ORIGINAL

IN THE SUPREME COURT FLORIDA

CASE No.: SC 06-999
L. T. No.: 2D- 06-915

ANDRZEJ MADURA,
Petitioner
vs.
FULL SPECTRUM LENDING, INC., and
COUNTRYWIDE HOME LOANS, INC.
Respondent

PETITIONER'S BRIEF ON MERITS

On the Review from the District Court of Appeal Second District
State of Florida

Respectfully submitted :

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PRELIMINARY STATEMENT

In this brief, the a petitioner Andrzej Madura, will be referred to as the petitioner. The respondent will be referred to as the respondents or Countrywide or Spectrum. Citations to the Appendix will be made by the letter A and appropriate document.

STATEMENT OF THE FACTS AND OF THE CASE

This is an action alleging rescission, violation of TILA and usury action pertaining to a loan. Petitioner and her husband are borrowers. In beginning of July 2000 the respondent, FULL SPECTRUM LENDING INC. (SPECTRUM) sent a loan applications borrowers. SPECTRUM was a subsidiary of Countrywide Home Loans Inc. (COUTRYWIDE) . On or about July 10, 2000, both borrowers received a package of the loan documents including the arbitration agreements. Petitioner and his wife, at that time, signed, mailed, and faxed their applications and other documents to SPECTRUM. On July 26, 2000, SPECTRUM closed the loan with the borrowers in the principal amount of $ 87,750 that was secured by a mortgage on the borrowers' principal residence. Petitioner as well as his wife were liable for a loan pursuant to mortgage -see last page of the mortgage (A-1), the Adjustable Rate Note (A-2) and to par. (A)(4)(D)(E) and B of the Adjustable Rate Rider(A-3). Respondents guaranteed in the Par.5 of the Adjustable Rate Note(A-2) and by the provisions of the TILA document (A-4) that the borrowers could pay off the loan in full at any time without penalty. It should be noted that the arbitration agreements define the "credit transaction as the obligation or *proposed* obligation "

and govern loan documents signed at the closing e.g. the documents reviewed by the borrowers and to which borrowers assented (A-5). Further, these arbitration agreements provide, in their first sentence, that there are constructed :

"In consideration of the Lender's extension of credit, and other good and valuable consideration, *the receipt and sufficiency of which is acknowledged by both parties.*" In the instant case, the borrowers acknowledged the contract signed at closing, not the contract which they never reviewed, assented or signed. At the July 26, 2000 closing, the petitioner signed again the same arbitration agreement pertaining to proposed him loan documents but not pertaining to loan documents produced by the respondents later and signed with borrowers names by respondents

On or about the day after closing, the respondents' agents or employees, without a notice to the plaintiffs, destroyed or concealed the original marked "final " TILA document (A-4) and the Promissory Note (A-2), signed by borrowers at closing, and, subsequently, and without notice to borrowers, prepared a new forged Promissory Note (A-6) and the TILA document (A-7) and signed it with the petitioner's and his wife's names and initials. Please note that all loan documents show that they were prepared by the Spectrum's Loan Officer, K. Phillips, and that forged TILA document was marked "final" as the other TILA document signed by borrowers at closing (A-5). Respondents never provided to the borrowers for review and for signing these " loan documents " which contained loan conditions never agreed to by the plaintiffs and which contained the forged by respondents or

their officers signatures of the borrowers. Instead, the respondents, on the day following closing , these " documents", bearing the forged signatures of the borrowers, uttered in the record of their Title Insurance Comp. in Tampa (A-8).

Respondents never sent to borrowers the forged TILA disclosure (A-7) nor the correct Notice to Cancel, as mandated by 15USC1635, all contrary to the provisions of 15 U.S.C. 1640. Instead, on April 21, 2001, they sent a Pay off Demand Note, where wherein they added to the existing balance an amount of $ 5,036.84, as a "prepayment penalty" which never existed in the loan signed at the closing.

This demand of the total due in the amount of $ 93,732.44 is at the interest rate of about 26% per year(A-9) and was repeated in May 2001(A-9). Despite numerous inquiries about the TILA document and the Promissory Note, the respondents refused to provide a copy of this patently altered and forged TILA document but on May 10, 2001, they faxed the altered copy of the Promissory Note which included, on pg .2, the forged petitioner's initials (A-10). After receiving this promissory note containing the loan conditions to which borrowers never agreed and the forged initials, the borrowers, on May 23, 2001, sent by Certified Mail a demand for the investigation of forgery. Further, because the respondents did not disclose the forged TILA Document (marked final) and never sent the correct new Notice to Cancel, as mandated by 15USC 1635, petitioner *demanded immediate rescission* of the agreement *to which her never assented*, as was his right under the Act (A-11).

Respondents have refused to honor rescission demand, in violation of 15 USC

1635, and on July 17 and July 27, 2001, through their Vice- President Jay Laifman , stated: "all disclosures have been made and all appropriate documents were signed" and that: "signatures of the Plaintiffs do not clearly appear to be forgeries". see two letters(A -12) . However, the respondents failed again to provide the borrowers with requested forged and altered TILA document and forged Promissory Note.

Petitioner and his wife started their own investigation and, in the beginning of November 2001, found in the record of the Title Company in Tampa, a copy of the forged TILA document and the Promissory Note, both containing new loan conditions, never assented to by the borrowers at closing. This TILA document not only contained the conditions to which the plaintiffs never agreed to but also included the forged dated signatures of both borrowers (A-7). In addition, a copy of the Promissory Note received from the Title Agency contained on page 2 the forged initial of the petitioner (A-6). Petitioner retained the Forensic Document Expert, Mr. Vastrick, who, in his November 25, 2001 Report, ascertained that both dated signatures on the TILA document are not genuine signatures of the borrowers but forgeries. In addition, he ascertained that the initial entries on page 2 of the Promissory Note were not made by the petitioner (A-13). On March 8, 2002 and on April 29, 2002, the borrowers, through their attorney, sent to respondents two letters containing a copy of this Forensic Report (A-14). Petitioner in these letters, again demanded a copy of the forged TILA document and information on what action has been taken by the respondents concerning the forged borrowers'

signatures on the loan documents. Respondents did not respond and never disclosed the altered and forged TILA requested by the petitioner.

Procedural Progress of the Case

Petitioner, in addition to his case, submitted below a part of his wife's case as he believes that this Honorable Court will benefit from this recitation because the petitioners' original complaint was filed jointly with his wife.

On May 1, 2002, within five months after borrowers were aware that the TILA was forged and eleven months after they were suspecting forgery and alteration of the Promissory Note, they, to vindicate their rights to enforce, requested on May 23, 2001 a rescission, filed a complaint. Borrowers claimed the respondents' failure to disclose the forged loan condition and raised allegations of forgery of the TILA and its concealment by respondent as well as forgery of the Promissory Note. See pgs 9-13 of original complaint (A-15). Borrowers claimed also criminal usury, conspiracy, and uttery of forged documents. The trial Court, compelled petitioner to arbitrate the said claims. The trial court supported its order compelling forgery to arbitration by *Prudential Sec. Ins. v. Katz,* 80 So.2d 173 (Fla.3rd DCA 2002) which is distinguishable from the circumstances of the instant case. In *Prudential*, the plaintiffs disputed an employment contract and there is nothing about the forgery. See page 3 of the August 5, 2002 Circuit Court's Order (A-16).

Borrowers appealed to 2ndDistrict Court of Appeals. On June 17, 2003 the 2nd District issued mandate following its *per curiam* decision affirming the trial

court's order compelling petitioner's claims to arbitration. On July 15, 2003, Mrs. Madura amended her complaint with additional TILA and fraud allegations. Her amendment arose out of the same transaction, conduct, and occurrence alleged in original complaint (A-17)(Exhibits are omitted as they are included in Appendix) . Respondents, after uttering the TILA document and the Promissory Note in their Title Agency, *uttered them knowing that the were forged and altered*, with the U.S. Supreme Court (case 03-6293), in their brief in opposition to the borrowers' petition for writ of certiorari of the 2nd District Order *percuriam* affirmation (A-18).

On January 20, 2004, at the evidentiary hearing, in order to vindicate right for rescission asserted in the May 23, 2001 letter (A-11), was admitted into evidence the testimony of the Forensic Document Examiner and his Nov. 25, 2001 Forensic Report about forgery of the TILA document and the Promissory Note, without any respondents' objections (A-19). At the April 20, 2004 Summary Judgment hearing, the trial judge acknowledged the existence of genuine issues of material facts and held that will rule within ten (10) days. See pgs. 49-50 and 58 of the excerpt of the proceeding (A-20). However, the Judge granted fifteen (15) months after hearing respondents' summary judgment motion and denied Mrs. Madura's motion for summary judgment on the issue of the respondents' liability for forgery, while the court's records as well as its Order were overwhelming with existence of a genuine issue of material facts, forgery and fraud (A-21). The trial Court found that the record shows that borrowers were aware, since November 2001, about forgery of

TILA document and that they timely filed original complaint in which they raised forgery, usury and conspiracy. The trial court held that : " in the May 2002 Complaint the borrowers raise allegation of forgery " (TILA document and the Promissory Note) but this is not a claim of violation of the federal statute and therefore, as of May 2002, respondents were not yet on notice of a TILA claim. Next, the trial Court held that " allegation of federal statutory violations cannot properly relate back; they are beyond the time limit and are barred by the one-year statute of limitation , citing *Ecenrode v Houshold Finance,* 422 F. Supp. 1327 (D. Del.1976) (despite the fact that the amended complaint arose out of the same conduct, transaction and occurrence as in original complaint). (See pg, 3 of A-21).

On Dec.23, 2004, the petitioner, through attorney, reiterated his demand for rescission, as is authorized by TILA Act (A-22). Respondents have refused again to honor or acknowledge this 2nd Notice of Rescission, in violation of the TILA Act. On June 17, 2005 the petitioner, through his attorney, moved to amend complaint to add claims for rescission and for avoidance of the loan transaction.(A-23). On Aug. 16, 2005 the petitioner filed response (A-25) to the respondents' opposition (A-24). On Jan.17, 2006 the new assigned Judge allowed withdraw of petitioner's counsel (A-26). On Jan.25, 2006 the petitioner asked the successor Judge, for a hearing on motion for leave upon experienced hardship to confirm a date for hearing with the opposite attorney(A-27). On Jan. 30, 2006 the respondents faxed to the Judge their July 22, 2005 opposition (A-24). On February 1, 2006 the successor Judge

denied the petitioner's motion without a hearing and prohibited the petitioner of filing a motion for rehearing.(A-28) On March 3 , 2006, the petitioner filed his petition for writ of certiorari with the Second District Court Appeal (A-29) .

On March 16, 2006 the 2nd District dismissed petition without opinion (A-30).

On March 24, 2006, in response to the respondent's motion to dismiss certiorari based on erroneous perception of the timeless of petitioner's petition the petitioner, filed, through his attorney, a motion for reconsideration of the said Order (A-31).

On March 23, 2006 the 2nd District dismissed petitioner's petition for certiorari for lack of jurisdiction(A-32). On March 30, 2004 the petitioner filed, through attorney, amended motion for reconsideration (A-33), in which submitted that, pursuant to Rule 9.040(c) Fla. R. App., certiorari should be treated as a notice of appeal as he will have no remedy on plenary appeal. See page 5 of petition for certiorari(A-29).

On April 13, 2006, the 2nd District denied amended motion for rehearing and held that the petitioner's motion for leave to file amended complaint is not reviewable by certiorari on the narrow basis that was bound by its decision in *Harry Pepper & Assoc., Inc v. City of Cape Coral.* 369 So.2d 969 (Fla.2nd DCA 1979). (A-34).

On May 12, 2006, the petitioner filed his notice to invoke the discretionary jurisdiction of this Court to review this 2nd District Court's decision. On June 19 2006 the petitioner filed jurisdictional brief in which submitted that the cited by the 2nd District *Harry Pepper* conflicts with *Hall v. Wojciechowski* and other district Court's Orders. On February 27, 2007, this Court accepted jurisdiction .

SUMMARY OF THE ARGUMENT

I. The 2nd District Court of Appeal erred in jurisdictional analysis to determine whether the trial court's order denying the petitioner motion for leave to file his first amended complaint could be corrected in plenary appeal. The Court supported its decision of dismissing petition for certiorari with its ruling in case *Harry Pepper & Assoc. Inc. v. City of Cape Coral,* 369 So.2d 969 (Fla.2nd DCA 1979) which is distinguishable from the circumstances of the instant case. The 2nd District, by this ruling created a new law that all petitions for writ of certiorari from the trial courts' Orders, denying motions for leave to file amended complaint, must be dismissed for lack of jurisdiction. Such law, would deprive numerous litigants of their rights to amend their complaints in case when their previous other claims were compelled to arbitration, and they would not have remedy on plenary appeal. Such law conflicts with several District Court's and with several 2nd District Court's decisions and with Rule 1.190 of Fla. R. C.P which states that leave to file amendment shall be given freely when justice so requires In summary, the 2nd District's decision will create harmful precedent in this state if it is upheld and should be quashed .

II. Present case is of significant public importance while the TILA Act covers all credit transactions which represent a portion of national economy; consumer credit for 2006 alone was ***$ 3,26 trillion***.

III. The trial court departed from the essential requirements of law when it denied without hearing petitioner's motion to file his first amended complaint. Petitioner

request that this Court, in accepting jurisdiction over the 2nd district order dismissing certiorari, also resolve the substantial issue presented to the 2nd District below--- whether the successor judge departed from the essential requirements of law when he denied (without a hearing) the petitioner's motion for leave to file *first* amended complaint. The trial Court made no specific finding that the respondents would be prejudiced by petitioner exercising his privilege by amending the complaint or that amendment would be futile. Such amended complaint should not be denied and also would not be futile to state cause of action.*Soucy v. Caspar*, 658 So.2d 1017 (Fla.4thDCA 1995). The trial court's decision conflicts with numerous Fla. Districts decisions and also with the 4th District decision in *Blakeslee v. Morse Operaion Inc.* 720 So.2dd 1166(Fla. 4th DCA 1998). In *Blakeslee,* the 4th District explicitly ruled that a plaintiff was entitled to amend complaint for purpose of avoiding arbitration.

Further, to the extent the fact that the amended complaint would be not futile to state cause of action, the United States Supreme Court, (Justice Scaldia) recently, in *Buckeyye Check Cashing Inc. v. Cardegna*, 126 S. Ct 1204 (2006) (*footnote at 1208*) and Justice Cantero, dissenting in this Court's *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So.2d 860 (Fla. 2005)(*at 870-875*) limited the severity of the *Prima Paint Corp., v. Flood & Conklin Mfg. Co.,* 388 U.S. 395., 87 S.Ct. 1801, 18 L.Ed. 2d 1; *Southland Corp. v. Keating,* 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 and others holdings in which circumstances are distinguishable from this case 's circumstances. Both Justices expressly held that if a plaintiff claims are that he was

deprived of review of the altered and forged contract or when he did not assent to it and sign it, or that he was induced to sign the arbitration agreement pertaining to this never formed contract, his claims could not be compelled to the arbitration. Petitioner never personally signed the customer agreements at issue, and thus he contended that he was not bound by the arbitration provisions within them.

The arbitration agreements show on their face that they merely govern *the loan proposed by the respondents* and they do not govern forged and concealed loan .

Therefore, petitioner amended the complaint including claims of rescission of the contract: (1) which was signed by respondents with the borrowers' names without the borrowers' knowledge; (2) which was not provided to the petitioner for its review; (3) to which the petitioner never assented and never signed it, *may not be compelled to the arbitration.* If no contract was formed, then the arbitration agreement, which was a part of that contract, was not formed, either. The borrowers signatures were forged and no contract came to being. If a party did not sign the underlying contract then the party may not have agreed to arbitration. Petitioner whose names were forged *has never agreed to anything.* Likewise, with a person whose name was written on a contract by a faithless agent who lacked the authority to make a commitment. The Court, no the arbitrator must determine this treshold issue.

In summary, petitioner's amended complaint is not futile and the trial court order will create harmful precedent in this state if it is upheld and should be reversed.

I. THE 2nd DISTRICT ERRONEOUS DECISION OF DISMISSAL CERTIORIARI FOR LACK JURISDICTION WILL CREATE HARMFUL PRECEDENCE IN THIS STATE AND SHOULD BE QUASHED

The 2nd District Court of Appeal did not make the jurisdictional analysis to determine whether the trial court's denying the petitioner first attempt to file amended complaint order could be corrected in plenary appeal . The 2nd District supported its decision dismissing petitioner's petition for certiorari with its own *Harry Pepper & Assoc. Inc. v. City of Cape Coral,* 369 So.2d 969 (Fla. 2nd DCA 1979) case , which is distinguishable from the circumstances of the instant case. In *Harry Pepper,* the plaintiff had remedy on plenary appeal but the petitioner, in the instant case would have no remedy on plenary appeal because his original claims were compelled to arbitration. The 2ndDistrict overlooked the fact that the petitioner's remedy by appeal *would be inadequate* because Fla. Statute provides that the trial court may only confirm or vacate arbitration panel's award (s. 682.12) or vacate when an award was produced by corruption, fraud or is evidence of the partiality by an arbitrator or the arbitrators exceeded their powers or refused to hear evidence. 682.13(a-d). S. 682.20 provides that an appeal may be taken only from: (a) An order denying an application made under s.682.03; (2) An order granting an application to stay arbitration made under s. 682.03(2-14); (c) An order confirming or denying confirmation of an award; (d) An order modifying or correcting an award ; (e) An order vacating an award without directing a rehearing and: (f) A judgment or decree entered pursuant to the provisions of this law. See

Davenport v. Dimitrijevic, 857 So.2d 957(4thDCA 2003) wherein the district court held that review of arbitration proceedings is extremely limited. Further, Court in M.D. Fla.2003, in *Shields & Co. v. Bright,* 254 F. Supp.2d 1253 held that : " when arbitration award sets forth its rationale, courts are prohibited fro going beyond for corners of award, and are limited to specific rationale asserted in award itself." In conclusion, the petitioner has no remedy to correct it by plenary appeal. See *Hall v. Wojciechowski,* 312 So.2d 204 (Fla. 4thDCA 1975) *Id204.* The district Court of appeal held in *Hall* that petition for writ of certiorari from the trial court's order denying motion for leave to file amended complaint is reviewable by certiorari. *Id at 204.* The 4th District Court, in *Hall,* correctly conducted the jurisdictional analysis whether or not the petitioner, in *Hall* case, has remedy to correct the trial court's non-final order on plenary appeal. The 2nd District did not so. The 2nd district decision holding that all certiorari from lower court's decision denying motions for leave to file amended complaint must be dismissed for lack of jurisdiction deprives numerous litigant from their rights to amend complaint when previous claims in case when they were compelled to arbitration is erroneous unconstitutional and conflicts with several District Court's and also 2nd District decision as well as 2nd District 's decisions. See, *Hohl v. Croom Motorcross, Inc.* 358 So.2d 241(Fla.2nd DCA 1978) (The 2nd District granted certiorari when the trial court denied the plaintiff's motion for leave to file an amended complaint . The Florida appellate Courts contend that the appellate courts must conduct

the jurisdictional analysis do determine whether the a trial court's interlocutory order result in material injury for the remainder of the trial court that cannot be corrected in plenary appeal, before it empowered to determine whether to grant relief is petition for writ from the non-final order. See *Barker v. Barker*, 909 So.2d 333 (Fla. 2nd DCA 2005) *Id at 334 and 336,* and *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658. In summary, the 2nd District Court of Appeal's decision in the petitioner's case, which is of significant public importance (see below), will create harmful precedent in this state it is upheld and as such should be quashed .

II. THE INSTANT CASE IS OF SIGNIFICANT PUBLIC IMPORTANCE

Respondent erred by arguing that this case is not of significant public importance and that this Court should not review it and cited: *Haines City Co. Devel v. Hicks*, 658 So.2d 523(Fla.1995). This case is distinguishable from the circumstances of the instant case. This Court correctly accepted jurisdiction because this case is about forgery of the Truth In Lending Act. The Act governs nationwide consumer credit transactions and this case is of significant public importance to wit:

Overview of TILA

Congress enacted TILA " to assure a meaningful disclosure of credit terms so that the consumer would be able to compare more readily the various credit terms available to him and avoid uninformed use of credit, and to protect the consumer against inaccurate and unfair credit, billing practices, " 16.U.S.C. Par. 1601(a) , see *Mourning v. Family Publ'ns Serv. Inc.* 411 U.S. 356, 377 (1972)(TILA

"reflects a transition in Congressional Policy from a philosophy of 'Let the buyer beware' to 'Let the seller disclose'"). Because the statute is remedial in nature, its terms must be liberally construed to achieve Congress's purpose. *Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261, 1262 (9th Cir.1993); *McGowan v. King,* 569 F.2d 1210, 1214 (2d Cir. 1973); *Pechinski v. Astoria Fed. Sav. & Loan Ass'n*, 238 F. Supp. 2d 640 (S.D.N.Y. 2003) (" The Courts of Appeals have consistently ruled that TILA should be liberally construed in favor of the consumer in order to effectuate Congress' intent."). Violations of the disclosure requirements may subject a creditor to civil and criminal liability. With respect to civil liability, Congress allowed consumers to recover actual and statutory damages.15 U.S.C. Par.1649; *see infra* pp. 506 (text of current of statutory damages provision). The Act applies to virtually every form of consumer credit transaction, see C.F.R.226.1(c) (1) (2003), "from home mortgages to small loans to credit card plan pawn transactions. " *Ralph J. Rohner & Fred H. Miller,* Truth In Lending (2002) supra. Covered transactions represent a portion of the economy, consumer credit for 2006 alone was ***$ 3,26 trillion***. See Federal Statistic Release G.19, Consumer Credit (Jan, 8, 2007 release available at http://www. federal reserve. gov./releases/g19/Current (visited Jan.17, 2007). As to a transaction, the Act's requirements extend to both lending documents created at the transaction and subsequent documents, such as periodic statements.15USC 1601. TILA provides a three-pronged enforcement mechanism; administrative agency enforcement

penalties, and private civil liability.15U.S.C.1607,1611, 1640. Among these civil actions have emerged as by far the dominant means of enforcement See *Ralph J.Rohner & H. Miller* TILA (2002) see *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 432(5thCir.1998) is due in part to the fact that TILA establishes in the civil context a remedial scheme virtually strict liability that requires no fault on the part of the creditor and does not require proof of damages on the part of the consumer 15 USC 1640. It should be noted that since its inception, TILA has authorized consumers to seek an automatic award of statutory damages for disclosure violations of the Act.

Therefore, this case is of significant public importance as the TILA Act covers all credit transactions which represent a portion of economy, consumer credit for 2006 alone was ***$ 3,26 trillion***.

III. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW WHEN IT DENIED WITHOUT A HEARING PETITIONER'S MOTION FOR LEAVE TO FILE 1st AMENDED COMPLAINT

A Preface

Notably, because of its decision on the issue of jurisdiction, the 2nd District never reached the substantive issue presented by petition for writ of certiorari (A-29): whether the trial court departed from the essential requirements of law when it denied without hearing the petitioner's motion for leave to file his *first* amended complaint. However, because this Honorable Court accepted jurisdiction, it may also address the merits of the trial court's ruling (A-28). See e.g., *Savoie v. State,* 422 So.2d 308, 310 (Fla. 1982) (once Supreme Court accepts jurisdiction over

case to resolve legal issue in conflict, it may consider other issues properly raised and argued). Accordingly, then petitioner respectfully requests that this Court consider the substantive issue presented in the petition for writ of certiorari to the Second District Court of Appeal.

B. The trial Court Departed from the Essential Requirements of Law When it Denied Without a Hearing the Petitioner's First Amended Complaint Despite That The Respondent Would be Not Prejudiced by Petitioner's Exercising his Privilege By Amending Complaint

Florida courts as well as federal courts are well settled that leave to amend only be denied when privilege has been abused or amendment would be futile to state cause of action. See *Soucy v. Caspar*, 658 So.2d 1017(Fla. 4th DCA 1995) or *Dryden Waterproofing , Inc., v. Bogard,* 488 So.2d 672, 673 (Fla. 4th DCA 1986) (amendments should be freely granted unless the privilege has been abused or the complaint is clearly not amendable) . In the present case, the trial judge ruled without a hearing and made no specific finding that respondent would be prejudiced by the petitioner exercising his privilege by amending the complaint or that amendment would be futile. Florida Rule of Civil Procedure 1.190(a) states that a motion for leave to amend should be liberally granted, *Smith v. Barreett*, 564 So.2d 582 (Fla.4thDCA 1990). In the present case, the petitioner did not abuse his privilege . On May 1 2002 he filed original complaint to vindicate his rights for rescission demanded on May 23, 2001(pgs. 3, 5 of this Brief and A-11).

No counts of his original complaint contain request for rescission of the loan transaction (A-15). The petitioner's appellate proceeding ended on November 17

2003 (A-36). Further petitioner, in good faith, attempted to file his 1st Amended Complaint which would effectively present the merits of this action. Therefore, petitioner waited for the outcome of Mrs. Madura's November 29, 2003 motion to compel discovery and for sanctions, regarding the respondents' failure to answer to any of her Interrogatories and to produce any of the documents requested, because such discovery would support his motion to amend. It should be noted that Mrs. Madura responded to all Interrogatories, was three times deposed and produced all the documents requested. On Jan.20, 2004, Mrs. Madura admitted into evidence (without any respondents' objections) the Forensic Examination Report proving respondents' forgery the TILA document and the Promissory Note(A-19). On March 8, 2004 the Court entered an Order and held in par.5 " If the courts denied summary judgment to defendants, all outstanding discovery requests shall be responded to within thirty days from then date of the Order." (A-36) .

At the April 20, 2004 summary judgment hearing on Mrs. Madura's motion for partial summary judgment as to the respondents' liability for forgery of the loan documents, the trial court stated that it will rule on advisement within ten (10) days on parties summary judgment motions. See pg. 58 of the excerpt of the April 20, 2004 proceeding (A-20) . However the petitioner waited *fourteen (14) months, not ten days,* for an Order and finally, on June 17, 2005, prior the trial court's ruling on summary judgment motions. he filed a motion for leave to file amended complaint, On Dec. 24, 2004 the petitioner sent to respondents the 2nd Notice of Rescission of

this never existed and forged loan contract (A-22) . The trial court was aware about the outlined above facts from pgs.5-6 of the petitioner's Aug.16, 2005 response to the respondents' opposition to his motion for leave to amend (A-25).

In summary, the amendment does not prejudice the respondents inasmuch as respondents have not alleged or *specified prejudice to it.* Further the filing of the answers to the amendment complaint would not prejudice the respondents inasmuch as the respondents have not yet file answers and affirmative defenses to petitioners' original complaint. Therefore, the petitioner has not abused the right to amend, nor can it be said that his original complaint is not amendable to state a cause of action.

C. The trial Court Departed from the Essential Requirements of Law When it Denied Without a Hearing the Petitioner's 1st Amended Complaint Despite that the Amendment is not Futile in the Light of Justice Cantero's (dissenting *in Cardegna*) and U.S. Supreme Court, *Buckeyye Check Cashing,* Justice Scalgia's Revisiting of *Prima Paint and Southland* .

To the extent the fact that the petitioner's amendment complaint would not be futile to state a cause of action, the petitioner responds here to the respondent's theory that the petitioner must arbitrate his claim of the rescission of the contract

a. Florida Courts are Well Settled that the Petitioner Was Entitled to Amend Complaint to Avoid Arbitration.

Florida Courts are well settled that plaintiff is entitled to amend complaint to avoid arbitration. See *Blakeslee v. Morse Operations Inc*, 720 So.2d 1166 (Fla. 4thDCA 1998). In *Blakeslee* the Circuit Court, Broward County, compelled all plaintiff's claims to arbitration as in the instant case. Plaintiff moved to file an amended

complaint deleting some allegations and adding other allegations, in order to avoid having to arbitrate . The court denied motion to file amended complaint . In *Blakeslee* the plaintiff file 2nd motion for leave to file 2nd amended complaint, to avoid arbitration. The trial Court denied. The plaintiff appealed this Order. The plaintiff in *Blakeslee* relies on *Lee v. All Florida Construction Co.,* 662 So.2d 36(Fla.3rdDCA 1995)(holding that a party cannot be forced to arbitrate a dispute arising from one contract based on an arbitration clause in another contract between the same parties). The 4th District reversed and held that the plaintiff was entitled to amend complaint for purpose to avoiding arbitration *Id at 720.*

b. The U.S. Supreme Court (Justice Scalgia) in Buckeye Check Cashing Inc. v. Cardegna, 126 S. Ct 1204 (2006) *and Justice Cantero, Dissenting in* Cardegna, v. Buckeye Check Cashing, Inc., 894 So.2d 860 (2005), *Excluded the Severity of* Prima Paint *and* Southland *from the Cases in Which the Plaintiffs did not Review the Contracts did not Assent to Contracts and did not Sign the Contracts, and in Which the Defendants Signed the Contracts with Plaintiffs' Names Without the Plaintiffs' Knowledge, Exactly As in the Instant Case.*

Federal Arbitration Act (FAA) mandates enforcement of arbitration provisions in all but two circumstances: (1) when a party alleges that contract as whole is void *ab initio* for any reason; or (2) when a party alleges that arbitration clause itself is voidable for reasons related specifically to the arbitration clause. 9 U.S.C.A., Par 1 et seq. See *Bertram v. Beneficial Consumer Discount Co.*286 F.Supp.2d 453(M.D. Pa.2003) *at 455.* " Declaration that contract is void nullifies all aspects of agreement, including an embedded arbitration clause, giving neither party the power to rarify or disaffirm its provision." *at 454.*

Petitioner's amended complaint should not be compelled to arbitration in the light of the U.S. Supreme Court *Buckey Cashing* Justice Scaldia's and dissenting in *Cardegna* Justice Cantero's revisiting *Prima Paint* and *Southland* and their holdings that the plaintiffs' claims in the similar cases to the instant case, could not be compelled to arbitration. Here no contract was formed, then the arbitration, which was part of that contract, was not formed, either.

1). There is no contract between the parties in the present case

Respondents, just after closing, destroyed or concealed the original Promissory Note and the TILA document and produced another contract which they signed with the plaintiffs' names and never provided it for a review or for signing to borrowers (A-6) and (A-7) and pg. 2 of this Initial Brief. Petitioner's fraud claims as well as other claims are barred from arbitration because petitioner clearly alleges that the respondents induced borrowers to sign proposed loan and the arbitration agreement *pertaining to proposed loan,* and that respondents' corrupt intent was to produce another contract with forged borrowers signatures on it and to " file " it with their Title Agency as true documents. Respondents breached the contract by destroying it and by producing altered contract with fraudulently added forged borrowers' signatures on it Such claims are barred from arbitration by the US Supreme Court and other federal courts' holdings below. Respondents by signing "their contract " lacked the authority to bind it to the contract containing the arbitration cause, the very existence of the agreement was disputed and the court must resolve the

threshold question of whether an arbitration agreement exist; *Three Valleys Mun, Water Dist.v. E.F. Hutton&Co, Inc.* 925 F.2d 1136,1138, 1144 (9thCir.1991) (holding that the court, not the arbitrator must decide whether the signatory had authority to bind the plaintiffs to the contracts containing the arbitration clauses. U. S. Supreme Court, in *Volt Info. Scis. Inc v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489, 474, 109 D. Ct. 1248, 103 L. Ed. 2d 765 (1983), held that: *" parties cannot be forced to submit to arbitration if they have not agreed to do so* " *Id* at 478. Respondents by their wrongful actions, breached the original contract which was signed by the petitioner and his wife. Therefore, the petitioner and his wife rescinded it but the respondents failed to honor this rescission which is also at issue of the amended complaint. The respondents' forged contract is void *ab initio* .

Therefore, in the present case, there is no contract between the parties.

2). The Arbitration agreements are not enforceable because do not pertain to the contract forged and uttered by respondents in the Title Agency, as a true document. Petitioner, whose signatures were forged, has never agreed to anything, and may not have agreed to arbitration, as he never seen and assented to forged contract.
If no contract was formed, then the arbitration agreement, which was a part of that contract was not formed, either. Court must determine this treshold issue.

Petitioner was twice induced (on July 11, 2000 and on July 26, 2000) to sign an arbitration agreement which pertains to the Promissory Note and the TILA document provisions reviewed by the plaintiffs prior to closing and signed at closing(A-2 and A-4). See an Arbitration Agreements, which provide that a "Credit Transaction" means a proposed obligation, and in its first line, provide, that: " In consideration of Lender's extension of credit, and other good and valuable

consideration, the receipt and sufficiency of which is acknowledged by both parties, it is further agreed as follows " . See the respondents' arbitration agreements (A-5).

Therefore, respondents' arbitration agreements pertain to the proposed by the respondents and acknowledged and signed at closing by the petitioner the TILA and the Note (A-2 and A-4). They do not pertain to the forged and concealed before the plaintiffs contract (A-6 and A-7), which was never provided to the petitioner for review and was never personally signed and acknowledged by the petitioner and his wife, but was uttered in the respondents' Title Insurance Agency

Petitioner, in Count IV of his amended complaint, submitted that he accepted the proposed loan and attached to this loan documents (including the arbitration agreement) upon reliance on the respondents' fraudulent misrepresentations that *this was a final contract.* Therefore, this arbitration agreement pertains to the contract signed at closing *but shall not compel* to arbitrate another forged and concealed by the respondents contract. Petitioner never signed the customers' agreements at issue and he was not bound by the arbitration provisions with them. See The Federal Court in *Chastain v. Robinson Humphrey Co.*, 95 F.2d 851 (11 Cir.1992) acknowledged that: "parties cannot be forced to submit to arbitration if they have not agreed to do so. *Id at 854* (citing *Volt Info. Scis.*, 489 US at 478) . Therefore, the arbitration agreement governs the loan agreement to which was attached, and, obviously, the petitioner was not bounded to arbitrate another never reviewed and never signed contract, to which he never assented.

Justice Scalgia, in U.S. Supreme Court *Buckeye Check Cashing, Inc. v. Cardegna* ,126 S.Ct.1204 (2006) recently revisited the severity of the U.S. Supreme Court's *Prima Paint Corp. v. Floo & Conklin Mfg Co.*388 U.S.395, 87S.Ct.1801,18L.Ed.2d 1270 and *Southland Corp. v. Keating,*465 US 1,10-11, 104 S. Ct. 852,79 L.E.d.2d (1984), and, in footnote 1 *at 1208* , ruled :

" The issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion to day addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Fla .Supreme Court in *Cardegna*) which hold that it is for the courts to decide whether the alleged obligor ever signed the contract *Chastain v. Robinson-Humphrey*,857F.2d 851(C.A.111992) ; whether the signer lacked the authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.*220 F.3d 99 (C.A.2000); *Sphere Drake Ins. Ltd. v. All American Ins.* Co., 256 F.,3d 587 (C.A.7, 2001), and whether the signor lacked the mental capacity to assent, *Spahr v. Secco* 330 F.3d 1266(C.A.10 2003). "

Petitioner believes that Justice Scaldia, in the above cited holdings, followed Justice Cantero findings (dissenting in *Cardegna v. Buckeye Check Cashing*, 894 So.2d 860 (Fla.2005) (which was overturned by Justice Scaldia in *Buckeye Check Cashing*) . Justice Cantero, in *Cardegna,* analyzed in the circumstances when a claim could not be compelled to arbitration. Justice Cantero, *Id* 872, held : "As the Sixth Circuit emphasized in *Burden v. Check Into Cash of Kentucky, LLC,* 267 F.3d 483, 486-87

(6th Cir.2001) at 489, however, in those cases the question was *not* whether a party assented to a contract that later was alleged to violate state law. 867 F.3d at 490. Rather, in each case , the complaining party alleged that because of some defect in signatory power, no contract was ever formed. See, e.g. *Sandvik* , 220 F.3d at 490 (holding that where a party claimed that the signee lacked the authority to bind it to the contract containing the arbitration cause," the very existence of [the] agreement [was] disputed" and the court must resolve the treshold question of whether an arbitration agreement exists.; *Three Valleys* (holding that the court, not the arbitrator must decide whether the signatory had the authority to bind the plaintiffs to the contracts containing arbitration clauses); *Spahr v. Secco,* 330 F.3d 1266, 1273 (10th Cir.2003) (holding that a claim that the signatory lacked the mental capacity to enter into the contract goes to making of both the contract and the arbitration agreement); *Sphere Drake Ins. Ltd v. All American Ins.* Co., 256 F.3d 587, 590-91 (7th Cir 2001) ("A person whose signatures was forged has never agreed to anything. Likewise with a person whose name was written on a contract by a faithless agent who lacked the authority to make a commitment. This is not a defense to enforcement, as in *Prima Paint*; it is a situation in which no contract came into being [.] ") . This Honorable Court should concern that in the instant case signatures were forged and no contract came to being.

Further, Justice Cantero, *Id 870*, analyze *Chastain*: " In *Bess v. Check Express,* 294 F.3d 1298, 1304 (11thCir 2002), the 11thCircuit concluded that the question of

the legality of the contract was for the arbitrator because the case fell "within the 'normal circumstances'.....where the parties have signed a presumptively valid agreement to arbitrate any disputes, including those about the validity of the underlying contract. " *Id* at 1306 (citing *Chastain v. Robinson-Humphrey Co.*, 857 F.2d 851 (11 Cir.1992)). Justice Cantero submits, *Id* 872: " In *Bess,* the Eleventh Circuit similarly distinguished its earlier decision in *Chastain.* In *Chastain,* the plaintiff never personally signed the customer agreements at issue, and thus she contended that she was not bound by the arbitration provisions within them. 957 F.2d at 853. The court acknowledged that " parties cannot be forced to submit to arbitration if they have not agreed to do so " *Id* at 854 (citing *Volt Info. Scis. Inc.* 489 U.S. at 478, 109 S.Ct. 1248). Therefore, Justice Cantero cites the United States Supreme Court's holding in *Volt Info. Scis Inc.,* on the exactly same issue as in the petitioner's amended complaint. Next, Justice Cantero, *Id* 872, analyses *Chastain*:

Thus, " [u]nder normal circumstances, an arbitration provision with a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration.", 957 F.2d at 854. The court found the case before it to be the " rare " case in which " the existence of any agreement, and the existence of an agreement to arbitrate " was at issue. Under those facts, there [wa]s no presumptively valid general contract. If a party did not sign the underlying contract, then the party may not have agreed to arbitration . Thus, the making of the arbitration agreement *was* at issue , and under FAA a court, not an arbitrator,

should decide the question. *Id* at 856. "

Further, Justice Cantero, *Id* 873, held: " In *Bess* , the Eleventh Circuit noted both the distinctive facts of *Chastain* and its narrow holding. *Id at 1305.* The court explained that: "the focus of the court's decision in *Chastain*....was on the question of assent, i.e., whether the parties mutually had agreed to the contracts and contrasted the claim before it that the differed payment contracts violate state law. "

Therefore, this Honorable Court should consider the fact that the petitioner, in the instant case, as the plaintiff in the *Chastain* case, clearly submitted that he have never seen, sign and assented to the forged by the respondents contract.

In conclusion, Justice Cantero, *Id* 873, held: " *If no contract was formed, then the arbitration agreement, which was a part of that contract was not formed , either. Court must determine this treshold issue."*

In the present case, the petitioner submits that he did not assent to both contract and arbitration agreement. Further, the arbitration agreement, itself, provides that it governs only the contract which was provided to petitioner and which was acknowledged by petitioner but not a contract later fraudulently produced and signed with the borrowers' names by the respondents without the borrowers' knowledge. (see the first sentence of the arbitration agreements, A- 5).

In summary, Justices Scaldia's and Cantero's analysis and holdings bar the respondents' demand to compel the petitioner's amended complaint to arbitration.

Petitioner has not abused the right to amend, nor can be said that his amended

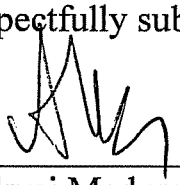
complaint does not state a cause of action. Had the trial court granted the motion for leave to file amended complaint, and had the respondents asserted " their arbitration severity arguments " by way of defense, the petitioner would have had an opportunity to present above outlined proper arguments against the arbitration agreement. Denial by the trial court, without a hearing, of petitioner motion to amend, was a departure from the essential requirements of law which effectively foreclosed petitioner from his day in court without an adequate remedy by appeal.

CONCLUSION

Petitioner feels strongly and justice demands that those who acted so harmfully against him and his wife must answer before jury for their shameful conduct.

The petition for writ of certiorari should be granted and the trial court's order should be reversed .

Respectfully submitted:



Andrzej Madura, pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been served by U.S. Mail the Defendant's counsels: William Heller, Esq. and Kimberly Learly, Esq., Akerman Senterfitt, Las Olas Centre II, Suite 1600, 350 East Las Olas Blvd., Fort Lauderdale, Florida 33301 by U.S. Mail on March 24, 2007.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I HEREBY CERTIFY, that this Petition complies with the font standards as required by Florida Rule of Appellate Procedure 9.210(a)(2) in that this petition is submitted in Times New Roman 14-point font type face.

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