

SUPREME COURT OF FLORIDA

SAMUEL SALOMON LEVY,

Petitioner/Former Husband,

CASE NUMBER: SC20-1195

L. T. CASE NO. 3D19-73;3D19-318;
11-31255

vs.

EINATH BACH LEVY,

Respondent/Former Wife.

_____ /

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, SAMUEL SALOMON LEVY, the Appellee/Cross-Appellant in the District Court of Appeal, Third District, shall hereinafter be referred to as the "PETITIONER" or "FORMER HUSBAND".

The Respondent, EINATH BACH LEVY, the Appellant/Cross-Appellee, in the District Court of Appeal, Third District, shall hereinafter be referred to as the "RESPONDENT" or "FORMER WIFE".

The Honorable Deborah Magid, Presiding General Magistrate of the Lower Tribunal, in and for the Eleventh Judicial Circuit in and for Miami Dade County, Florida, shall hereinafter be referred to as the "GENERAL MAGISTRATE".

The Honorable George A. Sarduy, Presiding Judge of the Lower Tribunal, in and for the Eleventh Judicial Circuit in and for Miami Dade County, Florida, shall hereinafter be referred to as the "TRIAL COURT JUDGE" or "TRIAL COURT".

Any documents referred to below that are part of the record on Appeal transmitted by the Third District Court of Appeal to the Florida Supreme Court shall be referred to as (R.).

References to the Petitioner's Appendix, shall be referred to as (App.). References to the numbering of the Appendix shall follow the numbering set forth at the bottom of each page.

TABLE OF CONTENTS

	Page(s)
INTRODUCTION	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	iv
ARGUMENT	1-9
CONCLUSION	10
CERTIFICATE OF SERVICE	10
CERTIFICATE OF COMPLIANCE WITH <i>Fla.R.App. P. 9.210(a)(2)</i>	11

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<i>Ajax Paving Industries, Inc., v. Hardaway Company</i> , 824 So. 2d 1026 (Fla. 2d DCA 2002).....	3
<i>CalAtlantic Group, Inc. v. Dau</i> , 268 So. 3d 265 (Fla. 5th DCA 2019).....	5,6
<i>Florida Community Bank, N.A., v. Red Road Residential. LLC</i> , 197 So. 3d 1112 (Fla. 3d DCA 2016)	3,4,5
<i>Florida Hurricane Protection and Awning, Inc., v. Pastina</i> , 43 So.3d 893 (Fla. 4th DCA 2010).....	2,3,4
<i>GEMB Lending, Inc., v. RV Sales of Broward, Inc.</i> , 2010 WL5313482 (S.D.Fla.2010).....	6
<i>Ham v. Portfolio Recovery Associates</i> , 308 So.3d 942 (Fla. 2020).....	2,3
<i>Holiday Square Owners Association, Inc., v. Tsetsenis</i> , 820 So. 2d 450 (Fla. 5th DCA 2002)	3
<i>Land & Sea Petroleum, Inc., v. Business Specialist, Inc.</i> , 53 So. 3d 348 (Fla. 4th DCA 2011).....	7
<i>Levy v. Levy</i> , 307 So.3d 71 (Fla. 3d DCA 2020).....	9,10
<i>Page v. Deutsche Bank Trust Company Americas</i> , 308 So. 3d 953 (Fla. 2020).....	1,2
<i>Sacket v. Sacket</i> , 115 So.3d 1069 (Fla. 4 th DCA 2013).....	5,6,7,8,9,10
<i>Zakian v. Zakian</i> , 837 So.2d 549 (Fla. 4th DCA 2003).....	8,9
<u>FLORIDA STATUTES</u>	<u>PAGE(S)</u>
§ 57.105(7), Fla. Stat.....	1,2,3,5,6,7,9

ARGUMENT IN RESPONSE AND REBUTTAL
TO ARGUMENT PRESENTED IN
RESPONDENT'S ANSWER BRIEF

In her Answer Brief, the Former Wife relies heavily on *Page v. Deutsche Bank Trust Company Americas*, 308 So.3d 953 (Fla. 2020), and even states that it is notable that the Former Husband did not cite to *Page* in his initial brief. The Former Wife's reliance upon *Page* is misguided and the Former Husband did not cite to the case in his initial brief on the merits, as *Page* is largely inapplicable to this case.

The Former Wife incorrectly argues that *Page* stands for the proposition that there can be no conditions precedent or qualifiers before **Florida Statutes 57.105(7)** can be applied to attorney's fee provisions in contracts. *Page*, as well as many of the cases cited in the Former Husband's initial brief, make it clear that there is an absolute condition precedent that must be satisfied before **Florida Statutes 57.105(7)** can be applied. As it is clearly stated in *Page*, said condition precedent is that the attorney's fees provision in question, must be one that is unilateral. *Id.* at 954-59. In analyzing **Section 57.105(7)**, this Honorable Court explained as follows: "the first clause requires the existence of "a contract that contains a provision allowing attorney's fees to a party where he or she is

required to take any action to enforce the contract” **§57.105(7), Fla.Stat.** This question is about what appears in the contract. Here, it is beyond dispute that the contract contains a unilateral fee “provision” as contemplated by the statute.” *Id.* at 959.

As set forth in the Petitioner’s initial brief on the merits, this analysis is consistent with the Fourth District Court of Appeal’s analysis in ***Florida Hurricane Protection and Awning, Inc., v. Pastina***, 43 So.3d 893 (Fla. 4th DCA 2010). As there was no doubt that the contractual attorney’s fees provision in ***Page*** was unilateral, this Honorable Court’s Opinion did not focus on this issue and was more concerned with what the crux of that case was: an argument over whether there was standing and a “contractual relationship” between the parties. *Id.* at 959-60.

It is for this reason that the ***Page*** decision is mostly inapplicable to this case and the Former Husband more appropriately concentrated on this Honorable Court’s decision in ***Ham v. Portfolio Recovery Associates***, 308 So.3d 942 (Fla. 2020), an opinion that was released the very same day as this Court’s opinion in ***Page***. As set forth in the Petitioner’s initial brief on the merits, in ***Ham***, this Honorable Court articulated a two-step analysis, which governs whether **Florida Statute §57.105 (7)** makes unilateral prevailing fee party clauses reciprocal, with the first step of the

analysis being, “whether the contract includes a provision allowing attorney’s fees to a party when he or she is required to take any action to enforce the contract”. *Id.* at 946-48. As the PSA in this case does not contain a provision as articulated in *Ham* and the attorney’s fee provision in the PSA is reciprocal, **Florida Statute section 57.105(7)** does not apply.

The Former Wife also cites to *Holiday Square Owners Association, Inc., v. Tsetsenis*, 820 So.2d 450 (Fla. 5th DCA 2002) and *Ajax Paving Industries, Inc., v. Hardaway Company*, 824 So.2d 1026 (Fla. 2d DCA 2002). The Former Wife’s reliance on these cases is also misguided as these cases clearly involved a unilateral prevailing party’s fee provision. *Holiday Square Owners Association, Inc.*, 820 So.2d at 453-54; *Ajax Paving Industries, Inc.*, 824 So.2d at 1028. It is accurate that with an attorney’s fees provision of that nature, **Fla. Stat. 57.105(7)** extends the attorney’s fee provision by statute and makes it bilateral. The attorney’s fees provision in this case is already bilateral in nature and is a defaulting party’s fee provision. It is therefore not extended by the statute.

The Former Wife’s reliance upon *Florida Hurricane Protection and Awning, Inc., v. Pastina*, 43 So.3d 893 (Fla. 4th DCA 2010) and *Florida Community Bank, N.A., v. Red Road Residential. LLC*, 197 So. 3d 1112 (Fla. 3d DCA 2016) is also faulty and this can be easily understood by

simply looking at the contractual provisions those cases were addressing. In ***Florida Hurricane Protection and Awning, Inc., v. Pastina***, 43 So.3d 893 (Fla. 4th DCA 2010), the attorney’s fees provision was as follows: “purchaser is responsible for all costs of collection including attorney’s fees. And 1.5% of contract amount.” ***Id.*** at 894.

In ***Florida Community Bank, N.A., v. Red Road Residential. LLC***, 197 So. 3d 1112 (Fla. 3d DCA 2016), the contractual provision at issue read as follows: “Mortgagor shall pay or reimburse Mortgagee for all costs, charges and expenses, including reasonable attorney’s fees... incurred or paid by Mortgagee in any threatened, pending or completed action, proceeding or dispute in which Mortgagee is or might be made a party or appears as a party plaintiff or party defendant and which affect the Note, this Mortgage or any other instrument securing the Note, or the Mortgaged Property or any part thereof, or the interests of Mortgagor or Mortgagee therein, including, but not limited to, the foreclosure of this Mortgage... including all appellate proceedings in connection with or arising out of any of the foregoing.” ***Id.*** at n. 1.

The provision in ***Florida Hurricane Protection***, is unilateral as it only makes the “purchaser” responsible for attorney’s fees. ***Florida Hurricane Protection and Awning, Inc.***, 43 So. 3d at 894. The provision in ***Florida***

Community Bank, N.A., is unilateral as it only allows for the mortgagor to collect attorney's fees and costs. **Florida Community Bank, N.A.**, 197 So. 3d at 1112. Compare this with the attorney's fee provision in this case which states as follows:

ENFORCEMENT. In the event that either party should take legal action against the other by reason of the other's failure to abide by this Agreement, the party who is found to be in violation of this Agreement shall pay to the other party who prevails in said action, the prevailing party's reasonable expenses incurred in the enforcement of this Agreement, said expenses to include, but not be limited to, reasonable attorney's fees, court costs, filing fees, court reporter appearance fees, copying costs, traveling costs and transcription fees.

(App.18)

An attorney's fee provision that only allows a mortgagor to collect attorney's fees or only obligates the purchaser to pay attorney's fees, is a unilateral prevailing party's fee provision and does in fact trigger **Section 57.105(7)**. In stark contrast, in this case, "either party" may bring the action and collect attorney's fees against the other party who was found to be in "violation". The provision in this case is clearly a bilateral defaulting party's fee provision, which is not extended by the statute.

The Former Wife argues that the Fourth District Court of Appeal's decision in **Sacket v. Sacket**, 115 So.3d 1069 (Fla. 4th DCA 2013) is in conflict with the Fifth District Court of Appeal's decision in **CalAtlantic**

Group, Inc. v. Dau, 268 So.3d 265 (Fla. 5th DCA 2019). As the Former Wife points out, the Court in **CalAtlantic** cited to and relied upon the case of **GEMB Lending, Inc., v. RV Sales of Broward, Inc.**, 2010 WL5313482 (S.D.Fla.2010), stating that the attorney’s fee provision being addressed in **CalAtlantic Group** is similar to the fee provision in **GEMB. CalAtlantic Group, Inc.** 268 So.3d at 268

The attorney’s fee provision in **GEMB** read as follows: “if you default, you agree to pay our costs for collecting amounts owing, including Court costs, reasonable attorney’s fees (if we refer this Contract to an attorney that is not a salary employee of ours for collection).” **GEMB Lending, Inc.** 2010 WL5313482 at 1.

In **GEMB**, the United States District Court for the Southern District of Florida goes on to directly explain that the attorney’s fee provision is extended and made bilateral by **Fla.Stat. 57.105(7)** because “the language means that if GEMB (“our”) had prevailed in this action against the Toranos (“you”) for breach of contract for failure to pay the loan, GEMB would have been able to recover attorney’s fees.” **Id.** The attorney’s fee provisions in **CalAtlantic Group** and **GEMB** were both unilateral prevailing party’s fee provisions and the decisions in those cases are therefore not in conflict with **Sacket.**

The Former Wife is also incorrect in her assertion that the **Sacket** Court ignored precedent from the Fourth District Court of Appeal set forth in **Land & Sea Petroleum, Inc., v. Business Specialist, Inc.**, 53 So.3d 348 (Fla. 4th DCA 2011). The attorney's fee provision in **Land & Sea Petroleum, Inc.**, is clearly a unilateral prevailing party's attorney's fees provision as it states as follows: "If a suit is filed to enforce Broker's rights hereunder and the Broker is the prevailing party, the Seller will pay the Broker its full commission, legal fees and costs incurred in any litigation and one (1) percent monthly interest pre and post judgment." **Id.** at 351

The decision in **Land & Sea Petroleum, Inc.** is not precedential with respect to **Sacket** or this case, as in that case, the Broker conceded that **Section 57.105(7)** allowed for the reciprocal recovery of attorney's fees pursuant to a contractual prevailing party provision. **Land & Sea Petroleum, Inc.** 53 So.3d at 352. Due to this concession, there is no analysis that it is in any way precedential for this case or particularly instructive, however, if anything is to be gleaned, it would be favorable to the Former Husband's position as, again, the attorneys' fee provision in **Land & Sea Petroleum, Inc.**, is a unilateral prevailing party's fee provision and that is why the party in that case conceded to **Section 57.105(7)**'s applicability. **Id.** at 351

The Former Wife attempts to diminish the Fourth District Court of Appeal's decision in **Sacket v. Sacket**, 115 So.3d 1069 (Fla. 4th DCA 2013), by referring to it as an "outlier case." In actuality, **Sacket** is the most important and applicable case in this matter, as the attorney's fee provision in that case is essentially one and the same as the attorney's fee provision in this case. *Id.* at 1070. **Sacket** is not an outlier, but rather the model case that deals with the analysis of a bilateral defaulting party fee provision in a contract. In **Sacket**, the Fourth District Court of Appeal arrived at the correct conclusion, as either party has the right to file a motion under the attorney's fee provision and collect the attorney's fees and costs, if the other party is to violate the agreement. *Id.*

Any other decision would serve to impermissibly re-write the contract of the parties. The Former Wife's claim that the **Sacket** Court relied on "dicta" in **Zakian v. Zakian**, 837 So.2d 549 (Fla. 4th DCA 2003) is also inaccurate. The attorney's fee provision in **Zakian** is also a defaulting fee provision which allows "either party" to bring an action and in its entirety reads as follows: "should either party fail to abide by the terms of this Agreement, the defaulting party will indemnify the other for all reasonable expenses and costs including attorney's fees incurred in the enforcement of this Agreement." *Id.* at 550.

The **Zakian** Court makes a clear determination with respect to the issues being considered in this case and in **Sacket**, stating that it disagrees with the Former Wife's position that the attorney's fees provision is indistinguishable from an ordinary "prevailing party" attorney fee agreement. *Id.*

In **Sacket** and **Zakian**, the Forth District Court of Appeal has drawn a clear line in the sand distinguishing between contractual bilateral defaulting party fee provisions and unilateral contractual prevailing party fees provisions. This line in the sand is supported by the breadth of case law set forth in the Petitioner's initial belief as well as this reply brief, which clearly state that contractual prevailing party attorney's fee provisions are only made bilateral by **Section 57.105(7)**, if they were unilateral to begin with. As the Fourth District Court of Appeal's reasoning and analysis is consistent with this well-established rule of law, the decision in **Sacket** should be accepted and the decision in **Levy** should be quashed and reversed.

CONCLUSION

Based upon the above, it is, respectfully, submitted that the Third District Court of Appeal's opinion in **Levy** should be disapproved and quashed and the Fourth District Court of Appeal's opinion in **Sacket** should be approved. **Sacket** 115 So.3d at 1069-72; **Levy**, 307 So.3d at 71-74.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent E-Mail to: ROBERT F. KOHLMAN, Esquire, 100 S.E. 2nd Street, Suite 3500, Miami, Fl. 33131, robert.kohlman@kohlmanlaw.com; this 23rd day of April, 2021.

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CERTIFICATE OF COMPLIANCE WITH *FLA.R.APP.P. 9.210(a)(2)*

The undersigned hereby certifies that the Respondent's Response has been submitted to this Honorable Court via E-Service transmission and in Arial 14 point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, as to the applicable word count limit requirements.

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