IN THE SUPREME COURT OF FLORIDA

Case No. SC17-2203

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

Petitioners,

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,

Respondents.

A PETITION FOR DISCRETIONARY REVIEW FROM AN OPINION OF
THE THIRD DISTRICT COURT OF APPEAL
Lower Tribunal No. 3D17-0001

PETITIONERS' AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

A discombobulation of the following facts can be found within the lower tribunal's opinion. Facts cited herein have been electronically book-marked in the amended appendix. Opening a bookmark should bring the cited fact to the top of the page of the appendix. Those referenced facts are identified in this brief by assigned alphabetic labels. References to those facts are placed in brackets. Within the brackets the "alphabetical" label is preceded by the word "Tab" (example: [Tab A]).

Like many homeowners in 2012, the Bennetts struggled with their home mortgage payments. The Bennets then applied for, and were approved to receive, a residential home mortgage loan through LF Loans (mortgage originator) [Tab C]. Immediately after closing, the mortgage loan was assigned to GTE Federal Credit Union (the mortgagee) [Tab F].

Truth In Lending Act (hereafter "TILA") documents shown to the Bennetts at closing, and signed by them, disclosed that the lender was not requiring mortgage insurance [Tabs D & E]. According to the disclosure documents presented to the Bennetts at closing and accepted by them, the monthly payments for servicing the loan were to be $1,237.96 [Tab E]. However, GTE commenced billing the Bennetts a monthly sum that was $100.92 greater than the monthly amount disclosed at closing [Tab J].

Following a request from the Bennetts for proof of their obligation to pay the

higher monthly amount [Tabs G & H], GTE sent the Bennetts a copy of the required TILA disclosure documents that contained forgeries of the Bennetts' signatures [Tab I]. Both a forged "payment letter to borrower" and "initial escrow disclosure statement," that were supposedly signed by the Bennetts at closing, contained a mortgage insurance premium in the amount of $100.92 in order to arrive at the higher monthly amount [Tab J].

In an attempt to avoid escalating the issue, on July 10, 2012, counsel for the Bennetts sent a demand letter to GTE and a copy to LF Loans [Tabs K, S, & U]. Bennetts' demand letter informed GTE of the forgery and required that the impermissibly charged amount be corrected within 60 days [Tab K, see indented ¶]. The Bennetts stated that in the interim they would be paying the mortgage insurance premium under protest (thus avoiding any automatic, but wrong, declaration of default) [Tab K]. Bennetts' demand letter specifically stated that failure to **fully rectify** the matter **within 60 days** would lead to the filing of legal action [Tab K, see indented ¶]. Rectification was defined in the demand letter as follows [Tab K, see indented ¶]:

> "In order to fully rectify this matter you must not only correct your Loan Statement and purge all the fraudulent documents in order to avoid a repetition of the fraud through further transfers of the mortgage instruments, but you must also pay compensation for fees and costs

suffered by the borrowers,[1] as well as credit back to them the overpayments for the improperly charged PMI."[2]

Only LF Loans responded to the homeowners' demand, which they did on July 31, 2012 [Tabs L & Q]. LF Loans stated that the monthly amount would be corrected by removing the monthly premium that was being charged for mortgage insurance, and that the mortgage insurance premiums that had been paid under protest would be returned [Tab L]. LF Loans did not express that it was acting as GTE's authorized agent. GTE did not reply. Neither GTE nor LF Loans accept the Bennetts' terms for rectification. Neither GTE nor LF Loans agree to reimburse the homeowners for their attorney's fees and costs, nor did they otherwise pay such charges [Tabs T & V]. Neither GTE nor LF Loans made an attempt at timely compliance of any demanded term. Instead, GTE continued to bill the Bennetts the higher amount — in violation of TILA — for August, September and October of 2012 [Tab M, mentions first correct monthly statement], contrary to LF Loans' response as to what it "would do" [Tabs L & Q]. So, the homeowners prepared for legal action.

On October 23, 2012 the homeowners filed their action against GTE and LF Loans for violations under TILA [Tabs O & A]. Bennetts' action sought both statutory rescission and statutory damages under TILA. Although, on October 17,

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[1] The amount demanded by the letter for fees and costs was $500.00 [Tab K, see bottom intended ¶].

[2] PMI is an abbreviation standing for "Private Mortgage Insurance."

2012 (i.e. 99 days after the July 10, 2012 demand letter) GTE supposedly mailed the monthly statement to the Bennetts for the payment due on November 1, 2012, which for the first time contained the correctly disclosed amount [Tab M]. Still later, in November of 2012 (i.e. more than 113 days after the July 10, 2012 demand letter), being weeks after the Bennett's action for violation of TILA had been filed, GTE offered a return of the mortgage insurance premiums paid by the Bennetts for the months of August, September and October of 2012 [Tab N]. No compensation for attorney's fees or costs was ever tendered by either GTE or LF Loans in response to the demand made by the Bennetts [Tabs T & V].

Notwithstanding the untimely and selective attempts at compliance with only some terms of the Bennetts' demand letter, the trial court granted the respondents summary judgment, asserting that the Bennetts had not suffered damages and therefore could not pursue their quest for TILA rescission and statutory damages against GTE, nor any of the other relief requested by the complaint. The Bennetts appealed to the lower tribunal generally asserting — first the obvious — that disputed issues of fact existed as to the asserted preclusion of damages, given LF Loans and GTE's untimely and selective attempt at compliance with the Bennetts' demand for rectification. Secondly, the Bennetts showed that as a matter of federal law actual damages were not necessary to attain statutory damages or rescission of the mortgage loan. Lastly, the Bennetts presented record proof that neither LF Loans nor GTE met

the terms of the demand letter for rectification (i.e. neither timely nor completely), and likewise would have failed to comply with the "safe harbor" provision under TILA (assuming that provision was available to LF Loans and GTE). There was clearly no compliance with the 60-day mandate as stated in the "safe harbor" provision (if the "safe harbor" provision were applicable) nor with the 60-day provision mirrored in the demand letter. Following oral argument, the lower tribunal entered its opinion affirming the trial court's entry of summary judgment.

Especially because the opinion of the lower tribunal states facts that do not support its result, the Bennetts filed a motion for rehearing *en banc*. In accordance with Rule 9.331(d)(2), the Bennetts expressed a belief that the opinion of the lower tribunal sticks out "like a big red outlier" and yet is "of great importance because it is a case of first impression within the state" that could have far reaching consequences "affecting thousands" of homeowners throughout the state. No known prior Florida case has construed (or misconstrued) either 15 U.S.C. §1640(b) or 15 U.S.C. §1635(e). Bennetts' motion for rehearing was denied on November 13, 2017. A timely notice seeking discretionary review by this court was then filed with the lower tribunal.

SUMMARY OF ARGUMENT

The opinion of the district court is in express and direct conflict with this court's decision in *Santa Rosa County v. Administration Commission*, 661 So. 2d 1190 (Fla. 1995) because it does not express an actual settlement nor does it express that there was a complete agreement resolving every issue presented.

ARGUMENT

The lower tribunal has completely misapplied this court's holding in *Santa Rosa*, thus arriving at a new and conflicting standard as to what constitutes a settlement leading to claim preclusion. In *Santa Rosa* this court found the issues between the litigants moot because "all disputes between the parties were resolved by a binding settlement agreement." *Santa Rosa* at 1192. Consequently, "[a]ll issues between the parties were rendered moot." *Santa Rosa* at 1193.

In contradiction to *Santa Rosa*, the lower tribunal found that claim preclusion arises even when there is neither a settlement agreement nor a full resolution of all the issues. A unilateral resolution (i.e. LF Loan's response) that falls short of addressing all of the issues (i.e. timely compliance, attorney's fees [Tab V], and assurance that all forged documents were redacted), is sufficient according to the lower tribunal. That stands in stark contrast with the requirement in *Santa Rosa* that all issues must be resolved through settlement for there to be claim preclusion. Or, perhaps the lower tribunal meant instead that an offer (i.e. the Bennetts' demand letter) requiring action by a time certain is nevertheless accepted — by an undisclosed

agent (i.e. LF Loans) merely stating that the inferred principal (i.e. GTE) would comply with some of the demands; without stating that their selective compliance would be timely as required by the demand; without the items selected for compliance meeting the stated time deadline; and, without fulfilling the self-selected items until after legal action had been commenced by the demanding party — regardless of there being an unaddressed issue as to a demand for attorney's fees [Tab V]. Still, either expression of a "resolution" by the lower tribunal raises a new and conflicting standard as to what constitutes a settlement, and as to what constitutes claim preclusion arising from a settlement.

Do not be dissuaded from accepting jurisdiction because of a false belief that the lower tribunal reached a proper decision on other grounds. GTE clearly was not in compliance with TILA's "safe harbor" provision, as the provision requires full compliance within 60 days — not a mere promise to comply. Furthermore, the "safe harbor" provision would have applied only if GTE discovered the error "prior to" written notice from the Bennetts. Yet, the opinion acknowledges that GTE found out about the error as a result of the Bennetts' demand letter [Tab S]. Even if there were merit to the lower tribunal's analysis on this point, it would not take away from the fact that the lower tribunal's expressed standard of what constitutes a binding settlement is explicitly in conflict with the standard of this court as set forth in *Santa Rosa*.

Likewise, this court ought not to be dissuaded by the lower tribunal's gratuitous comment that the homeowners' rescission claim is barred by §1635(e) of TILA . Section 1635(e)(2) provides: *"This section does not apply to—a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property [underline added]."* However, neither LF Loans nor GTE mortgage was holding the mortgage on the Bennetts' home at the time the Bennetts acquired the new loan from FL Loans. Those reading the lower tribunal's opinion who understand lending practices would see the inherent flaw in an instant because mortgage brokers and mortgage originators would not have been involved in the refinancing of a home mortgage by the existing mortgage holder. As with the other false trail, even if there were merit to employing §1635(e), the lower tribunal's opinion would nevertheless continue to stain this court's opinion in *Santa Rosa* unless it is corrected.

Petitioners are a real world representation of the character Winston Smith from the George Orwell novel tiled *1984*. Winston's frustration with the new world order, similar to the petitioners' frustration with the lower tribunal's opinion, is perhaps best exemplified by the following passage wherein Winston is facing the inner party interrogator of thought crimes:

> **Interrogator:** "You are a slow learner, Winston."
> **Winston:** "How can I help it? How can I help but see what is in front of my eyes? Two and two are four."
> **Interrogator:** "Sometimes, Winston. Sometimes they are five. Sometimes they are three. Sometimes they are all of them at once. You must try harder. It is not easy to become sane."

CONCLUSION

There is no need to look any further than the lower tribunal's acknowledgment that attorney's fees were never addressed by LF Loans or GTE in order to recognize an express and direct conflict with this court's opinion in *Santa Rosa*.

Wherefore, Petitioners pray that this court grant the petition and take jurisdiction over this matter for a full review.

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 Respondents herein, Appellees/Defendants below, by e-mail delivery to scottj8@aol.com, on this December 28, 2017.

/s/

Rex E. Russo
Florida Bar #0331597