IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC12-600
District Court Case No. 4D11-2348

NICHOLAS ARSALI,

Petitioner,

v.

CHASE HOME FINANCE LLC, AMY B. WILSON, AND CHRISTOPHER D. MANNING,

Respondents.

On Certified Question of Great Public Importance
From the Fourth District Court of Appeal

ANSWER BRIEF OF RESPONDENT JPMORGAN CHASE BANK, N.A., as successor by merger to CHASE HOME FINANCE, LLC

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I. STATEMENT OF THE CASE AND OF THE FACTS

This appeal arises from the grant of a motion to set aside a foreclosure sale. In April 2010, Respondent JPMorgan Chase Bank, N.A. as successor by merger to Chase Home Finance, LLC ("Chase") filed a foreclosure action against Respondents Amy B. Wilson, Christopher D. Manning (collectively "Borrowers"), and other defendants in the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County.[1] (Appx. 1) On September 8, 2010, the trial court issued a final judgment of mortgage foreclosure in favor of Chase for $86,979.93 and set a public sale of the property on May 9, 2011. (Appx. 2)

Approximately one month before the scheduled sale, Chase's foreclosure counsel sent a letter to the Borrowers offering to reinstate their mortgage and dismiss the foreclosure action if they made a payment of $12,018.98 to Chase by May 6, 2011 at 9:00 a.m. EST ("the Reinstatement Agreement"). (Appx. 3-B) On May 3, 2011, the Borrowers sent a cashier's check for the reinstatement amount to Chase's counsel via overnight mail. (Appx. 3-C) Chase's counsel received the payment on May 4, 2011. (*Id.*) Chase's counsel failed to arrange for cancellation of the foreclosure sale, however, and it took place as scheduled on May 9, 2011. (Appx. 3-A) Iron National Trust, LLC submitted the winning bid of $125,300. (*Id.*) That same day, the Clerk of Court filed the certificate of sale. (*Id.*)

[1] On May 1, 2011, Chase Home Finance, LLC merged with and into JP Morgan Chase Bank, N.A.

Four days later, on May 13, 2011, the Borrowers moved to vacate the foreclosure sale and certificate of sale on the basis of the Reinstatement Agreement with Chase. (Appx. 3) After Iron National Trust assigned its interest in the property to Petitioner Nicholas Arsali, Arsali moved to intervene in the proceeding. (Appx. 4) On May 24, 2011, the trial court granted Arsali's motion to intervene. (Appx. 5) Two days later, the trial court held a hearing on the Borrower's motion to vacate. (Appx. 6.) Following the hearing, the trial court granted the Borrower's motion and vacated the foreclosure sale and certificate of sale. (Appx. 7) The trial court also ordered the Clerk of Court to return all proceeds from the foreclosure sale to Arsali, vacated the final judgment of mortgage foreclosure, and dismissed the case. (*Id.*) Shortly thereafter, Arsali filed a motion for rehearing and sanctions, which the trial court denied on June 1, 2011. (Appx. 8, 9.)

On June 23, 2011, Arsali filed a timely notice of appeal to the Fourth District Court of Appeal. (Appx. 10) On appeal, Arsali argued that the trial court erred in setting aside the foreclosure sale because the Borrowers failed to show that the sales price of $125,300 was grossly inadequate. Arsali also challenged the trial court's failure to hold an evidentiary hearing before setting aside the sale. (Appx. 11)

The Fourth District, *sua sponte* sitting *en banc*, concluded that the trial court did not abuse its discretion in setting aside the foreclosure sale. (Appx. 12, 5) The

Fourth District emphasized that a trial court has wide discretion to set aside a sale as an exercise of equity. (*Id.* at 4) Construing this Court's decision in *Moran-Alleen Co. v. Brown*, 123 So. 561, 561 (Fla. 1929), the Fourth District determined that a foreclosure sale may be set aside based on a mistake, even in the absence of a grossly inadequate sales price. (*Id.* at 5) Accordingly, the Fourth District held that foreclosure counsel's failure to cancel the sale provided adequate grounds to set aside the foreclosure sale, and no evidentiary hearing on the adequacy of the sales price was necessary. (*Id.*) However, because of a perceived conflict between *Brown* and *Arlt v. Buchanan*, 190 So. 2d 575 (Fla. 1966), the Fourth District certified the following question of great public importance to this Court:

> DOES THE TEST SET FORTH IN *ARLT V. BUCHANAN*, 190 So. 2d 575, 577 (Fla. 1966), FOR VACATING A FORECLOSURE SALE APPLY WHEN ADEQUACY OF THE BID PRICE IS NOT AT ISSUE?

(*Id.*) Arsali timely sought to invoke this Court's discretionary jurisdiction to review the certified question. (Appx. 13) This Court accepted jurisdiction on May 11, 2012.

In his initial brief, Arsali contends that the question certified by the Fourth District does not address the issue in this case. (Petitioner's Brf., 13-14) Arsali proposes rephrasing the certified question and argues that a judicial sale should only be set aside when an irregularity in the sales process occurred. (*Id.* at 15-22) Arsali also challenges the trial court's authority to set aside the foreclosure sale and

failure to hold an evidentiary hearing on the Borrower's motion before issuing a ruling. (*Id.* at 22-26)

II. SUMMARY OF THE ARGUMENT

This Court should answer the certified question submitted by the Fourth District in the negative and hold that the test set forth in *Moran-Alleen Co. v. Brown*, 123 So. 561 (Fla. 1929), for vacating a foreclosure sale applies in cases in which adequacy of the bid price is not at issue. *Brown* properly allows a trial court to weigh the equities of the individual case and set aside judicial sales to avoid "the wrong result." *Arlt v. Buchanan*, 190 So. 2d 575, 577 (Fla. 1966). Further, *Brown* is consistent with equitable principles as well as other judicial foreclosure states' standards for setting aside judicial sales. *See, e.g., Household Fin. v. Ness*, 810 N.E.2d 1146, 1148 (Ind. Ct. App. 2004); *United Oklahoma Bank v. Moss*, 793 P.2d 1359, 1364 (Ok. 1990).

Arsali's rephrased certified question is directly contrary to *Brown*. Answering it in the negative, as Arsali suggests, would deprive trial courts of "their equitable powers and their duty to protect and preserve the integrity of the judicial sale process." *See Ingorvaia* v. *Horton*, 816 So. 2d 1256, 1258 (Fla. 2d DCA 2002). Further, in cases such as this one involving a unilateral mistake, a trial court should be permitted to consider relevant factors such as the relative hardships to interested parties for the purpose of "prevent[ing] injustice." *See Arlt*, 190 So.

2d at 577. Arsali's rephrased certified question needlessly hampers a trial court's ability to consider such factors and to achieve an equitable result. Indeed, if applied here, Arsali's requested test would have forced the trial court to refuse to set aside the sale and allow the Borrowers to remain in their home, notwithstanding the lack of prejudice to Arsali.

Additionally, Arsali's collateral attacks on the trial court's order are meritless. The trial court properly exercised its equitable powers in setting aside the judicial sale. Given that the factual basis for the Borrower's motion was undisputed, Arsali was not entitled to an evidentiary hearing. *See e.g.*, *Allstate Ins. Co. v. Bowne*, 817 So. 2d 994, 998 (Fla. 4th DCA 2002). Accordingly, this Court should affirm the Fourth District's decision and hold that the trial court did not abuse its discretion in granting the Borrower's motion to set aside the judicial sale.

III. ARGUMENT

A. *Standard of Review*

This Court reviews a certified question that involves a pure question of law *de novo*. *Boatman v. State*, 77 So. 3d 1242, 1247 (Fla. 2011). A trial court's grant of a motion to set aside a foreclosure sale is reviewed for abuse of discretion. *Beltran v. Kalb*, 63 So.3d 783, 785 (Fla. 3d DCA 2011); *see also Weiand v. State*, 732 So. 2d 1044, 1057 (Fla. 1999) (explaining that because this Court has

jurisdiction to answer the certified question, it may review other alleged errors raised in the appellate court).

B. *Arlt and Brown Apply in Different Classes of Cases and Do Not Conflict.*

This Court should answer the certified question in the negative and hold that the two-prong test set forth in *Arlt v. Buchnan*, 190 So. 2d 575 (Fla. 1966) applies only in cases in which adequacy of the bid price is at issue. When adequacy of the bid price is *not* at issue, this Court's decision in *Moran-Alleen Co. v. Brown*, 98 Fla. 203 (Fla. 1929), controls. Applying *Brown* in this second class of cases allows a trial court to properly exercise its equitable powers. Further, such an approach is consistent with other judicial foreclosure states' standards for setting aside a foreclosure sale. Notwithstanding the Fourth District's reading of these decisions, there is no conflict between *Brown* and *Arlt* because they apply in different classes of cases.

1. ***Arlt Applies Only When Adequacy Of The Bid Price is at Issue.***

This Court should answer the certified question in the negative because *Arlt v. Buchanan*, 190 So. 2d 575 (Fla. 1966), applies only when adequacy of the bid price is at issue. In *Arlt*, the plaintiff filed suit against the sheriff seeking to set aside an execution sale. 190 So. 2d at 576. As grounds, the plaintiff alleged that the sale was conducted at a location different than advertised; that the sales price

was $1,000 for property with an appraised value of $120,000, subject to a $40,000 mortgage; that the purchaser was permitted to pay by check rather than by cash as advertised; and that the plaintiff was at the advertised location ready to satisfy the judgment at the time of the sale. *Id.* The trial court denied the sheriff's motion to dismiss the complaint, and the sheriff appealed. *Id.* This Court affirmed, observing that:

> The general rule is, of course, that standing alone mere inadequacy of price is not a ground for setting aside a judicial sale. But where the inadequacy is gross and is shown to result from any mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result.

Id. at 577. Because the plaintiff's complaint alleged that the property was sold at an inadequate price due to irregularities in the sales process itself, this Court concluded that the trial court properly denied the sheriff's motion to dismiss. *Id.* at 577–78.

The two-prong test set forth in *Arlt* promotes finality and stability in the judicial sale process. An inadequate bid price "standing alone . . . is not a ground for setting aside a judicial sale" given the nature of foreclosure sales. *See id.* at 577. Because a foreclosure sale involves a "forced sale" of property, the property at issue is not expected to sell for its actual value. *See O'Neal v. McElhiney*, 172 So. 2d 492, 494 (Fla. 1st DCA 1965) (taking judicial notice "that a forced sale

seldom brings the property's true value"); *Comstock v. Purple*, 49 Ill. 158, 158 (Ill. 1868) ("Property does not fetch, and is not expected to fetch, at [judicial] sales, its full value."). The purchaser receives a windfall "not through any tender solicitude for him on the part of the court, for there is none, but because of the established rule that inadequacy of price is not alone sufficient to avoid a sale brought about by an orderly and accurate processes of the law." *Block v. Hooper*, 149 N.E. 21, 23 (Ill. 1925); *see also Wolfert v. Milford Sav. Bank*, 47 P. 175 (Kan. Ct. App. 1896) (explaining that a purchaser at a foreclosure sale has rights that should be protected).

However, when an inadequate bid price is accompanied by other irregularities, a judicial sale may be set aside because "it is not the primary or other purpose of the law to protect one who seeks the disproportionate benefit of procuring valuable property for little or no outlay." *Mut. Ben. Life Ins. Co. v. Lyons*, 20 N.E.2d 784, 788 (Ill. 1939); *see also Wolfert*, 47 P. at 175 (purchaser's "right to be assisted in the enjoyment of a great bargain or speculation is not of such a character as to override strong equities in favor of other parties"). Accordingly, when more than the bid price is at issue, "equity will act to prevent the wrong result." *Arlt*, 190 So. 2d at 577.

Nothing in *Arlt* suggests that its two-prong test has any application in cases in which adequacy of the bid price is *not* at issue. *See Josecite v. Wachovia*, No.

5D11-3313, 3–4 (5th DCA Aug. 31, 2012) (holding that trial court erred in applying *Arlt* where adequacy of the bid price was not at issue); *Ingorvaia v. Horton*, 816 So. 2d 1256, 1258 (Fla. 2d DCA 2002) (explaining that "[t]here is nothing in *Arlt* to suggest that the test set forth therein applies where adequacy of price is not at issue"). Notably, the *Arlt* court was not confronted with a case in which the bid price of the foreclosed property was alleged to be adequate. *See Arlt*, 190 So. 2d at 577 (plaintiff's complaint alleged that "property with an appraised value of $120,000, subject only to a $40,000 mortgage, was sold for $1,000"). Further, applying *Arlt* to every case and "hold[ing] that a trial court may not vacate a foreclosure sale absent a grossly inadequate bid price would deprive the courts of their equitable powers and their duty to protect and preserve the integrity of the judicial sale process." *Ingorvaia*, 816 So. 2d at 1258–59. Accordingly, this Court should answer the certified question in the negative.

2. ***Brown* Applies When Adequacy Of The Bid Price Is Not Challenged.**

This Court should address the certified question by holding that *Moran-Alleen Co. v. Brown*, 98 Fla. 203 (Fla. 1929), applies in cases in which adequacy of the bid price is not at issue. In *Brown*, this Court explained the scope of a trial court's authority to set aside a judicial sale as follows:

> On the question of gross inadequacy of consideration, surprise, accident, or mistake imposed on complainant, and irregularity in the

> conduct of the sale, this court is committed to the doctrine that a judicial sale may on a proper showing made, be vacated and set aside on ***any or all*** of these grounds.

Id. at 204 (emphasis added). Thus, under *Brown*, a trial court may set aside a judicial sale based on a variety of independent grounds. *Brown* is consistent with the fact that in Florida, a judicial foreclosure proceeding, as well as a proceeding to set aside a judicial sale, is an equitable proceeding. *See LR5A-JV v. Little House, LLC*, 50 So. 3d 691, 694 (Fla. 5th DCA 2010); *Bennett v. Ward*, 667 So. 2d 378, 382 (Fla. 1st DCA 1995). In an equitable proceeding, a trial court has broad discretion to "weigh the equities of the individual case[ ]." *United Companies Lending Corp. v. Abercrombie*, 713 So. 2d 1017, 1019 (Fla. 2d DCA 1998); *see also Long Beach Mortg. Corp. v. Bebble*, 985 So. 2d 611, 613 (Fla. 4th DCA 2008) ("[A]n equity judge considering whether to set aside a foreclosure sale has *large discretion* which will only be interfered with by the appellate court in a clear case of injustice.") (emphasis added). *Brown* properly gives the trial court broad discretion to consider relevant factors, such as whether the judicial sale was impacted by surprise, accident, mistake, or irregularities in the conduct of the sale, to prevent "injustice to the complaining party." *See Arlt*, 190 So. 2d at 577.

Notably, *Brown* is consistent with the standards followed in other judicial foreclosure states for setting aside a judicial sale. *See Household Fin. v. Ness*, 810 N.E.2d 1146, 1148 (Ind. Ct. App. 2004) (explaining that a trial court has

"considerable discretion" to set aside a judicial sale and should set aside a sale where "there is a gross inadequacy of the price *or* circumstances showing fraud, irregularity, or great unfairness") (emphasis added); *United Oklahoma Bank v. Moss*, 793 P.2d 1359, 1364 (Ok. 1990) (judicial sale may be set aside when "(1) the sale price is so grossly inadequate that it shocks the conscience of the court; (2) the sale price is grossly inadequate and the sale is tainted by additional circumstances; *or* (3) the result is inequitable to one or more of the parties before the court, whether the owner, purchaser, or creditor") (emphasis added); *Burge v. Fid. Bond & Mortg. Co.*, 648 A.2d 414, 419 (Del. 1994) (In determining whether to set aside a judicial sale, a trial court "may consider factors other than price" including "whether there was some defect or irregularity in the process or mode of conducting the sale, or [ ] neglect of duty . . . or some other sufficient matter . . . or whereby the rights of parties to, or interested in the sale are, or may have been prejudiced."); *Righter v. Clayton*, 194 A. 819, 822 (Md. Ct. App. 1937) ("Gross inadequacy of price, collusion, fraud, and mistake are all matters upon which affirmative relief of a court of equity may be invoked for the benefit of those having an interest in the property sold.").

Moreover, given the short time frame for objecting to a judicial sale, applying *Brown* to cases in which the adequacy of the bid price is not at issue will not undermine the finality or stability of the judicial sale process in Florida. By

statute, a motion to set aside a judicial sale must be filed within ten (10) days of filing of the certificate of sale. *See* § 45.031(5), Fla. Stat. (1967); *Ryan v. Countrywide Home Loans, Inc.*, 743 So. 2d 36, 38 (Fla. 2d DCA 1999) (holding that trial court erred in granting lender's motion to set aside judicial sale because motion was filed more than ten days following the sale and therefore was untimely). The short time frame for filing a motion to set aside a judicial sale requires interested parties to be diligent in "tak[ing] the required steps necessary to protect [their] own interests." *Alberts v. Fed. Home Loan Mortg. Corp.*, 673 So. 2d 158, 160 (4th DCA 1996). Further, it protects purchasers by preventing interested parties from challenging the sale long after it occurred and to the prejudice of the purchaser. For these reasons, this Court should hold that *Brown*, rather than *Arlt*, governs when adequacy of the bid price is not challenged.

3. ***Brown Does Not Conflict With Arlt***

Additionally, *Brown* does not conflict with *Arlt*. In certifying a question to this Court, the Fourth District stated that "*Brown* can be read to conflict with *Arlt*, in that *Brown* states 'that gross inadequacy of price alone is a sufficient ground to set aside a foreclosure sale whereas *Arlt* requires that other grounds must also be proven.'" (Appx 12, 5). As noted above, the *Brown* court observed:

> On the question of ***gross inadequacy of consideration***, surprise, accident, or mistake imposed on complainant, and irregularity in the conduct of the sale, this court is committed to the doctrine that a

> judicial sale may on a proper showing made, be vacated and set aside on ***any or all*** of these grounds.

98 Fla. at 204 (emphasis added). Notwithstanding this broad statement, the *Brown* court did not hold that an inadequate bid price, standing alone, provides a sufficient basis to set aside a judicial sale. In *Brown*, the plaintiffs moved to set aside a judicial sale on the basis of, *inter alia*, a grossly inadequate bid price, surprise, fraud, and irregularity in the conduct of the sale. *Id.* at 203. The trial court declined to set aside the sale, and the plaintiffs appealed. *Id.* at 204. This Court affirmed, finding that the plaintiffs were estopped from challenging the sale because they had initially sought confirmation of the sale and accepted the proceeds from the sale. *Id.* at 204-05.

Significantly, "[a] holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment." *State v. Yule*, 905 So. 2d 251, 259 n.10 (Fla. 2d DCA 2005) (Canady, J.) (concurring). Although the plaintiffs in *Brown* alleged inadequacy of consideration as a basis for setting aside the sale, the Court did not find that the bid price was in fact inadequate. Accordingly, the Fourth District's reading of *Brown* is not "based on the facts of the case" or what was "actually decided." *See Yule,* 905 So. 2d at 259 n.10; *Brown*, 98 Fla. at 204 (finding that "[plaintiffs] have not brought themselves within any of the[ ] grounds" upon which a judicial sale may be set aside). Thus, to the

extent that *Brown* implies inadequacy of consideration is a sufficient basis to set aside a judicial sale it is dicta. *See Myers v. Atlantic Coast Line R. Co.*, 112 So. 2d 263, 267 n.6 (Fla. 1959) ("The dictum of the reviewing court is not within the rule of law of the case and is, therefore, not conclusive on a subsequent appeal.").

Further, in *Lawyers' Co-op Pub. Co. v. Bennett*, 16 So. 185 (Fla. 1894), which was decided more than thirty years before *Brown*, this Court concluded that "inadequacy of price alone is not sufficient to set aside a judicial sale." *Id.* at 188. This Court has repeatedly emphasized that it "does not intentionally overrule itself sub silentio." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). "Where a [lower] court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the [lower] court is to apply [this Court's] express holding in the former decision until such time as this Court recedes from the express holding." *Id.* Accordingly, this Court's statement in *Brown* regarding inadequate consideration is not binding and does not give rise to a conflict with *Arlt*.

C. *Arsali's Rephrased Certified Question is Contrary to Brown and the Broad Discretion Afforded to Trial Courts in Equitable Proceedings.*

In a purported effort to state "the true issue under review," Arsali rephrases the certified question as follows and suggests that it should be answered in the negative:

> WHEN CONSIDERING WHETHER TO SET ASIDE A FORECLOSURE SALE, IF THE ADEQUACY OF THE BID PRICE IS NOT AT ISSUE, CAN A COURT SET ASIDE A SALE FOR REASONS UNCONNECTED WITH ANY IRREGULARITY IN THE CONDUCT OF THE SALE, SUCH AS A PARTY'S UNILATERAL MISTAKE?

(Petitioner's Brf., 14, 22). This Court should reject Arsali's request for two reasons. First, Arsali's rephrased question is directly contrary to *Brown*. The *Brown* court stated:

> On the question of gross inadequacy of consideration, surprise, accident, or ***mistake imposed on complainant, and irregularity in the conduct of the sale,*** this court is committed to the doctrine that a judicial sale may on a proper showing made, be vacated and set aside on ***any or all*** of those grounds.

Brown, 98 Fla. at 204 (emphasis added). As the Fourth District properly recognized below, "mistake" and "irregularity in the conduct of the sale" are "independent grounds that would support the setting aside of a foreclosure sale." (Appx 12, 3). *See Josecite,* No. 5D11-3313 at 3 (agreeing with the Fourth District's holding in *Arsali* that *Brown* sets forth four independent grounds for setting aside a foreclosure sale). Arsali's rephrased question improperly creates a two-prong test by requiring a mistake *and* irregularities in the sales process before a foreclosure sale may be set aside.

Second, Arsali's rephrased question is contrary to the broad discretion afforded to trial courts in equitable proceedings. In cases involving a unilateral mistake, "[t]he true principle is that the courts balance all of the equities . . . ."

Miller v. Music Square Church, Inc., No. 01-A-01-9207CH00275, 1991 WL 386292, *2 (Tenn. Ct. App. Dec. 30, 1992). Factors commonly considered are: "(1) [t]he degree of negligence involved in the mistake; (2) the knowledge of the mistake by the other party; (3) the materiality and nature of the mistake; and (4) the relative hardships the different results will cause to the respective parties." *Id.* (numbering added). Arsali's rephrased question hampers a trial court's ability to "balance all the equities" by requiring an "irregularity in the conduct of the sale" before a judicial sale may be set aside. As with an inadequate bid price, "hold[ing] that a trial court may not vacate a foreclosure sale absent [an irregularity in the conduct of the sale] would deprive the courts of their equitable powers and their duty to protect and preserve the integrity of the judicial sale process." *See Ingorvaia*, 816 So. 2d at 1258–59.

Arsali contends that "[a] party should not be able to set aside a properly conducted foreclosure sale that resulted in an adequate bid price merely for a unilateral mistake or other issue unconnected to the sale price or an irregularity in the sale process." (Petitioner Brf., 18) Arsali's argument, however, is fundamentally inconsistent with the broad scope of a trial court's equitable powers. *See Fed Land Bank of Omaha v. Fenske*, 291 N.W. 596, 598–99 (S.D. 1940) (explaining that "[i]t is unquestionably within the broad equitable powers of the circuit court after sale to hear and consider evidence for the purpose of determining

whether inequities have resulted and if equities require the interference of the court to set aside a sale"). A trial court is empowered to consider the particular circumstances of an individual case for the purpose of preventing injustice. *See First Nat'l Bank v. Paulson*, 288 N.W. 465, 472 (N.D. 1939) ("Courts of equity have a general supervision over judicial sales made under their decrees and may set aside or vacate sales for cause. Such supervision will be exercised with the end in view that no injustice shall be done to any of the parties, and that the property should be sold as may best conduce to that end."). *Brown* reflects this principle by allowing a trial court to set aside a judicial sale based on "any or all of th[e] grounds" set forth therein, which includes a "mistake imposed on complainant." *Brown*, 98 Fla. at 204.

Further, the breadth of a trial court's discretion in determining whether to set aside a judicial sale is evidenced by two district court of appeal cases with similar facts, but opposite outcomes. In *Wells Fargo Credit Corp. v. Martin*, 605 So. 2d 531 (Fla. 2d DCA 1992), the lender moved to set aside a judicial sale, arguing that the property was sold at a grossly inadequate price because of a unilateral mistake made by the lender's bidding agent. *Id.* The trial court denied the lender's motion, and the appellate court affirmed. *Id.* at 533. In finding no abuse of discretion, the appellate court explained: "[a]s between [the lender] and a good faith purchaser at the judicial sale, the trial court had the discretion to place the risk of this mistake

upon [the lender]." *Id.* The trial court in *Alberts v. Federal Home Loan Mortgage Corporation*, 673 So. 2d 158 (Fla. 4th DCA 1996), by contrast, granted the lender's motion when presented with similar facts. *Id.* at 159. Citing *Wells Fargo*, the purchasers appealed. *Id.* Although recognizing that the trial court in *Wells Fargo* reached a different conclusion, the appellate court affirmed, explaining that placing the loss on the purchasers was not a "clear case of injustice." *Id.* Thus, it is clear that trial courts have, and should continue to have, discretion to weigh the individual equities of each case and reach a conclusion on whether to vacate a sale based on these equities.

This case is a prime example of why a trial court should be given broad discretion in determining whether to set aside a judicial sale. Here, the Borrowers took "the required steps necessary to protect [their] own interest[ ]" in the property by complying with the terms of the Reinstatement Agreement. *See Alberts*, 673 So. 2d at 160 (quoting *John Crescent, Inc. v. Schwartz*, 382 So. 2d 383, 385–86 (Fla. 4th DCA 1980)). Despite their diligence, however, the Borrowers' property was sold at a foreclosure sale because of a unilateral mistake made by Chase's foreclosure counsel. Unlike in *Wells Fargo* and *Alberts*, the mistake was ***not*** made by the complaining party. *Cf. Wells Fargo*, 605 So. 2d at 532; *Alberts*, 673 So. 2d at 159. Further, while Arsali can be made "whole" through the return of the purchase price, no amount of money can compensate the Borrowers for the loss of

their home. Answering the rephrased certified question in the negative as Arsali suggests would deprive a trial court of the ability to prevent injustice in this case by setting aside the judicial sale.

D. *Arsali's Collateral Attacks on the Trial Court's Order are Frivolous.*

Apparently recognizing the weakness of his position, Arsali mounts a series of attacks on the trial court's order that are unrelated to the standard applied by the trial court in setting aside the sale. Each of these attacks is meritless. First, Arsali asserts that the Reinstatement Agreement cannot serve as grounds to set aside the judicial sale because a mortgage purportedly may not be "reinstated" after a foreclosure judgment is entered, and a foreclosure judgment had already been entered here. (Petitioner's Brf., 22-23) This is incorrect. Contrary to Arsali's assertion, a mortgage *may* be reinstated after entry of a foreclosure judgment. *See One 79th Street Estates, Inc. v. Am. Inv. Servs.*, 47 So. 3d 886, 889 (Fla. 3d DCA 2010). "Reinstatement signifies that the mortgage is returned to its pre-default status as an effective instrument, *by definition anticipating that any foreclosure judgment is vacated and the lawsuit dismissed*." *Id.* (emphasis added). Accordingly, Arsali's first collateral attack on the trial court's order is without merit.

Second, Arsali contends that the trial court lacked authority to set aside the foreclosure sale because the Borrowers' statutory right of redemption expired prior

to the filing of their motion. (Petitioner's Brf., 23) Significantly, however, a trial court may set aside a judicial sale after expiration of the statutory right of redemption. *See JRBL Dev., Inc. v. Maiello*, 872 So. 2d 362, 363–64 (Fla. 2d DCA 2004) (finding that trial court lacked authority to extend redemption rights beyond period in statute but noting that a court has broad discretion to set aside a foreclosure sale). Therefore, Arsali's second collateral attack on the trial court's order is also meritless.

Third, Arsali argues that the trial court lacked authority to vacate the final judgment of mortgage foreclosure because the Borrowers moved only to vacate the foreclosure sale and certificate of sale. (Petitioner's Brf., 25.) Although styled as a "Motion to Vacate Foreclosure Sale and Certificate of Sale," the Borrowers' motion expressly sought all "relief [the trial court] deems equitable and just." (Appx 3, 2.) As noted above, "[r]einstatement [of a mortgage] anticipat[es] that any foreclosure judgment is vacated and the lawsuit dismissed." *One 79th Street Estates, Inc.*, 47 So. 3d at 889. Accordingly, the trial court's vacation of the foreclosure judgment and dismissal of the action merely gave effect to the Reinstatement Agreement. Therefore, Arsali's third collateral attack on the trial court's order is baseless.

E. *The Trial Court Did Not Err in Failing to Conduct an Evidentiary Hearing on the Borrowers' Motion.*

Finally, the trial court did not err in failing to hold an evidentiary hearing on the Borrowers' motion to vacate the foreclosure sale and certificate of sale. (Petitioner's Brf. 25–26) In the absence of a conflict as to pertinent facts, no evidentiary hearing is necessary. *See, e.g.*, *Allstate Ins. Co. v. Bowne*, 817 So. 2d 994, 998 (Fla. 4th DCA 2002) (finding no evidentiary hearing was necessary where there was no conflict as to the pertinent facts); *Pierson v. State*, 214 So. 2d 17, 20 (Fla. 1st DCA 1968) (observing that "[a]n evidentiary hearing, in the absence of conflict in the evidence, is . . . unnecessary"); *cf. Suntrust Bank v. Puleo*, 76 So. 3d 1037, 1039 (Fla. 4th DCA 2011) (trial court erred in failing to hold evidentiary hearing on motion to vacate final judgment of garnishment where bank filed answer challenging factual basis of motion); *Novastar Mortg., Inc.v. Bucknor*, 69 So. 3d 959, 960 (Fla. 2d DCA 2011) (trial court erred in failing to hold evidentiary hearing on defendant's motion to vacate foreclosure judgment where parties submitted conflicting affidavits). Here, the Borrowers submitted evidence to support reinstatement. (Appx. 3) This evidence was not disputed. (*Id.*) Under such circumstances, an evidentiary hearing would have accomplished nothing other than "caus[ing] the parties unnecessary expense." *Bowne*, 817 So. 2d at 998. Accordingly, the trial court did not err in failing to hold an evidentiary

hearing before vacating the final judgment of mortgage foreclosure. *Id.* (Petitioner's Brf. 26).

IV. CONCLUSION

This Court should answer the certified question in the negative and hold that the test set forth in *Moran-Alleen Co. v. Brown*, 123 So. 561 (Fla. 1929), for vacating a foreclosure sale applies in cases in which adequacy of the bid price is not at issue. This Court should also affirm the Fourth District's decision and hold that the trial court did not abuse its discretion in granting the Borrowers' motion to set aside the judicial sale based on the particular equities of this case – which the trial court was in the best position to evaluate.

Dated this 19th day of September, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by first class U.S. Mail upon **Beth M. Coleman, Esq.**, Beth M. Coleman, P.A., Post Office Box 7280, Saint Petersburg, Florida 33734 and **Marshall J. Osofsky, Esq.**, The Law Office of Paul A. Krasker, P.A., 501 South Flagler Drive, Suite 201, West Palm Beach, Florida, 33401, on September 19, 2012.

/s/ Ryan Watstein
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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), I certify that this brief has been typed in Times New Roman 14-point font.

/s/ Ryan Watstein
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