IN THE THIRD DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

Case No. 3D17-1254

JOHN M. BENNETT, and
NANCY L. BENNETT, his wife

Appellants,

vs.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
HOME LOAN ALLIANCE, LLC
F/K/A LEVERAGE FINANCIAL, LLC D/B/A LF LOANS,
JAMAL M. WILSON, and
GTE FEDERAL CREDIT UNION,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
Lower Court Case No. 12-41600-CA-22

REPLY BRIEF

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INTRODUCTION

This is an appeal from a final judgment awarding the Appellee(s) sanctions in the form of attorney's fees and costs pursuant to Florida Statutes §57.105 against the Appellants following entry of summary judgment in favor of the Appellee in an action brought by the homeowner Appellants who invoked statutory remedies under the federal Truth-in-Lending Act (TILA) and stated an action for forgery. This court has jurisdiction pursuant to Florida Rules of Appellate Procedure, Rule 9.030(b)(1)(A). There is pending before this court a related appeal [Case No. 17-0001] from the underlying summary judgment which has been fully briefed and argued, but no opinion has yet been rendered.

(Ax ?, p?, L?/¶?)	Shall refer to the appendix of the record on appeal prepared and indexed by the Appellants and filed with this brief, followed by the page number of the appendix, and occasionally followed by a page number thereon (when multiple pages are shown on an indexed page), a numbered paragraph or line number on the referenced page.
(R ?, L?/¶?)	Shall refer to the record on appeal prepared and indexed by the clerk of the lower court, followed by the page number of the record, and occasionally followed by a numbered paragraph or line number on the referenced page.
Lower Court	Shall refer to the 11th Circuit Court, in and for Miami-Dade County, Florida, Judge – Michael A. Hanzman, initially presiding, but the honorable Rodolfo Ruiz then sitting in the division entered final judgment following an evidentiary hearing as to the amount.
Homeowner's Counsel	Shall refer to Rex E. Russo, counsel for the homeowners below, and herein, and an Appellant herein.

Homeowners	Shall refer to John M. Bennett and Nancy L. Bennett, his wife; Plaintiffs below and Appellants/Petitioners herein.
Mortgage Originator/Wilson	Shall refer to "Jamal M. Wilson," a Florida licensed mortgage originator, qualifier and sole corporate member of LF Loans; a Defendant below and an Appellee/Respondent herein.
Mortgage Broker/LF Loans	Shall refer to "Home Loan Alliance, LLC f/k/a Leverage Financial, LLC d/b/a LF Loans," that first held the subject mortgage; a Defendant below and an Appellee/Respondent herein.
Mortgagee/GTE	Shall refer to "GTE Federal Credit Union," the holder of the equitable interest in the subject mortgage; a Defendant below and an Appellee/Respondent herein.
MERS	Shall refer to "Mortgage Electronic Registration Systems, Inc.," holder of the legal title to the subject mortgage; a Defendant below and an Appellee/Respondent herein.
Closing Agent	Shall refer to Stewart Title Company and/or Stewart Title Guaranty Company, closing agent for the mortgage broker and a non-party throughout these proceedings.
TILA	Shall refer to the federal "Truth-in-Lending Act," 15 U.S.C.§1601 *et seq*. (as in effect on 06/12/2012).
PMI	Shall refer to "private mortgage insurance".

ARGUMENT IN REPLY AND REBUTTAL

I. APPELLEE'S ANSWER BRIEF IS LONG ON WHAT IS ESSENTIALLY A FORM OF TRASH TALK, BUT SHORT ON PROPER SUPPORTING REFERENCES TO THE RECORD, SHORT ON SUPPORTING STATUTORY OR CASE LAW CITATIONS, AND SHORT ON ANSWERING THE ISSUES THAT WERE PRESENTED.

In many instances, especially within the restatement of the facts and the case, the mortgage originator (i.e. Wilson, the Appellee herein) makes rather strong yet wholly unsupported assertions of what are wrongly stated to be "facts," and alternatively puts forward either his own pleadings as though they must be taken as "facts" or merely points to the order of the lower court [Ax 368 – 370] without seeing the need to find support for the lower court's findings within the actual record. For instance:

- *"Appellants were sanctioned for having absolutely no evidence at all to support their scandalous claims and frivolous suit against [Wilson] individually."* [Page 2 of the Answer Brief, bracketed word substituted in for clarity.]

The lower court order never used the words "scandalous" or "frivolous," although the lower court did inexplicably state in the order (very apparently prepared by Wilson's attorney) that "counsel knew no evidence existed" to support the count for forgery against Wilson [Ax 369, ¶4]. That finding oddly places more knowledge upon the homeowners as to what Wilson did or did not do than Wilson himself apparently possessed as it would have been no great task for Wilson to set forth his position in the record with a sworn statement. Clearly, the lower court judge must have had a conflict of conscience in reaching such a conclusion, after having first recognized that there were

facts which supported the claims against the mortgage originator, including that the homeowners' signatures were forged to the relevant document which was later relied upon by the mortgagee [Ax 377, L16 to 2; Ax 397, P4, L24 to P5, L3]].

After the homeowners' counsel pointed out that Wilson was the one with the greatest interest in seeing to the instrument being forged [Ax 381, L17 to 25] and that the record is devoid of any document by Wilson affirming under oath that he neither forged the Payment Letter to Borrower nor had a hand in it [Ax 383, L1 to 12], Wilson's counsel replied that the forgery came about after the closing [Ax 383, L24 to p.384, L1], and the court in response inquired of Wilson's counsel [Ax 384, L2]: "And where would GTE have gotten it?" Counsel representing the united defendants which includes Wilson (the mortgage originator), the mortgage broker (LF Loans, which was Wilson's company), and the mortgagee (GTE Federal Credit Union) tellingly responded [Ax 384, L4]: "That's a good question. There remains a question as to whether GTE ever sent anything." Yet, later at the hearing on entitlement to attorney's fees, counsel for Wilson stated that he took it as fact that the document was sent to the homeowners by GTE Mortgage [Ax 397, P5, L6 to L9].

As with the mortgage originator, the mortgagee could have simply stated under oath what it did or did not send to the homeowners. Of course, if either filed a sworn statement with the lower court they would have risked the potential of perjury. For their part, the homeowners' affidavit states that the forged Payment Letter to Borrower came

from the mortgagee [Ax 310, ¶6]. If not for the forged Payment Letter to Borrower, and likely other forged documents supporting the amount that GTE was billing, there would be no reason why GTE would have been billing the incorrect amount to the homeowners. In any event, as stated in the initial brief: "A party does not need to have conclusive evidence to prove its case at the time of filing in order to avoid sanctions." *Trust Mortg., LLC v. Ferlanti*, 193 So. 3d 997, 1001 (Fla. 4th DCA 2016). A non-opposing party only needs to contravene any "evidence" submitted by the moving party and thus raise a material question of fact. *Ferlanti*, at 1000.

- *"Appellants... never raised these issues in the trial court..., Appellants have waived their right to... argue the procedural claims in this appeal."* [Page 2 of the Answer Brief].

The word "objection" does not necessarily have to be stated for there to be an objection. *Spurlock v. State*, 420 So. 2d 875, 876–877 (Fla. 1982). As in *Spurlock* it is clear that the lower court judge was "fully aware that an objection had been made," "specific grounds for the objection were presented to the judge," and "the judge was given a clear opportunity to rule upon the objection." In response to the lower court's inquiry as to whether a "safe harbor letter" had been sent, counsel for the mortgage originator responded that he had previously sent a "safe harbor letter" [Ax 383, L16–19]. Later when the lower court inquired as to whether the homeowners' counsel responded to the "safe harbor" document, counsel for the homeowners responded that there was no "safe harbor" document filed to which he would respond [Ax 385, L15 to

L20]. When the mortgage originator's counsel attempted to hand the "safe harbor" document to the court, homeowners' counsel objected by stating that it was to late to do so, and that the hearing was not an evidentiary hearing [Ax 385, L21 to p386, L3]. When the court asked to see a copy of the "safe harbor" document, counsel for the homeowners once again objected by stating that the "safe harbor letter" was suppose to have been attached to Wilson's motion for §57.105 sanctions [Ax 386, L17 to L20].

- *"Appellants signed loan applications and other documents, under oath and penalty of perjury, acknowledging that there would be private mortgage insurance (hereinafter "PMI) payments which was required as part of this specialized government assistance loan."* [Page 3 of the Answer Brief].

In support of this contention, the best record citation that Wilson comes up with is from his own pleadings. As previously explained, the applications have nothing to do with the final disclosures in this instance, and the applications were most certainly not under oath, not under penalty of perjury, and not contractually binding. Wilson acts as if the court must give every favorable inference to his pleadings because he prevailed on summary judgment. That is a complete antithesis — the losing party gets such inferences. Wilson's argument sounds like something that Creon[1] might have concocted. Although repetitively challenged, Wilson has never cited a single source in support of his assertion that PMI was required — not that such a requirement would have been an excuse for forgery, nor a pathway to circumvent TILA disclosure.

- *"This is the exact amount of PMI that was on the applications Appellants had*

[1] Creon was the mythical king in Sophocles' Antigone whose outlandish edicts led the tragic heroine Antigone to rebel.

repeatedly signed, under penalties of perjury, up until the day of closing when somehow PMI was left off the final documents." [Page 4 of the Answer Brief].

Once again, in support of this contention, Wilson cites to his own writing, as if it somehow became record evidence. A full review of the record would show that different amounts were stated in the applications as to what "might be" charged for PMI, not that it matters under TILA unless the amount is in the TILA disclosure for the closing.

- *"For some reason still unknown to everyone, the loan was closed with PMI being left off of the final documents."* [Page 3 of the Answer Brief].

The reason is not "unknown" just because it is not acknowledged by Wilson. PMI was left off the final documents because the homeowners did not want PMI [Ax 310, ¶3: "I really did not want to pay mortgage insurance."]. LF Loans prepared the documents accordingly and sent them to the closing agent [Ax 243, "we sent the final closing package to the title company"]. Once, the homeowners were "roped in" it was no big deal for Wilson, or someone under his direction at LF Loans, to forge the disclosure documents.

- *"The basis for the claim for attorney's fees was the F.S. §57.105 motion Appellees had provided to Appellants on April 28, 2015, over a year prior, providing the required 21 day safe harbor notice."* [Page 9 of the Answer Brief].

That may be so in the mind of counsel for Wilson, but that motion was not filed, if it is deemed filed at all, until just days prior to the hearing on the issue of entitlement, which was more than 30-days past the entry of the summary judgment and was therefore

stale. Furthermore, if that was the document shown to the lower court judge at the motion seeking rehearing on the issue of attorney's fees, then the lower court judge also recognized that the motion had no relationship to the embedded motion for attorney's fees [Ax 387, L2 to L16. "It doesn't look like your safe harbor letter raises the issue that you're here on today." "It does not mention the basis upon which you're seeking fees."] [Ax 388, L12 to L14. The motion does not "reference that there's no evidence of a forgery."]

- *"The fundamental flaw with Appellants' entire position is their claim that they need not have any evidence until the trial."* [Page 14 of the Answer Brief].

Not unsurprising, Wilson's counsel does a very poor job representing the homeowner's case. Stated correctly, the homeowner's position is that as the non-prevailing party on summary judgment, they — not Wilson, are entitled to have every reasonable inference drawn in their favor. At summary judgment, the homeowners were obligated to come forward with only such evidence that contradicted evidence presented by Wilson. BUT, Wilson did not present any evidence in support of his contentions. Wilson merely draws inferences from the record, including his own writings, while never presenting to the court his sworn statement.

- *"[O]nce Appellee provided record evidence that Appellants had no facts to support their claims against WILSON, the burden shifted to Appellants to come forward with some evidence which Appellants never did."* [Page 15 of the Answer Brief].

It would greatly help the intellectual discussion that we are suppose to be having

regarding this case if Wilson's counsel would state exactly what "record evidence" he believes exists showing that Wilson himself did not commit the forgery, or even some evidence that Wilson in his capacity as the owner of LF Loans had no control over anyone who might of had the opportunity to commit the forgery. Questions of fact were not precluded by Wilson merely challenging the homeowners to show their cards first. *Trust Mortg., LLC v. Ferlanti*, 193 So. 3d 997 (Fla. 4th DCA 2016).

- *"The pleadings in the lawsuit, from the original complaint through and including the Second Amended Complaint upon which summary judgment was granted, each stated emphatically and affirmatively that the forgery was done "at the direction of WILSON."* [Page 18 of the Answer Brief].

Again, unsurprisingly, Wilson's counsel does a poor job restating the pleadings from the complaint, and conveniently omits any record citation. The allegation fully states: "LF Loans directly or through their agents, at the direction of Wilson, forged the signatures of the Plaintiffs to the subject PAYMENT LETTER TO BORROWER so as to include an amount for PMI that was not agreed to by the Plaintiffs" [Ax 10, ¶16]. Admittedly, stating "under the direction of Wilson" would have been more grammatically correct. The point is, Wilson bears liability as the qualifying mortgage originator, sole officer, and sole director of LF Loans. See, *§494.001(21), Fla. Stat. (2012);* and *§494.0035(1), Fla. Stat. (2012).*

- *"[J]ust 20 days after Appellants gave a 60 day window for the PMI issue to be solved, Appellants were advised in writing that the PMI due on the life of this loan had been paid in full thus saving Appellants over $36,000."* [Page 18 of the

Answer Brief].

Homeowners' primary demand was that the amount being billed had to be corrected [Ax 104. "In order to fully rectify this matter you must ... correct your Loan Statement"]. While Wilson may have seen it as solving the PMI issue, the homeowners only saw it as a demand for correct billing of the amount disclosed. What is truly amazing however is that Wilson's counsel has repetitively asserted, without any evidentiary support, that if a PMI charge had been properly disclosed to the homeowners as an added finance charge, then the homeowners would have been paying an additional $36,000. If that amount were true, the commissions earned by Wilson or LF Loans must have been staggering considering LF Loans asserts that they paid $5,500 for the PMI [Ax 398, L7 to L11]. That is looking like an obvious motive for the forgery.

II. WILSON WOULD HAVE HAD TO ACTUALLY FILE THE §57.105 MOTION, AND MAKE KNOWN THAT IT WAS FILED, BEFORE THE HOMEOWNERS COULD REASONABLY BE EXPECTED TO MAKE AN OBJECTION TO THE LATE FILING.

Wilson's motion for §57.105 fees made its way into the record more than 30-days after the entry of summary judgment, and only a few days prior to the hearing on the issue of entitlement to such fees, as an unannounced attachment to Wilson's memorandum in support of the motion [Ax 333]. The homeowners did not even realize that the document was attached to Wilson's memorandum until well after the hearing was concluded as it was never presented as an exhibit at the hearing [Ax 396].

III. APPELLEE NEVER STATES AT WHAT POINT IN TIME HE

CONTENDS THAT THE HOMEOWNERS WERE PROCEEDING ON A FRIVOLOUS CLAIM.

Was it when the homeowners' counsel, after charging a modest consultation fee from the homeowners agreed that the homeowners were protected by TILA from paying the higher undisclosed amount that had been verbally stated to them and disclosed in the forged Payment Letter to Borrower they received?

Was it when the homeowners' counsel issued his demand letter of July 10, 2012, which was prior to the first of the incorrectly billed monthly statements?

Was it when, even after the issuance of the demand letter, the mortgagee commenced none-the-less to bill the incorrect amount on or about July 15, 2012 for the payment due August 1, 2012, and billed again on or about August 15, 2012 for the payment due September 1, 2012, and billed again on September 15, 2012 for the payment due on October 1, 2012, the homeowners continued to press for correct billing of the amount disclosed at closing?

Was it when, following LF Loans' reply to the homeowner's demand letter (GTE, the mortgagee, did not reply) in which LF Loans stated that the correct amount would be reflected in the next monthly statement (i.e. the one sent on or about August 16, 2012) while LF Loans andGTEMortgage otherwise ignored the other demands made by the letter, but yetGTEMortgage did not correct the billing by the next billing cycle, and additionally neither LF Loans norGTEMortgage communicated any request for

additional time to comply – nor expressed any reason for their delay – nor presented any proof that they had taken any action, the homeowners' filed their complaint well after the time had passed for the anticipated correction?

Was it when, after the homeowners incurred yet additional costs and fees to file the complaint, they received the statement for the following month's payment (i.e. the payment due for November 1, 2012) which for the first time contained the correct billing amount, and yet kept their case alive?

Was it following the mortgagee's return of the overage payments (made by the homeowners under protest) about one month after the filing of the complaint, and more than 120 days past the homeowner's demand letter, and yet kept their case alive?

When correctly read, it is seen that 11 U.S.C. §1640(b) barred the lender (which includes LF Loans, Wilson, and GTE Mortgage) from any "safe harbor correction" because the lender was notified of the properly disclosed amount by the homeowners' demand letter prior to any attempt at correction by the lender. Accordingly, when the lender did not comply with the homeowners' demand letter, the homeowners were within their right under TILA to file a demand for rescission, as well as for statutory damages, costs, and attorney's fees. That right to seek rescission, statutory damages, costs, and attorney's fees existed at that point **even if** the lender had complied with the demand letter after the 60-days as was allowed for by the demand letter. In fact, the lender never fully complied with the demand letter because it did not tender attorney's fees, and its correction of the amount billed was only received after suit was filed, and

its return of the overage payments was only tendered after suit was filed, and it never gave assurance that the file held by MERS was purged of forged disclosure information.

WHEREFORE, the court must reverse the lower court order allowing §57.105 sanctions and the subsequent judgment entered thereon.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), that the preceding computer generated brief has been prepared in Times New Roman 14-point font and is proportionally spaced.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Scott Jay Feder, attorney for the Appellees/Respondents herein, Defendants below, by e-mail delivery to scottj8@aol.com, on this September 18, 2017.

/s/

Rex E. Russo
Florida Bar #0331597

[An electronic copy of this brief was sent via e-mail to the court pursuant to administrative order, A03D05-1.]