redemption.

Ultimately, the Appellees and the Amicus Curiae ignore the substantial problems associated with the procedure they ask this Court to adopt. They provide no answer to the "catch-22" scenario described in CitiMortgage's Merit Brief. They do not address the collateral attack by-product of their proposed rule, and they do not dispute the frivolous appeal problem. They have no answer for the substantial problems that would ensue if the Fifth District approach is adopted throughout Ohio.

**F. Failure to Itemize The Amounts Advanced For Property-Related Expenses Does Not Prevent Execution.**

The Amicus Curiae wrongly contends that no execution can be taken from a judgment decree that does not itemize the costs advanced for property-related expenses, and the cases cited by the Amicus Curiae do not support this proposition. For example, this Court stated in *Roach v. Roach*, 164 Ohio St. 587, 592, 132 N.E.2d 742, 745 (1956), that “if a judgment is so indefinite as to its amount that it cannot create a lien on real property within the jurisdiction of the court granting it, no execution may be issued thereon which will create a lien on real estate in a foreign jurisdiction.” Thus, the Court held that a foreign execution for \$6,199 of purported unpaid and delinquent alimony installment payments could not issue because there was in fact *no* judgment that had been issued for that amount. *Id.* This is a far cry from the issue presented here. Moreover, R.C. 2329.09 states only that an execution indorse the amount “for which the judgment is entered.” It does not require the itemization of certain costs awarded but not stated in the judgment. A judgment decree in foreclosure is sufficiently definite to create a lien on real property for the unpaid principal balance, and the failure to itemize certain property related expenses does not prevent execution.

**II. CitiMortgage, Inc.’s Proposition of Law No. II -- A Mortgagor May Contest The Amounts Expended by a Mortgagee For Inspections, Appraisals, Property Protection and Maintenance as Part of The Proceedings to Confirm The Foreclosure Sale, and Appeal Any Adverse Ruling in an Appeal of The Order of Confirmation.**

The second certified question arose as a result of the Fifth District’s justification for its decision. The Fifth District defended its ruling, stating that the amounts for property-related expenses must be itemized in the foreclosure judgment because the amounts would not be subject to judicial review in the confirmation order. But the foreclosure sale proceedings in aid of execution, which start with the order for sale and end with the confirmation of the sale, are not

so limited. Appellees cite no authority that borrowers are precluded from challenging, and courts are precluded from reviewing, the amounts for advances for property-related expenses in an order confirming a sale, or otherwise rebut CitiMortgage's position that the cases on which the Fifth District relied are not on point. Instead, Appellees argue that the second question was improvidently certified, and that allowing courts to address property-related advances at confirmation would create judicial inefficiency. These arguments are flawed and should be rejected.

**A. The Second Certified Question Is Properly Before This Court.**

Appellees argue that the second question was improvidently certified, and therefore there is no conflict to resolve, because this Court decided the issue in *Oberlin Sav. Bank Co. v. Fairchild*, 175 Ohio St. 311, 194 N.E.2d 580 (1963). *Oberlin* did not decide the second certified question, however. In *Oberlin*, a life tenant was named as a defendant in a foreclosure action, but failed to answer. After the trial court entered judgment decreeing no relief to the life tenant, but before the foreclosure sale, the life tenant entered an appearance in the action and attempted to assert her life interest. The trial court confirmed the sale without recognizing the life tenant's interest. On appeal, this Court, citing *Queen City*, held that the life tenant should have appealed the judgment ordering the foreclosure sale and declaring the amounts due the various claimants, because that was the final appealable order affecting her property interest, not the confirmation order. *Oberlin*, 175 Ohio St. 311 at 312, 194 N.E.2d 580. *Oberlin* is simply a straightforward application of *Queen City*. Nothing in *Oberlin* precludes an appeal from issues first raised in the confirmation proceeding relating to the trial court's conduct of the confirmation proceedings, which CitiMortgage submits is the correct rule of law.

**B. Answering the Second Certified Question in the Affirmative Best Promotes Fairness and Judicial Efficiency.**

As explained in CitiMortgage’s Merit Brief, allowing a borrower to challenge the amounts advanced at the time they can be most accurately calculated, and allowing a right to appeal, promotes judicial efficiency by avoiding piecemeal appeals and the “catch-22” problem. The “disadvantages” suggested by Appellees are not disadvantageous at all. The sale price of the property is the sale price; what the confirmation order does is confirm the sale, and confirm the amounts to be paid from the sale proceeds to the interested parties, which include the court (costs); the taxing authority (property taxes); the lien holders (the amounts represented by the respective liens); and others (such as the homeowner, for any undisbursed sale proceeds). The homeowner’s interest in these amounts is only implicated in the unusual circumstance where the property sells for more than the outstanding taxes, costs and liens, or in the instance of wanting to contest the amount of a deficiency judgment. In either circumstance, the precise amounts are not known until the sale is confirmed, and only then can the debtor know whether substantial rights are impinged. Nothing precludes an appeal to protect the right to an accurate distribution of undisbursed sale proceeds or an accurate deficiency amount.

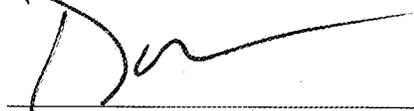
Importantly, neither Appellees nor the Amicus Curiae cite any cases upholding the Fifth District’s interpretation of the scope of what issues can be raised at confirmation or what can be challenged in an appeal from a confirmation order. There is simply no such restriction in Ohio jurisprudence. The Court should not endorse such an approach.

**CONCLUSION**

For these reasons, this Court should answer “yes” to both certified questions. The Court should reverse the decision of the Fifth District below, and affirm that a judgment decree in foreclosure does not need to itemize amounts advanced for inspections, appraisals, property

protection and maintenance to constitute a final appealable order. Further, this Court should hold that amounts advanced for inspections, appraisals, property protection and maintenance may be itemized prior to confirmation, and a borrower can challenge any disputed amounts as part of the proceedings to confirm, and in an appeal from the order of confirmation.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Reply Brief Of Appellant CitiMortgage, Inc. was served by first class, U.S. Mail, postage prepaid, on July 8, 2013, upon:

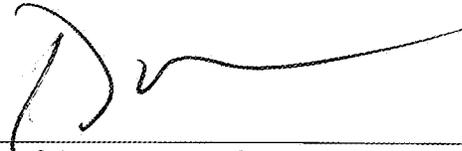
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