

NO.: 05-11-01425-CV

IN THE
COURT OF APPEALS
FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS, TEXAS

WELLS FARGO BANK, N.A. AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN
TRUST 2006-1 ASSET-BACKED CERTIFICATES, SERIES 2006-1
APPELLANT

V.

LONZIE LEATH
APPELLEE

On Appeal from the 95th Dallas County District Court
Dallas County, Texas
Trial Court No. DC-08-07290

APPELLANT'S BRIEF

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APPELLANT REQUESTS ORAL ARGUMENT

TABLE OF CONTENTS

Index of Authorities iii

Statement of the Case 2

Statement of Facts 3

Summary of the Argument..... 7

Argument and Authorities 9

Issues:

I. The court erred by Signing a judgment that went beyond Finding and declaring the value of the property 9

II. The jury’s answer to the sole question presented Was made on insufficient evidence or was made against The great weight and preponderance of the evidence and is manifestly unjust 22

III The court erred in allowing the testimony of Ann piper and admission of her valuation report 26

IV The court erred in its award of attorney’s fees 36

V In the alternative to the foregoing arguments, Wells Fargo was entitled to equitable subrogation for advances made at the request of Leath to pay his existing lien 39

Conclusion and Prayer 43

Certificate of Service..... 44

INDEX OF AUTHORITIES

CASES

<i>Avary v. Bank of America, N.A.</i> , 72 S.W.3d 779, 787 (Tex. App.-Dallas 2002, pet. denied), -----	32
<i>Barshop v. Medina County Underground Water Conservation Dist.</i> , 925 S.W.2d 618, 637, (Tex. 1996) -----	38
<i>Biopolymer Eng'g, Inc. v. ImmuDyne, Inc.</i> , 304 S.W.3d 429, 445 (Tex. App. San Antonio 2009 no pet.)-----	38
<i>Benchmark Bank v. Crowder</i> , 919 S.W.2d 657 (Tex. 1996)-----	41
<i>Bocquet v. Herring</i> , 972 S.W.2d 19, 21 (Tex. 1998).-----	36
<i>Burroughs Wellcome Co. v. Crye</i> , 907 S.W.2d 497, 499 (Tex. 1995).-----	22
<i>Cain v. Bain</i> , 709 S.W.2d 175, 176 (Tex. 1986) -----	22, 23
<i>Cochran v. Woolgrowers Central Storage Co.</i> , 166 S.W.2d 904, 908 (1942) -----	16
<i>Cont'l Dredging, Inc. v. De Kaizered, Inc.</i> , 120 S.W.3d 380, 387-388 (Tex. App. Texarkana 2003) -----	22
<i>Criton Corp. v. the Highlands Ins. Co.</i> , 809 S.W.2d 355, 357 (Tex.App.--Houston [14th Dist.] 1991, writ denied)-----	37
<i>Curry v. Bank of America</i> , 232 S.W.3d 345, 352-53 (Tex. App. Dallas, 2007 pet. denied) -----	11
<i>Custom Leasing, Inc. v. Texas Bank and Trust Co.</i> , 516 S.W.2d 138, 144 (Tex. 1974) --	15
<i>Dolenz v. The State Bar of Texas</i> , 72 S.W.3d 385, 387 (Tex.App.-Dallas 2001, no pet.)	32
<i>Doody v. Ameriquest Mortgage Company</i> , 49 S.W.3d. 342 (Tex. 2001) -----	11, 13
<i>Downer v. Aquamarine Operators, Inc.</i> , 701 S.W.2d 238, 241-42 (Tex. 1985) -----	36
<i>E.I du Pont de Nemours & Co. v. Robinson</i> , 923 SW.2d 549, 556 (Tex. 1995) -----	33
<i>Exxon Pipeline Co. v. Zwahr</i> , 88 S.W.3d 623, 629 (Tex. 2002) -----	33

<i>F.D.I.C. v. Graham</i> , 882 S.W.2d 890, 900 (Tex.App.--Houston [14th Dist.] 1994, no writ)-----	37
<i>Federal Deposit Ins. Corp. v. Projects American Corp.</i> , 828 S.W.2d 771, 772 (Tex. App. Texarkana 1992, writ denied)-----	9
<i>First Nat'l Bank of Kerville v. O'dell</i> , 856 S.W.2d 410 (Tex. 1993)-----	42
<i>Gammill v. Jack Williams Chevrolet, Inc.</i> , 972 S.W.2d 713, 726-727 (Tex. 1998)-----	34
<i>Garcia v. Gomez</i> , 319 S.W.3d 638, 642 (Tex. 2010), -----	16
<i>Hollander v. Capon</i> , 853 S.W.2d 723, 726 (Tex. App.--Houston [1st Dist.] 1993, writ denied)-----	22
<i>In re Estate of Bean</i> , 206 S.W.3d 749, 763-64 (Tex. App.--Texarkana 2006, pet. denied)-----	38
<i>King v. Fisher</i> , 918 S.W.2d 108, 112 (Tex.App.--Fort Worth 1996, writ denied)-----	15
<i>Kroger Co. v. Warren</i> , 410 S.W.2d 194, 196 (Tex. Civ. App. Tyler 1966)-----	17
<i>LaSalle National Bank v. White</i> , 246 S.W.3d 616 (Tex. 2007)-----	40
<i>Lofton v. Texas Brine Corp.</i> , 720 S.W.2d 804, 805 (Tex. 1986)-----	22
<i>Maritime Overseas Corp. v. Ellis</i> , 971 S.W.2d 402, 406-07 (Tex. 1998)-----	23
<i>Marion v. Davis</i> , 106 S.W.3d 860, 868 (Tex. App. Dallas 2003)-----	37
<i>Merrell Dow Pharms., Inc. v. Havner</i> , 953 S.W.2d 706, 711(Tex. 1997). -----	23
<i>Montemayor v. City of San Antonio Fire Dep't.</i> , 985 S.W.2d 549, 551 (Tex. App.--San Antonio 1998, pet. denied)-----	9
<i>Petroleum Anchor Equipment, Inc. v. Tyra</i> , 419 S.W.2d 829, 834 (Tex. 1967)-----	21
<i>Ragsdale v. Progressive Voter's League</i> , 801 S.W.2d 880, 882 (Tex. 1990)-----	16
<i>Richards v. Suckle</i> , 871 S.W.2d 239, 241 (Tex. App.-Houston [14th Dist.] 1994, no writ)-----	41
<i>Scottsdale Ins. Co. v. Travis</i> , 68 S.W.3d 72 (Tex. App. Dallas 2001 pet. denied)-----	38

<i>Shell Chemical Co. v. Lamb</i> , 493 S.W.2d 742, 744 (Tex. 1973)-----	12
<i>State Dep't of Highways & Pub. Transp. V. Payne</i> , 838 S.W.2d 235, 241 (Tex. 1992). -	19
<i>Tanglewood Homes Ass'n, Inc. v. Henke</i> , 728 S.W.2d 39, 45 (Tex. App.--Houston [1st Dist.] 1987, ref. n.r.e.)-----	38
<i>Texas Employers Ins. Assn. v. Page</i> , 553 S.W.2d 98, 102 (Tex. 1977) -----	15
<i>Tex. Land & Loan Co. v. Blalock</i> , 13 S.W. 12 (Tex. 1890)-----	41
<i>Trevino v. Allstate Ins. Co.</i> , 651 S.W.2d 8, 11 (Tex. App.--Dallas 1983, writ ref'd n.r.e.)-----	11
<i>Uniroyal Goodrich Tire Co. v. Martinez</i> , 977 S.W.2d 328, 334 (Tex. 1998) -----	22
<i>Weng Enterprises v. Embassy World Travel</i> , 837 S.W.2d 217, 222-23 (Tex.App.--Houston [1st Dist.] 1992, no writ)-----	37
<i>Wichita Falls & Oklahoma Ry.Co. v. Pepper</i> , 135 S.W.2d 79, 85 (Tex. 1940)-----	20, 21
<i>Wilson v. Remmel Cattle Co., Inc.</i> , 542 S.W.2d 938, 942 (Tex.Civ.App. -- Amarillo 1976, writ ref'd n.r.e.)-----	21

STATUTES

Texas Admin. Code § 153.91 -----	18
Tex. Civ. Prac. & Rem. Code §37.003-----	13
Tex. Civ. Prac. & Rem. Code §37.004-----	13
Tex. Civ. Prac. & Rem. Code §37.010-----	10
Tex. Civ. Prac. & Rem. Code §37.009-----	36

OTHER AUTHORITIES

Tex. Const. art. XVI § 50(a)(6) -----	10, 39, 41
Tex. Const. art. XVI, § 50(a)(6)(B) -----	10
Tex. Const. art. XVI, § 50(a)(6)(Q)(x)-----	11
Tex. Const. art. XVI, § 50(e)-----	41
Tex. Const. art. XVI § 50(a)-----	39, 40, 41

RULES

Tex. R. Civ. P 194.2(f)-----	33
Tex. R. Civ. P. 190.3(b)(1)(B)(ii) -----	26
Tex. R. Civ. P. 193.5 -----	31

Tex. R. Civ. P. 193.6 (a)	31
Tex. R. Civ. P. 193.6 (b)	32
Tex. R. Civ. P. 195.2(a)	27
Tex. R. Civ. P. 277	20
Tex. R. Civ. P. 279	21
Tex. R. Civ. P. 54	11
Tex. R. Civ. P. 92	12
Tex. R. Evid. 403	33
Tex. R. Evid. 702	33, 35

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Wells Fargo Bank, NA as Trustee for Option One Mortgage Loan Trust 2006-1 Asset-Backed Certificates, Series 2006-1 respectfully submits its brief for the court's consideration. In this Brief, Wells Fargo Bank, NA as Trustee for Option One Mortgage Loan Trust 2006-1 Asset-Backed Certificates, Series 2006-1 is referred to as "Wells Fargo." Appellee Lonzie Leath is referred to as "Leath."

The record on appeal in this case consists of the Clerk's Record: A single volume Pages 1-93. Wells Fargo will refer to the clerk's record as "CR" which will be followed by a citation to the page of the record; *e.g.*, "CR 15."

The reporter's record consists of the following volumes:

- Volume 1, a Master Chronological Index;
- Volume 2 containing the pre-trial proceedings on Wells Fargo's Motion to Strike Plaintiff's expert;
- Volume 3 containing voir dire and trial proceedings;
- Volume 4 containing further trial proceedings;
- Volume 5 containing closing arguments and the jury verdict;
- Volume 6 containing the plaintiff's Motion for Final Judgment;
- Volume 7 containing Wells Fargo's Motion for New Trial and Motion to Modify or Reform the Judgment; and
- Volume 8 containing the trial exhibit list.

References to the reporter's record will be first to the volume, then page and finally line numbers; *e.g.*, RR. Vol. 3, Pg. 12, L. 8-14. References to the Appendix will be APP. Tab ____.

ORAL ARGUMENT

Wells Fargo requests oral argument.

STATEMENT OF THE CASE

Nature of the Case:

This is a declaratory judgments case arising from a home equity loan of October 25, 2005 extended to Lonzie Leath in the original principal amount of \$340,000.00. The loan is secured by Leath's homestead. Plaintiff sued Wells Fargo seeking a declaratory

judgment that Wells Fargo is not entitled to foreclose the property and that the loan was forfeited because it violated the Texas Constitution. [CR 7]

This appeal is an appeal of the court's judgment brought on four points of error.

Trial Court:

The Honorable Ken Molberg, 95th Judicial District Court, Dallas County, Texas.

Trial Court's Disposition:

After a jury verdict on the single question submitted to the jury, the trial court entered judgment nullifying Wells Fargo's loan.

Following a trial on the merits, the Court entered judgment. [CR 62] Wells Fargo objected to the judgment. [CR 39] Wells Fargo prosecuted two post-trial motions; a motion to modify or reform the judgment [CR 64] and a motion for new trial. [CR 68]

All motions were overruled.

STATEMENT OF FACTS AND BACKGROUND OF THE CASE

Procedural Background

1. On or about June 16, 2008. Wells Fargo filed an action seeking an order of foreclosure pursuant to *Tex. Riv. Civ. P. 736*. [RR Vol. 8 Def. Exhibit 50]
2. Leath filed his action on July 1, 2008. [CR 7] When filed, Leath's suit abated the expedited foreclosure proceeding. *Tex. R. Civ. P. 736(10)*.
3. Wells Fargo answered Leath's petition. Wells Fargo's live pleading at the time of trial was its First Amended Original Answer filed on September 22, 2008. [CR 10]

4. The Court entered a scheduling order on October 6, 2008. [CR 12] The scheduling order did not specify a date for designating expert witnesses outside of the rules of procedure for a level 2 discovery case.

5. On November 2, 2010, Wells Fargo filed an objection to Leath's expert witness, Ann Piper. [CR 13] The court heard the motion before trial and denied Wells Fargo's motion. [CR 19, RR Vol. 2] Wells Fargo re-urged its motion to strike Leath's expert witness. [CR 20] The Court heard the re-urged motion during the pre-trial phase of the trial. [RR Vol. 3 Pg. 13, L. 17 – Pg. 21, L. 17, Pg. 22, L. 3 – Pg. 30, L. 6] Wells Fargo re-urged its request to strike the witness once more before the jury. The Court overruled Wells Fargo's motion. [RR Vol. 3, Pg. 114, L. 10 – 13]¹

6. The litigants stipulated to the amount of reasonable and necessary attorneys' fees. Neither side agreed to the recoverability of the attorney's fees. [RR. Vol. 4 Pg. 126 L. 22 – Pg. 127 L. 18]

7. At the close of evidence, the case was submitted to the jury on the following question: *What was the fair market value of 936 Hickory Knob Circle, Cedar Hill, Dallas County Texas on October 26, 2005?* [CR 31] Wells Fargo objected to submission of the charge. [RR Vol. 5 Pg. 4, L. 11-18]

8. The jury returned a verdict of \$421,400.00. [CR 33; RR Vol. 5 Pg. 44 L. 3 – Pg. 45 L. 16]

¹ The facts involving the motion to exclude the testimony and report of Ann Piper are more fully developed under Issue III *infra*.

9. On or about June 21, 2011 Leath filed a motion for entry of judgment. [CR 46] Wells Fargo responded in opposition and objection to the proposed judgment. [CR 39]

10. The Court entered judgment on July 8, 2011. The judgment voided Wells Fargo's lien, forfeited the principal and interest of the Home Equity Note and awarded attorneys' fees to Leath. [CR 62]

11. Wells Fargo filed a motion to modify or reform the judgment on August 8, 2011. [CR 64] Wells Fargo filed its motion for new trial on the same date. [CR 68] The motions were heard while the Court had plenary power. [RR Vol. 7, Pg. 1, L. 20-23] The motions were overruled by operation of law.

12. Wells Fargo appealed the trial court's judgment. [CR 80]

Substantive Facts

13. On October 26, 2005, Leath signed a home equity loan. The loan was secured by his homestead. Leath signed a Home Equity Adjustable Rate Note in the principal amount of \$340,000.00; 80% of \$425,000.00. [RR Vol. 8. Def Exhibit 1] The Note contains express language for giving of notices. Paragraph 8 of the Note provides that any notice that must be given to the Note Holder will be given by mailing it by first class mail to the Note Holder at the address stated in §3(A) of the Note, or at a different address if Leath was provided with a different address. The address given in §3(A) of the Note is Option One Mortgage Corporation P.O. Box 92103 Los Angeles, CA 90009-2103.

14. To secure repayment of the Note, Leath executed a Deed of Trust granting a first lien security interest in his homestead to the lender. [RR Vol. 8 Def. Exhibit 2]

15. Of the money borrowed by Leath, \$279,581.74 was used to retire a preexisting loan made to Leath. [RR Vol. 8 Def. Exhibit 26, Plaintiff's Exhibit 26; Vol. 3, Pg. 218, L. 21 – Pg. 219, L. 21] Leath received cash out from the loan of \$51,978.31. [RR Vol. 8 Def. Exhibit 26, Plaintiff's Exhibit 7; Vol. 3, Pg. 221, L. 12-17]

16. In applying for and obtaining the loan, Leath signed the following instruments acknowledging the value of the property located at 936 Hickory Knob Circle, Cedar Hill, Dallas County, Texas to be \$425,000.00:

- Borrower's and Lender's Acknowledgement of Fair Market Value. [RR Vol. 8 Def. Exhibit 15]; and
- Uniform Residential Loan Application. [RR Vol. 8, Def. Exhibit 31]

17. Leath further signed an affidavit that when he made the loan that its principal amount, when added to the principal balance of all other liens against the homestead, did not exceed 80% of the fair market value of the property on the date the loan was made. [RR Vol. 8, Def. Exhibit 24]

18. The appraisal on the property, performed within a few days before the loan agreements were signed valued the property at \$425,000.00. [Vol. 8, Def. Exhibit 4] The testimony of Wells Fargo's expert, Clyde Crum validated the appraisal amount. [RR Vol. 4, Pg. 104, L. 9-12] Leath testified at trial that he knew of the appraisal value before

signing the loan agreements. [RR Vol. 4, Pg. 14, L. 9 – L. 12] When Leath knew of the appraisal amount he did not dispute it. [RR Vol. 4, Pg. 20, L. 17- Pg. 21, L. 13]

19. At trial, Leath stated that he did not know the value of the realty at the time the loan was made. [RR Vol. 4 Pg. 11, L. 9-11] Leath acknowledged that the loan was made on the value – acknowledged and undisputed when the loan closed – based on the \$425,000 appraisal. [RR Vol. 4, Pg. 23, L. 22 – 25]

20. On April 18, 2003, an appraisal of the property associated with a previous loan was performed that set the value of the property at \$350,000.00 while the property was under demolition. [RR Vol. 8, Plaintiff's Ex. 10] Wells Fargo's expert witness testified that when he placed a value on the property of \$425,000.00 on October 11, 2005, the property was in excellent, like new condition. [RR Vol. 4 Pg. 98, L. 4-19]

21. Prior to bringing his suit, Leath sent a letter to Option One Mortgage Corp. requesting a loan modification. [RR Vol. 8, Def. Exhibit 48] Leath supplemented the letter stating that the reason for his financial hardship was because his adjustable rate loan adjusted to a higher rate. [RR Vol. 8, Def. Exhibit 49]

SUMMARY OF THE ARGUMENT

22. It was error for the court to render a judgment that went beyond a finding and declaration as to the value of the property. Until the jury resolved the factual dispute as to the value of the property at the time of the loan, whether the loan failed to comply with the constitutional requirements for home equity loans was in dispute. In a declaratory judgment proceeding, it was error for the court to declare that the other

elements needed to void the loan had occurred. The Court erred by signing a judgment that voided Wells Fargo's lien and forfeited the loan. It was error to void the lien without submission of ultimate issues to the jury, namely whether the Leath notified Wells Fargo or its predecessor in accordance with statute and established precedent and whether the bank failed to timely cure upon being noticed.

23. The jury's answer to the sole question presented was made on insufficient evidence or was made against the great weight and preponderance of the evidence and is manifestly unjust. The overwhelming weight of the evidence shows that at the time the loan was made.

24. It was error for the court to allow Plaintiff's expert to testify. It was error for the Court to allow the expert report of Ann Piper into the evidentiary record. Allowing the expert to testify and the report into evidence probably caused the rendition of an improper judgment.

25. The court's award of attorney's fees solely to Plaintiff was not equitable and just.

26. Until the jury resolved the factual dispute as to the value of the property at the time of the loan, whether the loan failed to comply with the constitutional requirements for home equity loans was in dispute. The Court accordingly erred in rendering a judgment that denied Wells Fargo its right to assert its entitlement to equitable subrogation for the credit extended to Leath through the October 26, 2005 loan.

ARGUMENT AND AUTHORITIES

ISSUE I

THE COURT ERRED BY SIGNING A JUDGMENT THAT WENT BEYOND FINDING AND DECLARING THE VALUE OF THE PROPERTY

1. The judgment found that the home equity loan made in the amount of \$340,000.00 is greater than 80% of the fair market value of Leath's homestead. The Court found that Wells Fargo did not cure its failure to comply within 60 days of being notified of the violation. Based on these findings, the Court signed a judgment declaring that the Deed of Trust lien was void and of no effect. The Court declared that the principal and interest on the home equity note was forfeited. Entry of the judgment was error.

- Standard of Review – Declaratory Judgments

2. Declaratory judgments are reviewed under the same standards as other judgments and decrees. *See Tex. Civ. Prac. & Rem. Code* § 37.010; *Federal Deposit Ins. Corp. v. Projects American Corp.*, 828 S.W.2d 771, 772 (Tex. App. Texarkana 1992, writ denied). If reversal is warranted, the appellate Court can render judgment unless a remand is necessary for further proceedings. *See Lone Star Gas Co. v. Railroad Comm'n of Texas*, 767 S.W.2d 709, 710 (Tex. 1989). Declaratory-judgment actions are intended to determine the rights of parties when a controversy has arisen, before any wrong has actually been committed, and are preventative in nature. *Montemayor v. City of San Antonio Fire Dep't.*, 985 S.W.2d 549, 551 (Tex. App.--San Antonio 1998, pet. denied).

- Leath's legal Theories

3. Leath's live pleading asserted two causes of action. [CR 7] The Court directed a verdict on one of Leath's theories: usury. [RR Vol. 4, Pg. 127, L. 22 – Pg. 128, L. 13]

4. The other theory pled by Leath was for declaratory judgment. Leath sought a declaration that the principal amount of the debt secured by Wells Fargo's lien exceeded 80 percent of the market value of the homestead on the date the loan was made.

5. In his prayer, Leath prayed that the Court forfeit the principal and interest under the extension of credit.

6. The gravamen of Leath's complaint is that when he borrowed \$340,000.00, [RR Vol. 8, Def. Exhibit 1] the value of his homestead was less than the \$425,000.00 amount he previously swore was the fair market value. [RR Vol. 8, Defendant's Exhibit 15]

- The Texas Constitution

7. Article XVI §50(a)(6) of the Texas Constitution details the terms and conditions of a home equity loan and the rights and obligations of the borrower and lender. *Tex. Const. art. XVI, § 50(a)(6)(A)-(Q)*. Among the provisions is the requirement that the principal amount of the loan, when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the extension of credit is made. *Tex. Const. art. XVI, § 50(a)(6)(B)*.

8. A Texas home equity loan is forfeited if the lender fails to comply with the lender or holder's obligations under the Constitution, *and* the lender or holder fails to comply not later than the 60th day after the lender or holder is notified by the borrower of the lender's failure to comply. *Tex. Const. art. XVI, § 50(a)(6)(Q)(x). Doody v. Ameriquest Mortgage Company*, 49 S.W.3d. 342 (Tex. 2001).

- Leath's burden of proof

9. To be entitled to a declaration that this home equity loan is invalid and to a judgment declaring the loan forfeited, Leath had to conclusively establish a three part test:

- the loan failed to comply with the constitutional requirements;
- reasonable steps were taken to notify the lender of the alleged failure to comply by identifying the borrower, identifying the loan and providing a description of the alleged failure to comply; and
- the lender or holder failed to timely cure upon being noticed.

Tex. Admin. Code §153.91; See also, Curry v. Bank of America, 232 S.W.3d 345, 352-53 (Tex. App. Dallas, 2007 pet. denied).

10. Leath's live pleading [CR 7] contained no averment that conditions precedent occurred. Performance of any condition precedent is an essential element of the plaintiff's case. *Trevino v. Allstate Ins. Co.*, 651 S.W.2d 8, 11 (Tex. App.--Dallas 1983, writ ref'd n.r.e.). If a plaintiff pleads generally the performance or occurrence of conditions precedent, the plaintiff need only prove performance of those conditions specifically denied by the defendant. *Tex. R. Civ. P. 54*. But if a plaintiff fails to plead performance of the conditions precedent the plaintiff is then held to his burden of proof,

including the performance of all conditions precedent. Failure to establish one of several essential elements of any cause of action bars recovery even though all other elements may be established. The law is clear that performance of a condition precedent is an essential element of the plaintiff's case on which the plaintiff has the burden of proof unless he alleges performance of all conditions precedent and the defendant fails to deny specifically performance of the conditions, as required by rule 54. *Trevino, 651 S.W.2d at 12*. Although Leath's pleading avers that Defendant – Wells Fargo – was notified of the failure to comply, no conditions precedent are pled. Wells Fargo's live pleading [CR 10] specifically denied that conditions precedent necessary for Leath's recovery were satisfied. Accordingly, Leath's burden under *Curry* and the Texas Administrative Code to prove notice to his lender or holder was squarely a controlling fact issue in the proceeding.

11. Wells Fargo's general denial placed Leath in the position of having to prove every material fact of his cause of action. *Tex. R. Civ. P. 92*. A general denial puts plaintiff on proof of every fact essential to his case and issue is joined on all material facts asserted by plaintiff, except those which are required to be denied under oath. *Shell Chemical Co. v. Lamb, 493 S.W.2d 742, 744 (Tex. 1973)*.

- Did the loan fail to comply with the constitutional requirements?

12. The first material fact that Leath had to establish was that the loan failed to comply with the constitutional requirements for home equity loans. The element is crucial. Without its proof, whether notice and opportunity to cure were sent is academic. As an action for declaratory judgment, the Court had the authority to determine a limited

issue, namely whether the loan violated the Constitution. *Tex. Civ. Prac. & Rem. Code* §37.003, §37.004. The only issue submitted to the jury was on the question of the value of the property, *i.e.*, validity. Until the jury answered the controverted issue of value, there was no establishment of the first prong of the *Curry* burden – that the loan was invalid. *See, Doody v. Ameriquest Mortgage Company*, 49 S.W.3d. 342 (Tex. 2001).² Wells Fargo challenged Leath’s allegation that the loan was invalid by defending the suit, challenging and controverting Leath’s proof. Until the jury answered the question put to it, only speculation and allegation existed on whether the loan violated the Constitution.

13. Armed with an answer to the question of validity, an appropriate judgment for the case should have stopped after the Court’s finding that the loan amount of \$340,000.00 was greater than 80% of the fair market value of the property on October 26, 2005. All of the other decrees and declarations of the court are not supported by the evidence and were not ripe for adjudication.³

14. The issue of the value of the property on the date of the loan’s closing was challenged. Wells Fargo asserted the value to be \$425,000.00, the agreed upon value at the time of the loan’s closing. Evidence on both sides of the value issue was presented to the jury and was an ultimate issue determined by the jury. [RR Vol. 8 Def. Exhibits 4, 15, 24, 26, 31; Vol. 4, Pg. 104, L. 9-12; Vol. 4 Pg. 11, L. 9-11]

² *Doody* expressly adopted respondent, Ameriquest’s argument in the case that a lender does not forfeit any rights, including its lien rights, if it corrects mistakes “...upon learning of their existence...” *Doody v. Ameriquest*, 49 S.W.3d at 345 (emphasis added).

³ Save the declaration on attorneys’ fees discussed below.

- Did Leath provide Option One a description of the alleged failure to comply?

15. The trial court's judgment contains an express finding that "Defendant" did not cure its failure to comply within 60 days of being notified of the violation. Wells Fargo objected to the inclusion of this finding in the judgment. [RR Vol. 6 Pg. 11, L. 7 – Pg. 16. L. 3].⁴

16. Leath elicited no evidence or at the most controverted evidence to show that he gave notice to Option One or Wells Fargo of a failure to comply with an obligation. Without evidence of reasonable notice given and without a jury finding that notice was given and that a lender or holder failed to comply, the Court erred in entering a judgment invalidating the lien and forfeiting the loan.

17. The evidence Leath submitted regarding notice and cure was challenged and controverted by Wells Fargo. [RR Vol. 4, Pg. 114, L. 11 – Pg. 118, L. 5; RR Vol 8, Def. Exhibits 48 and 49.] On cross examination, Wells Fargo challenged Leath to provide the notices sent to Option One regarding the loan and the value of the property. [RR Vol. 4, Pg. 31, L. 23 – Pg. 35, L. 24] Leath never responded with any evidence showing the notice allegedly given to Option One notwithstanding the invitation for him to do so. The only evidence of notice of correspondence with Option One, the entity to receive notice in accordance with the note [RR Vol. 8, Def. Ex. 1] was Defendant's

⁴ On May 31, 2011, prior to submitting the judgment the Court ultimately signed, Leath's counsel faxed Wells Fargo's counsel a draft motion for final judgment and a draft final judgment for review along with a cover letter. The instruments were not filed with the court. The initial judgment proposed by Leath [App. Tab 8] did not request the finding and was only requested after Wells Fargo brought the Court's attention to the issue in its Response in Opposition to Motion for Entry of Judgment. [CR 39] Leath's motion for final judgment attached in the appendix is not part of the clerk's record. The motion and its attachments were not filed by Leath with the Court. A copy is included in the appendix for the Court's convenience. Counsel referred specifically to this form of judgment in argument to the court for entry of judgment. [RR Vol. 6, Pg. 10, L 21-Pg 11, L 6]

exhibits 48 and 49. [RR Vol. 8 Def. Exhibits 48 and 49] Those exhibits, sent to Briana Lucio with Option One and copied to Senator Royce West cite to an April 18, 2003 appraisal [RR Vol. 8 Plaintiff's Ex. 10] and not to the valuation by Clyde Crum dated October 11, 2005 [Vol 8, Plaintiff's Ex. 6]; a date right before the loan closed on October 26, 2005. It cannot be said from Leath's letter and the supplement that the reason for the correspondence was because the property was overvalued and contrary to the Constitution. To the contrary, a plain reading of Exhibit 48 indicates that it was sent to explain Leath's "...delinquency/inability to satisfy my mortgage obligations." [RR Vol. 8, Defendant's Exhibit 48] And the reason for the supplement [RR Vol. 8, Defendant's Exhibit 49] was again, not because Leath was complaining about the property's value, but to add to the reasons he gave for his delinquency in Exhibit 48. And this time, in Exhibit 49, Leath gives an additional reason why he needed a loan modification, namely because his note was an adjustable rate note, and the rate adjusted upward causing him financial hardship.

18. Conflicting evidence of probative value raises a fact issue which should be presented to the jury for determination. *See, Texas Employers Ins. Assn. v. Page*, 553 S.W.2d 98, 102 (Tex. 1977); *King v. Fisher*, 918 S.W.2d 108, 112 (Tex.App.--Fort Worth 1996, writ denied). Facts may be established as a matter of law if evidence in the record is uncontroverted. *See, Custom Leasing, Inc. v. Texas Bank and Trust Co.*, 516 S.W.2d 138, 144 (Tex. 1974).

19. There is an exception to this rule. Where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the

same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true as a matter of law. *Ragsdale v. Progressive Voter's League*, 801 S.W.2d 880, 882 (Tex. 1990), citing *Cochran v. Woolgrowers Central Storage Co.*, 166 S.W.2d 904, 908 (1942). Whether notice to cure was provided – an ultimate fact necessary for Leath to meet his burden of proof – was controverted and not established as a matter of law. Leath's testimony was not clear, direct and positive on the issue. Leath's burden to show that he notified Option One was not established as a matter of law. *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex. 2010), citing *Cochran v. Woolgrowers Central Storage Co.*, 166 S.W.2d 904, 908 (1942).

20. Leath proffered no evidence showing notice to cure. Any evidence submitted that may have touched on the issue was not clear, direct and positive. Nor was it free of inaccuracy. The language and tone of the letters to Briana Lucio [RR Vol. 8, Def. Exhibit 48 and 49] are evidence of attendant circumstances, including Leath's want for a loan modification and his explanation of a "key reason" for his hardship. The fact that Leath had the right to cancel the loan when he made it [RR Vol. 8 Defendant's Ex. 36] and that he accepted the loan and the cash out. [RR Vol. 8 Def. Exhibit. 26.; Vol. 3 Pg. 221, L. 12 – L. 17] cast suspicion on the circumstances. Leath's submission of an earlier appraisal [RR Vol. 8, Plaintiff's Exhibit 10] as providing notice to Option One is inaccurate, in that it refers to an appraisal that Leath's lender didn't agree with in making the October 26, 2005 loan. The appraisal was from 2003 and conditional. There was no evidence that the earlier appraisal was relied on by Leath's lender in making the October 26, 2005 loan. According to the report of Clyde Crum and his testimony, the property

was in excellent condition when he appraised it. [RR Vol. 8, Def. Exhibit 41 Vol. 4, Pg. 97, L. 17- Pg. 98, l. 19]

21. If notice was provided to Option One, whether the notice was the result of Leath's "reasonable steps" was never offered. One form of notice that Leath argued he provided to Wells Fargo (as opposed to Option One – the party who was to receive notice as stated in the Note [RR Vol 8, Def. Exhibit 1]) was his pleading in the previous home equity case. At the hearing on Leath's motion for final judgment [CR 46; RR Vol. 6, Pg. 10, L. 7-14] Leath argued that filing an answer on April 3, 2008 in a rule 736 home equity proceeding was indicative of reasonable steps taken to notify the lender or holder of a failure to comply with the Constitution. He argued that his answer in a proceeding where the applicant was seeking to foreclose a loan that funded 2 years and 6 months (890 days) prior, after he received the loan proceeds (including \$51,978.31 in cash) showed reasonable steps taken. As a general rule, pleadings in a pending cause, even though they are verified, are not admissible in evidence to prove the facts alleged therein. *Kroger Co. v. Warren*, 410 S.W.2d 194, 196 (Tex. Civ. App. Tyler 1966).

22. Another compelling fact weighing heavily against this argument is that when Leath was facing foreclosure, he changed horses. First he complained that he needed a loan modification because he was in financial straits and burdened by the loan. [RR Vol. Def. Exhibits 48 and 49] Then he says, well no it was really because the property was valued too high. Wells Fargo submits that the issue should have gone to the jury and that it was error for the court to unilaterally decide this controlling fact issue.

- Wells Fargo's Objection to the charge

23. Rule 279 directs courts on how to proceed when an element of a ground of recovery is omitted from a jury charge:

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge, without request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such manner as to support the judgment. A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

24. One or more of the elements needed for Leath to sustain his burden under *Curry* and the *Texas Admin. Code § 153.91* were not submitted to the jury. For the Court to be able to make the finding and judgment there must be an absence of an objection to submission of the charge. Wells Fargo objected:

THE COURT: Counsel, you have -- the Court has provided you -- and we're outside the presence of the jury -- with a copy of the Court's proposed charge. I'll now hear from the plaintiff on any objections or submissions.

MR. WITHROW: No objections or submissions, Your Honor.

THE COURT: Okay. Mr. Negrin, on behalf of the defendant?

MR. NEGRIN: Just for the record, Your Honor, yes, I do object to the submission of the charge to the jury, and to the question as worded. This case,

if it goes in terms of value, will not fully resolve all of the disputes under the dec action. The Court, of course, has the discretion.

THE COURT: All right. Overruled. Bring in the jury.

[RR Vol. 5, Pg. 4, L. 2-18]

25. There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle. In this case, Wells Fargo met this test. *State Dep't of Highways & Pub. Transp. V. Payne*, 838 S.W.2d 235, 241 (Tex. 1992).

26. Next, assuming that Wells Fargo's objection is insufficient, the evidence on the omitted elements required to make the finding must, according to rule 279, be "factually sufficient." Should this Court determine that the objection to submission of the charge was inadequate, this Court must then determine whether there is evidence to support a deemed finding that notice to cure was provided to Wells Fargo or Option One. *In the Interest of J.F.C.*, 96 S.W.3d 256, 263 (Tex. 2002).

27. In addition to claiming that his pleading showed reasonable steps to notify the lender or holder, [RR Vol. 6, Pg 10, L 7] Leath cited the Court to a letter sent by prior counsel for Leath regarding the property's valuation. Leath's counsel admitted to the Court that the letter attached to his motion for entry of judgment was not presented to the jury. [RR Vol 6, Pg. 9, L. 23 – Pg. 10, L. 2] In the letter counsel speaks about was never seen by the jury and the first time the letter was brought to the Court's attention

was at the hearing on Leath's request for entry of judgment. [RR Vol 6, Pg. 9, L. 23 – Pg. 10, L. 2] *See*, note 4, above.

28. Next, Leath argued that the Court could find the missing elements of Leath's cause of action because the notice and cure provisions of the Constitution, the *Curry* burden of proof and *Tex. Admin. Code §153.91* were affirmative defenses that were required to be raised in a responsive pleading. The argument is not in accord with this court's *Curry* opinion. Leath cites no authority for his position that Wells Fargo had the burden of proof on the requirement to show that the loan satisfied the constitutional provisions. In addition to this Court, at least one other Texas Court relieves Wells Fargo of that burden, holding that judicial economy dictates that the few requirements that are contested rather than the many that are not should be the focus of litigation questioning the validity of a home equity loan.⁵ *Curry* and *Tex. Admin. Code §153.91* place the burdens squarely on Leath.

29. In a jury trial, each litigant has the legal right to have the jury pass upon the essential issues of fact raised by the pleadings and the evidence which are sufficient to form the basis of a judgment. *Wichita Falls & Oklahoma Ry.Co. v. Pepper*, 135 S.W.2d 79, 85 (Tex. 1940). Leath pled and produced evidence on the issue of the value of the property relative to the amount of the loan. Only controverted evidence was elicited at trial on the element of notice and cure; yet, despite the direction by *Tex. R. Civ. P. 277* for the court to submit the controlling issues raised by the pleadings and the evidence, the

⁵ *Wilson v. Ames Capital Corporation*, 2007 Tex.App. LEXIS 8345. A copy of the Lexis version and the Memorandum Opinion from the 14th Court of Appeals are in the appendix. [App. Tab 9]

issue of notice and cure was omitted from the court's charge. Leath made no request for the submission, or even any objection to the omission of the issue. *Tex. R. Civ. P. 279* requires the party relying on the issue to request, on penalty of waiver, the issue's submission in substantially correct wording. Under the rule, waiver would not occur if the omitted issue is a component element of a ground of recovery or defense partially submitted and the issue is omitted *without a request therefore by the party relying on it or an objection by the party opposing the issue*. In that situation, the omitted jury issue is submitted to the trial court for resolution. *Wilson v. Remmel Cattle Co., Inc.*, 542 S.W.2d 938, 942 (Tex.Civ.App. -- Amarillo 1976, writ ref'd n.r.e.). Here, however, although it had no duty to do so, Wells Fargo objected to the omission of the issue, [RR Vol. 5, Pg. 4, L. 11- 18] and its objection precluded any finding by the trial court on the element not submitted to the jury. *Petroleum Anchor Equipment, Inc. v. Tyra*, 419 S.W.2d 829, 834 (Tex. 1967). Consequently, Leath waived one of the controlling issues upon which he relied for recovery and, by doing so failed to meet the burden placed on him by the law. *Wichita Falls & Oklahoma Ry.Co. v. Pepper, supra, at 85.*

30. There being no establishment that Leath noticed Option One – a lender or holder of the note with a description of the alleged failure to comply, the Court erred in entering a judgment that the lien was invalid and the loan forfeit.

ISSUE II

THE JURY'S ANSWER TO THE SOLE QUESTION PRESENTED WAS MADE ON INSUFFICIENT EVIDENCE OR WAS MADE AGAINST THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE AND IS MANIFESTLY UNJUST

- Standard of review

1. When reviewing a claim that the evidence is factually insufficient to support a jury finding, the court of appeals must first examine all of the evidence. *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986); *Hollander v. Capon*, 853 S.W.2d 723, 726 (Tex. App.--Houston [1st Dist.] 1993, writ denied). After considering and weighing all of the evidence, the verdict should be set aside if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Hollander*, 853 S.W.2d at 726. Evidence is legally insufficient when (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *Cont'l Dredging, Inc. v. De Kaizerred, Inc.*, 120 S.W.3d 380, 387-388 (Tex. App. Texarkana 2003), citing *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998). More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995). When deciding a

no-evidence point, this Court must consider all the evidence in the record in the light most favorable to the party in whose favor the verdict has been rendered. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711(Tex. 1997).

2. After reviewing the evidence, if this Court finds some probative evidence, the court is to test the factual sufficiency of that evidence by examining the entire record to determine whether the finding is clearly wrong and unjust. When considering a factual sufficiency challenge to a jury's verdict, the Court must consider and weigh all of the evidence, not just that evidence which supports the verdict. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998). This Court can set aside the verdict only if it is so contrary to the overwhelming weight of the evidence that the verdict is clearly wrong and unjust. *Id.* at 407; *Cain v. Bain*, 709 S.W.2d at 176.

3. The single Jury Question asked:

What was the fair market value of 936 Hickory Knob Circle, Cedar Hill, Dallas County Texas on October 26, 2005?

4. The jury answered \$421,400.00. [CR 33] In light of the entire record, the jury's answer was so against the great weight and preponderance of the evidence that it is clearly wrong or unjust. The issue was preserved for appeal through Wells Fargo's motion for new trial. CR 68.

5. The evidence adduced at trial included numerous instances where the \$425,000.00 value was expressly stated as Leath's positive assertion. In spite of the instruments, Leath controverted his own sworn statements and affidavit.

6. Defendant's Exhibit 15 [RR vol. 8, Def, Exhibit 15] is captioned Borrower's and Lender's Acknowledgement of Fair Market Value. The exhibit is signed and sworn to by Leath. In it he swore that the fair market value of the property on October 26, 2005 was \$425,000.00.

7. Most importantly, the amount of the loan is undisputed: \$340,000.00. [RR Vol. 8, Def. Ex. 1]. \$340,000.00 is 80 percent of \$425,000.00. Leath testified that the loan was made and that he received the cash out portion of the funds specified in the HUD-1 [RR Vol. 8. Def. Exhibit 26; Vol. 3, Pg. 221, L. 12-17].

8. Leath signed a Texas Equity Loan Affidavit. It contained the following paragraph:

"The principal loan amount for this Texas Equity Loan mortgage, when added to the principal balances of all other liens against the Affiants homestead, does not exceed 80% of the fair market value on the date that this extension of credit is made. The Lender and the Affiants have signed a written acknowledgement as to the fair market value on the date that this extension of credit is made."

[RR Vol. 8, Def. Ex. 24]

9. Leath signed a Uniform Residential Loan Application containing the following acknowledgement:

Each of the undersigned specifically represents to Lender and to Lender's actual or potential agents, brokers, processors, attorneys, insurers, servicers, successors and assigns and agrees and acknowledges that: (1) the information provided in this application is true and correct as of the date set forth opposite my signature and that any intentional or negligent misrepresentation of this information contained in this application may result in civil liability, including monetary damages, to any person who may suffer any loss due to reliance upon any misrepresentation that I have made on this application, and/or in criminal penalties including, but not limited to,

fine or imprisonment or both under the provisions of Title 18, United States Code, Sec. 1001, et seq.; (2) the loan requested pursuant to this application (the "Loan") will be secured by a mortgage or deed of trust on the property described herein; (3) the property will not be used for any illegal or prohibited purpose or use; (4) all statements made in this application are made for the purpose of obtaining a residential mortgage loan; (5) the property will be occupied as indicated in this application; (6) any owner or servicer of the Loan may verify or reverify any information contained in the application from any source named in this application, and Lender, its successors or assigns may retain the original and/or electronic record of the application, even if the Loan is not approved; (7) the Lender and its agents, brokers, insurers, servicers, successors, and assigns may continuously rely on the information contained in the application, and I am obligated to amend and/or supplement the information provided in this application if any of the material facts that I have represented herein should change prior to closing of the Loan; (8) in the event that my payments on the Loan become delinquent, the owner or servicer of the Loan may, in addition to any other rights and remedies that it may have relating to such delinquency, report my name and account information to one or more consumer credit reporting agencies; (9) ownership of the Loan and/or administration of the Loan account may be transferred with such notice as may be required by law; **(10) neither Lender nor its agents, brokers, insurers, servicers, successors or assigns has made any representation or warranty, express or implied, to me regarding the property or the condition or value of the property;** and (11) my transmission of this application as an "electronic record" containing my "electronic signature," as those terms are defined in applicable federal and/or state laws (excluding audio and video recordings), or my facsimile transmission of this application containing a facsimile of my signature, shall be as effective, enforceable and valid as if a paper version of this application were delivered containing my original written signature. (emphasis added).

[RR Vol. 8, Def. Ex. 31]

10. Exhibit 31, signed by Leath, provided a stated present fair market value of \$425,000.00. The loan application was signed on October 26, 2005. At trial, Leath testified that he signed the loan application. He acknowledged the value placed on the homestead as stated in the application and he agreed that his lender was allowed to rely

on the representations made in the application. [RR Vol. 3, Pg. 222, L. 20 – Pg. 224, L. 1; Pg. 224, L. 14 – 24]

11. Clyde Crum's appraisal placed a value of \$425,000.00 on the property. [RR Vol. 4, Pg. 104, L. 9-12; Vol. 8, Def. Ex. 4. Plaintiff's Ex. 6].

12. In spite of all the evidence presented to the jury, as well as Leath's testimony that he didn't know what the property's value in 2005 and relied on appraisals for the value. [RR. Vol. 4, Pg. 11, L. 9 – 16], the jury found a value in response to the question asked of it of \$421,400. The evidence was legally insufficient. It was clearly wrong and unjust.

Issue III

THE COURT ERRED IN ALLOWING THE TESTIMONY OF ANN PIPER AND ADMISSION OF HER VALUATION REPORT

1. The proceeding was filed on July 1, 2008. Discovery in the case was governed by a Level 2 discovery control plan. [CR 12] Written discovery began on November 26, 2008 when Wells Fargo served requests for production and for disclosure. [App. Tab 3]⁶ The due date of the first response to written discovery was December 29, 2008. Nine months from December 29, 2008 was September 29, 2009, which is when the discovery period ended. *Tex. R. Civ. P. 190.3(b)(1)(B)(ii)*.

2. On December 23, 2008, Leath submitted his response to Wells Fargo's requests for disclosure and requests for production. The responses to the requests for

⁶ The certificate of written discovery filed with the trial court was not part of the original clerk's record. On January 20, 2012, Wells Fargo sent a letter to the trial court clerk requesting that the record be supplemented to include the certificate of written discovery. A file copy of the certificate is included in the appendix.

disclosure listed no retained experts, and only listed plaintiff's counsel as an expert witness on attorneys' fees. [App. Tab 4]

3. Plaintiff's deadline to designate experts was 90 days before the end of the discovery period. The discovery period ended on September 29, 2009. Ninety days prior to the close of discovery was July 1, 2009. *Tex. R. Civ. P. 195.2(a)*. No discovery was conducted in the case after the discovery deadline.

4. Wells Fargo's requests for production. [App. Tab 5] requested specific documents and tangible things regarding experts and expert testimony:

- Request number 65 requested plaintiff to produce all reports of each expert which were prepared for the Plaintiffs or on behalf of Plaintiff. Plaintiff's response:

"No expert's reports except attorney fees."

- Request number 70 requested production of all notes, records, reports, memoranda, compilations of data, and letters of each person Leath would call as an expert witness in the trial of the case. Leath's response:

"None except attorney fees. Object to any request for attorney-client privileged documents."

- Request number 72 requested production of all documents evidencing or pertaining to communications with each person Leath would call as an expert witness in the trial of this case. Leath's response:

"See response to #70 above." i.e., None except attorney fees.

- Request number 73 requested production of all documents, tangible things and visual representations reviewed or relied upon by each person Leath would call as an expert witness in the trial of this case. Leath's response:

"See response to #70 above.)) i.e., None except attorney fees.

- Request number 74 requested production of all documents, tangible things and visual representations that Leath provided to each person he would call as an expert witness in the trial of this case. Leath's response:

"See response to #70 above.)) i.e., None except attorney fees.

- Request number 75 requested production of copies of the curriculum vitae of Leath's testifying experts. Leath's response:

"See attached." The only CV attached was that of plaintiff's counsel.

- Request number 76 requested production of all documents, visual representations and tangible things, including all tangible reports, physical models, compilations of data and other materials prepared by an expert or for an expert in anticipation of the expert's trial or deposition testimony. Plaintiff's response:

"See response to #70 above.)) i.e., None except attorney fees.

- Request number 77 requested production of all papers, books, tests, writings, drawings, charts, photographs, literature, or learned treatises that Leath would introduce into evidence or upon which Leath's expert(s) would base opinion testimony in the trial of the case. Leath's response:

"See response to #70 above." i.e., None except attorney fees.

- Request number 78 requested production of all models, visual aids, experiments, documents, or other writings or any item of demonstrative evidence prepared or preserved by Leath, his experts or any other person other than Leath's attorney, acting on Leath's behalf that will be exhibited to the jury or offered into evidence in the trial of the case. Leath's response:

"See response to #70 above." i.e., None except attorney fees.

5. On August 24, 2010, 419 days past the date to designate expert witnesses, Leath served supplemental discovery responses [App. Tab 6]⁷ which identified Ann Piper as his expert witness. The supplemental response merely identified Ann Piper as an expert witness and the general subject matter of her testimony. The supplement contained no report of Ann Piper and although discovery was closed, stated that Ms. Piper was available for deposition.

6. Wells Fargo's requests for production were never supplemented to include the information requested concerning Leath's experts. Yet Ann Piper's report indicates that she relied on documents and other things in making her report that had not been produced in response to Wells Fargo's requests for production. [RR Vol. 8, Plaintiff's Exhibit 1]

7. The Court's October 6, 2008 scheduling order [CR 12] required that any objection or motion to exclude or limit expert testimony due to qualification of the expert

⁷ The supplemental responses and the second supplement are captioned as "Plaintiff's Supplemental Discovery Responses" and "Plaintiff's Second Supplemental Discovery Responses," respectively. Neither specify what discovery is being supplemented.

or reliability of the opinion were to be filed no later than seven days after the close of the discovery period, or the objection was waived, except for the sanction of exclusion under rule 193.6. Wells Fargo brought its motion to strike the expert CR 13 and its re-urged motion CR 20 at a time outside the deadline for objecting because Leath did not designate his expert witness within the discovery period. Wells Fargo brought its motion and re-urged motion to strike within a reasonable time after receiving the designation and report.

8. The Court conducted a hearing on the motion to strike on December 14, 2010. [RR Vol. 2] At the hearing, the arguments for striking the witness were explained to the court. RR Vol. 2, Pg. 4, L. 11 – Pg. 9, L. 19. The Court denied the motion to strike. The Court made no express findings of good cause or lack of unfair surprise.

9. A few days after the hearing, namely December 20, 2010 [App. Tab 7] Leath provided the expert report of Ann Piper. The report was provided 537 days past the deadline to designate expert witnesses. The report was attached to Leath's second supplemental discovery responses. [App. Tab 7] A review of the report [RR Vol 8, Plaintiff's Exhibit 1] indicates that it was signed on December 14, 2010. The report was not delivered until six days later, namely via fax on December 20, 2010. Further review of the report indicates that the property that is the subject of the report and this litigation was inspected more than five months prior to the date the report was signed. Ms. Piper inspected the property for use in her report on July 9, 2010. [RR Vol 8, Plaintiff's Exhibit 1- page 4]

10. Having received the report, Wells Fargo re-urged its motion to strike and included *Daubert/Robinson* objections. [CR 20] The Court heard Wells Fargo's arguments in support of its re-urged motion immediately before trial. [RR Vol. 3, Pg. 13, L. 17 – Pg. 21, L. 16, Pg. 22, L. 4 – Pg. 24, L. 7] At the hearing the court reviewed Ann Piper's report [RR. Vol. 8, Plaintiff's Ex. 1] including Wells Fargo's *Daubert/Robinson* objections. The Court made no definitive ruling on the motion. Once Ms. Piper was called to the witness stand, Wells Fargo objected again and the court overruled the objection, allowing Ms. Piper to testify. [RR Vol. 3, Pg. 114, L. 10-13] Wells Fargo objected to entry of the report into evidence. [RR Vol. 3, Pg. 125, L. 22 – Pg. 126, L. 1]

11. The court erred in failing to exclude the testimony and report of Ann Piper and allowing her report into the evidentiary record.. The late disclosure of Ann Piper did not comply with *Tex. R. Civ. P. 193.5*, as the designation was not made *reasonably promptly after the party discovers the need for such a response*. Moreover, the only issue presented to the jury was a question on the value of the property. Accordingly, value and a valuation expert was always been an issue in the case, and the only issue. Leath's failure to designate timely and to supplement timely was inexcusable.

- **Standard of review**

12. A party who fails to respond to or supplement his response to a discovery request shall not be entitled to offer testimony of a witness having knowledge of a discoverable matter unless the trial court finds good cause sufficient to require admission or determines the other party will not be unfairly surprised or prejudiced. *Tex. R. Civ. P. 193.6 (a)*. When an objection is made to an unidentified witness, the burden to establish

good cause or lack of surprise or prejudice is on the party offering the witness. *Tex. R. Civ. P. 193.6 (b)*. The trial court has discretion to determine whether the offering party met this burden. *Dolenz v. The State Bar of Texas*, 72 S.W.3d 385, 387 (Tex.App.-Dallas 2001, no pet.). A trial court's discovery rulings are accordingly reviewed under an abuse of discretion standard. *Avary v. Bank of America, N.A.*, 72 S.W.3d 779, 787 (Tex. App.-Dallas 2002, pet. denied).

13. Rule 193.6 provides:

(a) party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:

(1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or

(2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

(b) The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence or call the witness. A finding of good cause or the lack of unfair surprise or unfair prejudice must be supported by the record.

14. At the hearing on wells Fargo's re-urged motion to strike, Leath failed to meet his burden of establishing good cause or lack of unfair prejudice with any support in the record. The Court made no express findings of good cause or lack of unfair surprise. It was error for the court to allow the testimony of Ann Piper.

15. Allowing the expert report or testimony of Ann Piper unfairly prejudiced Wells Fargo. When Ms. Piper was designated as an expert witness [App. Tab 6] in addition to discovery being closed, none of the materials required by *Tex. R. Civ. P. 194.2(f)* were provided. When she was designated, Wells Fargo was not provided with Ms. Piper's opinion. [App. Tab 6] Wells Fargo was not given the required brief summary of the basis for Ms. Piper's opinion. At the time of her disclosure and late designation, Leath failed to identify the documents, tangible things, reports, models or data compilations that were provided to, reviewed by, or prepared by or for Piper in anticipation of her testimony. From the report [RR Vol. 8, Plaintiff's Exhibit 1] it is clear that the information reviewed by Ms. Piper in July 2010 was available to be identified and disclosed. It is also clear from the report that the items to be produced under *Tex. R. Civ. P. 194.2(f)(4)* were available.

16. The probative value of the expert's opinion is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. *Tex. R. Evid. 403*. The court abused its discretion in allowing the testimony of Ann Piper on the retroactive appraisal of the realty because it was unreliable. *E.I du Pont de Nemours & Co. v. Robinson*, 923 SW.2d 549, 556 (Tex. 1995). *Tex. R. Evid. 702*'s reliability requirement focuses on the principles, research, and methodology underlying an expert's conclusions. Expert testimony is unreliable if it is not grounded in the methods and procedures of science and is no more than subjective belief or unsupported speculation *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002) ; *Robinson*, 923 S.W.2d at 556. In discharging its duty as

gatekeeper, trial courts must first determine how the reliability of particular testimony is to be assessed. The criteria for assessing relevance and reliability vary depending on the nature of the evidence *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726-727 (Tex. 1998). The Texas Supreme Court set out the following factors to guide courts in cases involving scientific evidence. *Robinson*, 923 S.W.2d at 557:

- The extent to which the theory has been or can be tested.
- The extent to which the technique relies on the subjective interpretation of the expert.
- Whether the theory has been subjected to peer review of publication.
- The technique's potential rate of error.
- Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community.
- The non-judicial uses that have been made of the theory or technique.

17. In the additional comments section of the report [RR Vol. 8 Plaintiff's Exhibit 1 (page 10)] Leath's expert indicates that she did not have comparable sales listings for August 26, 2005, when the loan closed. Yet the scope of her assignment was to provide a retrospective value of the property. The report makes no indication of what methods were used to determine the value retrospectively. The report was accordingly unreliable. Ms. Piper's theory could not be tested.

18. The report is speculative and based on the expert's own subjective interpretation. The report states that there were no listings available from 2005. Then the report states that "extended market times for closed sales indicates an oversupply of

listings.” That speculation is nothing more than Ms. Piper’s subjective interpretation of untested data and techniques. The report failed another *Robinson* determinant.

19. The report does not indicate that the theories or opinions espoused were subjected to peer review or publication.

20. Based on the fact that the report is retrospective with no real or reliable data on which to base it, its potential rate of error could not be measured. At best, the valuation opinion was the witness’s guess as to value, given in hindsight, made and based on subjective speculation. The trial court abused its discretion in allowing Ms. Piper to testify and erred in the admission of her report.

21. The report states that it was made for litigation purposes. [RR Vol. 8, Plaintiff’s Exhibit 1 (page 4)] The report expressly states that it is not to be relied upon for mortgage financing transactions, the exact reason a market analysis was needed within the context of the litigation. The report had no non-judicial use.

22. Based on the unreliability of the report and its failure to meet most of the *Robinson* factors, the report and Ms. Piper’s testimony could not meet *Tex. R. Evid. 702*’s requirement that her opinion assist the jury in understanding the evidence or to determine a fact issue. There is simply too great an analytical gap between the data and the opinion proffered. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d at 726-27, quoting *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 519, 139 L.Ed.2d 508 (1997).

ISSUE IV

THE COURT ERRED IN ITS AWARD OF ATTORNEY'S FEES

1. According to *Tex. Civ. Prac. & Rem. Code* §37.009, the court can award attorneys' fees as are equitable and just. In its judgment, the Court awarded fees only to Leath and no fees to Well Fargo. The award was not equitable and just.

- **Standard of review**

2. The court reviews the award of attorney's fees under the declaratory judgments act under an abuse of discretion standard. There are four limitations on a trial court's discretion in awarding attorney's fees under the act:

- The fees must be reasonable – a fact issue;
- The fees must be necessary – a fact issue;
- The fees must be equitable – a matter of equity; and
- The fees must be just – a matter of equity

Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998).

3. At trial, the parties stipulated to what would be reasonable and necessary fees. [R Vol. 4 Pg. 127, L. 6-17] The judgment awarded fees to Leath and none to Wells Fargo. The Court awarded attorney's fees to Leath without any guiding rule or principle. The Court's award appears arbitrary and unreasonable under the circumstances of the case. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). The record is silent as to any guiding rule or principal for the court's award of attorney's fees to Leath. It can accordingly only be assumed that Leath was solely award attorney's fees based on the Court's perception that Leath was the prevailing party.

4. A prevailing party is one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention. *F.D.I.C. v. Graham*, 882 S.W.2d 890, 900 (Tex.App.--Houston [14th Dist.] 1994, no writ) (quoting *Criton Corp. v. the Highlands Ins. Co.*, 809 S.W.2d 355, 357 (Tex.App.--Houston [14th Dist.] 1991, writ denied)); *Weng Enterprises v. Embassy World Travel*, 837 S.W.2d 217, 222-23 (Tex.App.--Houston [1st Dist.] 1992, no writ). A prevailing party in a declaratory judgment action is not entitled to attorney's fees simply as a matter of law; entitlement depends upon what is equitable and just, and the trial court's power is discretionary in that respect. *Marion v. Davis*, 106 S.W.3d 860, 868 (Tex. App. Dallas 2003).

5. Wells Fargo prevailed on the main issue – valuation of the realty. Leath's pleading requested a declaratory judgment that the loan amount exceeded 80% of the value of the property. [CR 7] The question presented to the jury asked the jury that single question. Should the Court consider the testimony of Ms. Piper, the value Leath was seeking for the verdict was \$268,000.00. Had the jury found \$268,000 as the value, the loan would have exceeded the value of the property by 27%. Instead, the jury found the value of the property to be \$421,400.00, such that the \$340,000 loan exceeded the 80% maximum by a mere .6%. Based solely on the single issue verdict, Wells Fargo was the prevailing party.

6. Even assuming Wells Fargo was not the prevailing party, nonprevailing parties are allowed to recover fees under the declaratory judgments act. *See Tex. Civ. Prac. & Rem. Code* § 37.009 ("In any proceeding under this chapter, the court may

award costs and reasonable and necessary attorney's fees as are equitable and just."); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637, (Tex. 1996). Awarding attorney's fees in declaratory judgment actions is clearly within the trial court's discretion and is not dependent on a finding that a party substantially prevailed; *Scottsdale Ins. Co. v. Travis*, 68 S.W.3d 72, 77 (Tex. App.--Dallas 2001, pet. denied). It is not an abuse of discretion to award attorney's fees to a nonprevailing party if that is equitable and just under the circumstances *e. g.*, *In re Estate of Bean*, 206 S.W.3d 749, 763-64 (Tex. App.--Texarkana 2006, pet. denied); *Tanglewood Homes Ass'n, Inc. v. Henke*, 728 S.W.2d 39, 45 (Tex. App.--Houston [1st Dist.] 1987, ref. n.r.e.). Under the circumstances of this case and the narrow issue, Wells Fargo should have been awarded attorney's fees.

7. Should the Court reverse the trial court's judgment, an award of attorney's fees to Leath may no longer be equitable and just. Accordingly, if this Court reverses the judgment, this Court is vested with the power to remand the issue of equitable and just attorney's fees to the trial court for reconsideration. *Scottsdale Ins. Co. v. Travis*, 68 S.W.3d 72 (Tex. App. Dallas 2001 pet. denied). *Biopolymer Eng'g, Inc. v. ImmuDyne, Inc.*, 304 S.W.3d 429, 445 (Tex. App. San Antonio 2009 no pet.). Should this Court reverse the decision of the trial Court, yet defer to the discretion of the trial Court in awarding attorney's fees, Wells Fargo requests remand to the trial Court for further review and consideration of its attorney's fee award.

ISSUE V

IN THE ALTERNATIVE TO THE FOREGOING ARGUMENTS, WELLS FARGO WAS ENTITLED TO EQUITABLE SUBROGATION FOR ADVANCES MADE AT THE REQUEST OF LEATH TO PAY HIS EXISTING LIEN

1. Until the jury resolved the factual dispute as to the value of the property at the time of the loan, whether the loan failed to comply with the constitutional requirements for home equity loans was in dispute. The Court accordingly erred in rendering a judgment that denied Wells Fargo its right to assert its entitlement to equitable subrogation for the credit extended to Leath through the October 26, 2005 loan.

2. If Leath's home equity loan failed to comply with any of the requirements of Tex. Const. art. XVI § 50(a)(6), Wells Fargo was still entitled to an equitable lien on the homestead based upon the doctrine of equitable subrogation. At the request of Leath, loan proceeds in the amount of \$279,581.74 were advanced to pay Leath's existing lien on the homestead, which was a valid lien. [RR Vol. 8 Def. Exhibit 26, Plaintiff's Exhibit 7; Vol. 3, Pg. 218, L. 21 – Pg. 219, L. 21] In signing its judgment forfeiting the principal and interest and invalidating the lien, the Court erroneously barred application of the doctrine of equitable subrogation to provide Wells Fargo Bank with an equitable lien for these advances made to Leath. The result of the Court's judgment resulted in an unconscionable windfall to Leath.

3. *Texas Constitution art. XVI § 50(a)* authorizes numerous separate and independent bases for a lender to obtain a valid lien on the homestead:

(a)(1) the purchase money thereof, or a part of such purchase money;

(a)(2) the taxes due thereon;

(a)(3) an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding;

(a)(4) the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner;

(a)(5) work and material used in constructing new improvements thereon, if contracted for in writing, or work and material used to repair or renovate existing improvements there on if: ...;

(a)(6) an extension of credit for a home equity loan;

(a)(7) a reverse mortgage; and

(a)(8) the conversion and refinance of a personal property lien secured by a manufactured home to a lien on real property.

Tex. Const. art. XVI, § 50(a).

4. If the loan, the extension of credit to Leath failed to comply with the requirements for an "extension of credit" under § 50(a)(6), which is only one of eight different constitutional grounds upon which a valid homestead lien may be based, then Wells Fargo's lien is still separately and independently valid under Tex. Const. art. XVI § 50(a)(1) to the extent of the \$279,583.74 purchase money indebtedness on the homestead.

LaSalle National Bank v. White, 246 S.W.3d 616 (Tex. 2007).

5. The doctrine of equitable subrogation has been used repeatedly in Texas to sustain lien claims against a homestead that otherwise fail to comply with constitutional requirements. In reliance on the doctrine, the Texas Supreme Court has held that a lender can recover monies used to pay off preexisting purchase money indebtedness. *Tex. Land*

& Loan Co. v. Blalock, 13 S.W. 12 (Tex. 1890). The doctrine has even been applied by the Texas Supreme Court to find equitable subrogation to support a homestead lien when the lien is not one of the types cited above. *Benchmark Bank v. Crowder*, 919 S.W.2d 657 (Tex. 1996) (federal payroll tax lien).

6. The equitable doctrine of subrogation holds that where a person, other than the principal obligor, pays a mortgage indebtedness on land in which he has an interest, equity will substitute him in place of the original mortgagee, and vest that mortgagee's rights in him. *Richards v. Suckle*, 871 S.W.2d 239, 241 (Tex. App.-Houston [14th Dist.] 1994, no writ).

7. Tex. Const. art. XVI § 50(e) provides as follows:

A refinance of debt secured by a homestead and described by any subsection under Subsections (a)(1)-(a)(5) that includes the advance of additional funds may not be secured by a valid lien against the homestead unless:

(1) the refinance of the debt is an extension of credit described by Subsection (a)(6) of this section; or

(2) the advance of all the additional funds is for reasonable costs necessary to refinance such debt or for a purpose described by Subsection (a)(2), (a)(3), or (a)(5) of this section

Tex. Const. art. XVI, § 50(e).

8. The provision simply states that if a lender is to refinance an existing constitutional lien on the homestead and lend extra money to the borrower, the refinance transaction must be restructured as a home equity loan under Tex. Const. art. XVI § 50(a)(6). The provision says nothing about the doctrine of equitable subrogation being invalidated.

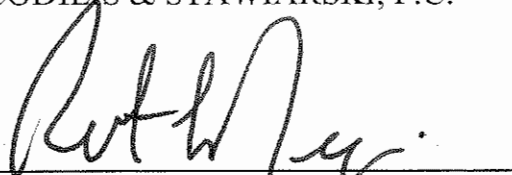
9. Tex. Const. art. XVI section 50(a)(6)(Q)(x) only states that the lender "shall forfeit all principal and interest of the extension of credit." The language above does not speak to the completely different obligation or debt that arises in law upon the remedy of unjust enrichment underling the equitable subrogation remedy. It is this equitable obligation or debt -- founded on the doctrine of unjust enrichment -- that supports the remedial lien conferred by equitable subrogation. The contractual debt evidenced by the "extension of credit" is a legally different and distinct obligation; it alone is addressed by the forfeiture language of section 50(a)(6)(Q)(x). The equitable obligation implied in law to avoid unjust enrichment is beyond the reach of section 50(a)(6)(Q)(x). *First Nat'l Bank of Kerville v. O'dell*, 856 S.W.2d 410 (Tex. 1993).

10. Had the Court signed a judgment limited to the issue of valuation – the only issue presented to the jury, Wells Fargo would have had the opportunity, in applying the judgment to assert its right to equitable subrogation, as well as the notice and opportunity to cure outlined in this brief. Wells Fargo never got the chance. Application of the doctrine of equitable subrogation will not allow circumvention of the Constitution and leave no remedy for the borrower. Even with application of the doctrine of equitable subrogation Wells Fargo is still left with a complete loss of the cash advance of \$51,978.31 that Leath received from the loan. [RR Vol. 3, Pg. 221, 12 – 17]

CONCLUSION AND PRAYER

The Court's rendition of a judgment invalidating the lien and forfeiting the principal and interest of the loan was error. Without express findings from the jury that Leath gave the notices to cure, the Court's judgment should have stopped after its finding of value based on the verdict. Such a judgment would have resolved the dispute between the parties that the loan was an invalid loan under the Texas Constitution. Until the jury ruled, there existed nothing more than a disputed issue of fact. The Court's judgment went too far. For the reasons stated in this brief, Wells Fargo asks the Court to reverse the judgment and hold that the evidence was insufficient to support the jury's finding that the value of the house was less than \$425,000.00. Wells Fargo requests that the Court reverse the judgment of the trial Court and render the judgment that the Court should have signed. Upon reversing and rendering, Wells Fargo prays that this Court remand the case to the trial Court for a determination of whether its award of attorney's fees solely to Leath is equitable and just.

Respectfully submitted,
CODILIS & STAWIARSKI, P.C.



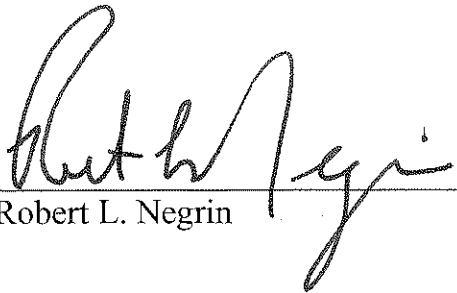
Robert L. Negrin: SBN 14865550
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650 N. Sam Houston Parkway East,
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Houston, Texas 77060
Telephone: 281-925-5200
Facsimile: 281-925-5300
Attorneys for Appellant, Wells Fargo Bank,

**NA as Trustee for Option One Mortgage Loan
Trust 2006-1 Asset-Backed Certificates, Series
2006-1**

Certificate of Service

I hereby certify that a copy of the foregoing Brief of Appellant was forwarded to Appellee by certified mail, return receipt requested on January 27, 2012.

Wendel A. Withrow
1120 Metrocrest, Ste. 200
Carrollton, TX 75006



Robert L. Negrin

NO.: 05-11-01425-CV

IN THE
COURT OF APPEALS
FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS, TEXAS

WELLS FARGO BANK, N.A. AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN
TRUST 2006-1 ASSET-BACKED CERTIFICATES, SERIES 2006-1
APPELLANT

V.

LONZIE LEATH
APPELLEE

On Appeal from the 95th Dallas County District Court
Dallas County, Texas
Trial Court No. DC-08-07290

APPENDIX – APPELLANT’S BRIEF

Tab 1 Judgment

Tab 2 Jury Charge and Verdict

Tab 3 Certificate of Written Discovery

Tab 4 Plaintiff's Responses to Defendant Wells Fargo's Request for Production

Tab 5 Wells Fargo's Requests for Production to Plaintiff

Tab 6 Plaintiff's Supplemental Discovery Responses

Tab 7 Plaintiff's Second Supplemental Discovery Responses

Tab 8 Plaintiff's Draft Motion and Initial Proposed Final Judgment

Tab 9 14th Court of Appeals opinion in *Wilson v. Ames Capital Corporation*

TAB 1

440D
01-55



NO. DC-08-07290-D

LONZIE C. LEATH

IN THE 95TH

V.

JUDICIAL DISTRICT COURT

WELLS FARGO BANK, N.A. AS TRUSTEE

OF DALLAS COUNTY, TEXAS

FINAL JUDGMENT

On the 9th day of May, 2011, the above-styled and numbered cause was called for Jury trial. Plaintiff, Lonzie Leath appeared in person and through his attorney of record. Defendant, Wells Fargo Bank, N.A. as Trustee for Option One Mortgage Loan Trust 2006-1 Asset-Backed Certificates, Series 2006-1 appeared by corporate representative and attorney of record. All parties announced ready. A jury trial was requested, and one question of fact was submitted by the Court to the Jury. After due deliberation, the Jury returned its verdict as follows: What was the fair market value of 936 Hickory Knob Circle, Cedar Hill, Dallas County, Texas, on October 26, 2005 - Answer: \$421,400.00.

The Court, having considered the pleadings, evidence and official records on file in this cause, is of the opinion that Judgment should be rendered for Plaintiff. The Court finds and hereby declares that the home equity loan made in the amount of \$340,000.00 on October 26, 2005 is greater than 80% of the Fair Market Value on October 26, 2005 in violation of the Texas Constitution and that Defendant did not cure its failure to comply within 60 days of being notified of this violation.

It is therefore ORDERED, ADJUDGED, DECREED, and DECLARED

FINAL JUDGMENT

PAGE 1

that Lonzie Leath, Plaintiff, recover from Defendant, Wells Fargo Bank, N.A. as Trustee for Option One Mortgage Loan Trust 2006-1 Asset-Backed Certificates, Series 2006-1, Judgment as follows:

1. The Deed of Trust lien dated October 26, 2005 on the Plaintiff's homestead, 936 Hickory Knob Circle, Cedar Hill, Texas 75104, is hereby voided and of no effect on said property at 936 Hickory Knob Circle, Cedar Hill, Texas 75104.
2. The Principal and Interest on the Home Equity Adjustable Rate Note dated October 26, 2005 is hereby forfeited.
3. \$15,000.00 for attorney fees up through the trial of this cause.
4. \$2,500.00 for attorney fees if appealed to the Court of Appeals.
5. \$5,000.00 if appealed to the Texas Supreme Court.
6. Costs for Court.

FURTHER, it is ordered that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

All relief not expressly granted herein is denied.

SIGNED this 8th day of July, 2011.



JUDGE PRESIDING

TAB 2

ORIGINAL

FILED

No. DC-08-07290-D

2011 MAY 11 AM 9:10
IN THE DISTRICT COURT
GAIL M. SIMMONS
DISTRICT CLERK
DALLAS CO. TEXAS
TANNY CHAMPION
DEPUTY
DALLAS COUNTY, TEXAS

LONZIE LEATH,

Plaintiff,

vs.

WELLS FARGO BANK, NA,
AS TRUSTEE,

Defendant.

§
§
§
§
§
§
§
§
§

95TH JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

After the closing arguments of the attorneys, you will go to the jury room to decide the case, answer the questions that are included herein, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason.

Any notes that you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the Court's bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that no one can read what you wrote.

I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. Base your answer to the question presented only on the evidence admitted in Court and on the law that I have given you in these instructions and the question. Do not consider or discuss any evidence that was not admitted in the courtroom. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of the instructions and definitions I have given you in this Charge.

4. If my instructions use a word in a way that is different from its ordinary meaning, you must use the meaning I have given you, which is a proper legal definition.

5. The question presented to you and your answer to it are important. No one should say they are not important.

6. Your answer to the question must be based on a preponderance of the evidence. "Preponderance of the evidence" means the greater weight of credible evidence admitted in this case. A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the question and then just answer the question to match your decision. Answer the question carefully without considering who will win. Do not discuss or consider the effect your answer will have.

8. Do not answer the question by drawing straws or by any method of chance. The question you are given to answer asks you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

9. Unless otherwise instructed, the answer to the question must be based on the decision of at least 10 of the 12 jurors. Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

QUESTION 1

What was the fair market value of 936 Hickory Knob Circle, Cedar Hill, Dallas County, Texas, on October 26, 2005?

Answer in dollars and cents:

Answer: 421,400⁰⁰

Presiding Juror:

After you retire to the jury room to answer the question I have put to you, the first thing you must do is choose a presiding juror.

It is the duty of the presiding juror –

1. to have this complete Charge read aloud, if it will be helpful to your deliberations,
2. to preside during your deliberations, meaning to manage the discussions, and see that you follow these instructions,
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to me,
4. to write down the answer to the question,
5. to get the signature(s) for the verdict certificate, and
6. to notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror?

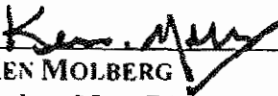
Instructions for Signing the Verdict Certificate:

1. Unless otherwise instructed, you may answer the question on a vote of 10 jurors.
2. If 10 jurors agree on the answer, those 10 jurors sign the verdict. If 11 jurors agree on the answer, those 11 jurors sign the verdict. If all 12 of you agree on the answer, you are unanimous and only the presiding juror signs the verdict.
3. All jurors should deliberate on the question.

Do you understand these instructions?

When you have answered the question you are required to answer under the instructions I have given you and your presiding juror has placed your answer in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff that you have reached a verdict, and then you will return into Court with your verdict.

Signed this 11th day of May, 2011.


KEN MOLBERG
Judge, 95TH District Court

CERTIFICATE

Check one:

1. _____ Our verdict is unanimous. All 12 of us have agreed to the answer. The presiding juror has signed the certificate for all 12 of us.

Signature of Presiding Juror

Printed Name of Presiding Juror

2. _____ Our verdict is not unanimous. Eleven of us have agreed to the answer and have signed the certificate below.


3. Our verdict is not unanimous. Ten of us have agreed to the answer and have signed the certificate below.

Jurors' Signatures

Jurors' Printed Names



Andrew C. Ivey



Daphne J. Bass

Malia Rodriguez

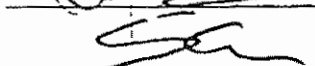
Malia Rodriguez

Damarques Davis

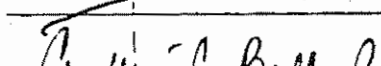
Damarques Davis



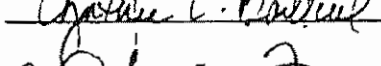
Atul Sikha



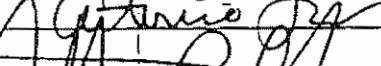
SARA KUNZMANN



CYNTHIA C. BAILLEUL



Antonio Luz



Jonathan Collins



AKERIA LOWE

TAB 3

CAUSE NO. 08-07290

LONZIE LEATH § IN THE DISTRICT COURT
 §
V. § DALLAS COUNTY, TEXAS
 §
WELLS FARGO BANK, NA §
AS TRUSTEE § 95TH JUDICIAL DISTRICT

DEFENDANT’S CERTIFICATE OF DISCOVERY

TO: Plaintiff, LONZIE LEATH, by and through his attorney of record, Wendel A. Withrow
Canada Withrow, LLP, 1120 Metrocrest, Ste. 200, Carrollton, TX 75006.

Pursuant to the Texas Rules of Civil Procedure, DEFENDANT WELLS FARGO BANK,
NA AS TRUSTEE, files this its Certificate of Written Discovery regarding:

1. Defendant’s Request for Disclosure to Plaintiffs; and
2. Defendant’s Request for Production to Plaintiffs.

Respectfully submitted,
Codilis & Stawiarski, P.C.

By: /s/ Robert Negrin
Robert L. Negrin, TBN: 14865550
650 N. Sam Houston Parkway East, Ste. 450
Houston, Texas 77060
(281) 925-5200 - Phone
(281) 925-5300 – Fax
Attorney for
DEFENDANT WELLS FARGO BANK, NA AS
TRUSTEE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent as indicated to the following parties on this 26th day of November, 2008 via facsimile to:

Via Facsimile 972/417-0685

Wendel A. Withrow

Canada Withrow, LLP

1120 Metrocrest, Ste. 200

Carrollton, TX 75006

/s/ Robert Negrin

TAB 4

NO. 08-07290

LONZIE LEATH) IN THE DISTRICT COURT
)
Plaintiff,)
)
vs.) 95TH JUDICIAL DISTRICT
)
WELLS FARGO BANK, NA)
AS TRUSTEE)
)
Defendant) DALLAS COUNTY, TEXAS

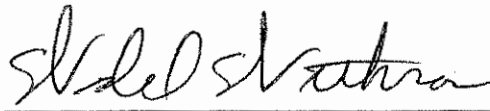
PLAINTIFF'S RESPONSES TO DEFENDANT
WELLS FARGO BANK, NA AS TRUSTEE
REQUEST FOR PRODUCTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, WENDEL A. WITHROW, Attorney for Lonzie Leath, Plaintiff, and pursuant to the Texas Rules of Civil Procedure, files the following Responses to Defendant Wells Fargo Bank, NA as Trustee's Request for Production.

Respectfully submitted,

LAW OFFICE OF WENDEL A. WITHROW

By: 

WENDEL A. WITHROW
State Bar No. 21830800
1120 Metrocrest, Suite 200
Carrollton, Texas 75006
Phone: 972/416-2500
Fax: 972/417-0685

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing documents have been forwarded to all counsel of record in accordance with the Texas Rules of Civil Procedure on this 23 day of December, 2008.



WENDEL A. WITHROW

PLAINTIFF'S RESPONSES TO DEFENDANT
WELLS FARGO BANK, NA AS TRUSTEE
REQUEST FOR PRODUCTION

1. A true and correct copy(ies) of any and all cancelled checks, money orders, cashier's checks, paid receipts evidencing attorney's fee paid to date as a result of this lawsuit.

RESPONSE: Will supplement with itemized legal bills.

2. A true and correct copy(ies) of any and all outstanding invoices/bills/statements regarding attorney fees to be paid as a result of this lawsuit.

RESPONSE: See Response to No. 1 above.

3. Financial statements prepared by or for you since October 1, 2005, 2006 and 2007, 2008, pertaining to any property in which you have or had an interest, regardless of whether the property was titled to you.

RESPONSE: Objection as outside the scope of discovery. Plaintiff's financial statements, assets, insurance, tax information, trust agreements, homeowner's association dues, are not in issue in this litigation. There is no Judgment against Plaintiff.

4. All documents reflecting conveyances, donations, gifts, transfers, and/or sales of property with a cost or value in excess of \$5,000.00 in which you have or had an interest in since October 1, 2005.

RESPONSE: See Response to #3 above.

5. All documents of any financial institution where you have or had an interest or deposited checks or money(ies) received from any person or entity during the time period from October 1, 2005 through and including October 1, 2008, including, but not limited to:

All monthly or other periodic checking account statements;
All monthly or periodic savings account statements;
All monthly or other periodic credit union statements;
All cancelled checks, negotiable orders of withdrawal, deposit slips, receipts, deposit items, transit items, or other documents from all financial institutions;
All monthly or other periodic 401(k) account statements;
All monthly or other periodic IRA account statements;
All monthly or other periodic certificate of deposit account statements;
All monthly or other periodic account statements regarding stocks, bonds, mutual funds.

RESPONSE: See Response to #3 above.

9. All property insurance declaration page(s) from property insurance policies pertaining to the real property made the basis of this litigation.

RESPONSE: See Response to #3 above.

10. Correspondence and/or notices you have sent or received from the Internal Revenue Service.

RESPONSE: See Response to #3 above.

11. True and correct copies of any and all documents pertaining to any trust in which you are or were the settler, trustee, or beneficiary, including, but not limited to, trust agreements, list of assets held by each trust, trust tax returns, bank records and correspondence.

RESPONSE: See Response to #3 above.

12. True and correct copies of any and all statements/invoices/receipts indicating paid property taxes.

RESPONSE: See Response to #3 above.

14. True and correct copies of any and all statements/
invoices/receipts indicating unpaid property taxes.

RESPONSE: See Response to #3 above.

15. True and correct copies of any and all homeowner's association
fees indicating they have been paid.

RESPONSE: See Response to #3 above.

16. True and correct copies of any and all homeowner's association
fees which indicate they have not been paid.

RESPONSE: See Response to #3 above.

17. True and correct copies of any and all statements/invoices/
receipts indicating paid school district taxes.

RESPONSE: See Response to #3 above.

18. True and correct copies of any and all
statements/invoices/receipts indicating unpaid school district
taxes.

RESPONSE: See Response to #3 above.

19. True and correct copies of any and all documents evidencing
any loan or contract between you and **WELLS FARGO BANK, NA AS
TRUSTEE** pertaining to the property made the basis of this
lawsuit.

RESPONSE: See attached.

20. True and correct copies of any and all documents relating to any assignment or transfer of loan or contract to you relating to the property made the basis of this lawsuit.

RESPONSE: It is believed Defendant has this document.

21. True and correct copies of any and all documents which evidence any lien you have or had on the property made the basis of this lawsuit.

RESPONSE: See Response to #3 above.

22. True and correct copies of any and all documents which evidence the appointment of any trustee to act on your behalf or for your benefit in any deed of trust pertaining to the property made the basis of this lawsuit.

RESPONSE: See attached.

23. True and correct copies of any and all documents/correspondence that you have sent to **WELLS FARGO BANK, NA AS TRUSTEE.**

RESPONSE: See attached.

24. True and correct copies of any and all documents/correspondence that you have received from **WELLS FARGO BANK, NA AS TRUSTEE.**

RESPONSE: See attached.

25. True and correct copies of any and all documents/correspondence, including telephone notes, e-mails, memos, letters, reports, etc. pertaining to the property made

the subject of this lawsuit or any indebtedness on said property.

RESPONSE: See attached.

26. True and correct copies of any and all documents pertaining to your purchase of the property made the basis of this lawsuit.

RESPONSE: See attached.

27. True and correct copies of any and all documents pertaining to the re-financing of the property made the basis of this lawsuit.

RESPONSE: See attached.

28. True and correct copies of any and all documents pertaining to any other lien on the property made the basis of this lawsuit.

RESPONSE: See Response to #3 above.

29. True and correct copies of any and all documents regarding the note made by **LONZIE LEATH** and payable to Option One Mortgage.

RESPONSE: See attached.

30. True and correct copies of the Deed of Trust securing the note made by **LONZIE LEATH** and payable to Option One Mortgage.

RESPONSE: See attached.

31. True and correct copies of any and all documents that you contend contain or constitute evidence of an agreement between

you and **WELLS FARGO BANK, NA AS TRUSTEE** concerning the default and/or foreclosure made the basis of this lawsuit.

RESPONSE: See attached.

32. True and correct copies of any and all documents that you contend contain or constitute evidence of an agreement between you and Codilis & Stawiarski, P.C. concerning the default and/or foreclosure made the basis of this lawsuit.

RESPONSE: None.

33. True and correct copies of any and all documents, billing statements, invoices, time slips or other documents evidencing the amount of time and/or money charged for services rendered in connection with this lawsuit or your claims made the basis of your request for attorney fees as set out in your pleadings.

RESPONSE: See Response to #1 above.

34. True and correct copies of any and all documents/agreements (written or verbal) you have or had with **WELLS FARGO BANK, NA AS TRUSTEE** concerning the default on the note and/or lien the subject to the foreclosure made the basis of this lawsuit.

RESPONSE: See attached for any written documents.

35. True and correct copies of any and all documents/agreements (written or verbal) you have or had with Codilis & Stawiarski, P.C. concerning the default on the note and/or lien the subject of the foreclosure made the basis of this lawsuit.

RESPONSE: None.

36. A copy, with privileged information redacted, of any information which otherwise evidences that amount of attorneys' fees incurred by you in that matter.

RESPONSE: See Response to #1 above.

37. A copy of any letters which you believe supports your claims in this lawsuit.

RESPONSE: Attached.

38. To the extent you were previously involved in any civil litigation, please produce a copy of the most recent live pleading in such lawsuit.

RESPONSE: Object as outside the scope of discovery.

39. a copy of any and all settlement agreements, releases, checks, wire transfers, letter agreements, Rule 11 Agreements, money orders, debit cards, annuities or other documents indicating that **WELLS FARGO BANK, NA AS TRUSTEE** or anyone else has settled or compromised any claim which has been asserted, or could have been asserted in this lawsuit or the lawsuit related to the claims at issue in this litigation.

RESPONSE: None.

40. To the extent you have communicated with **WELLS FARGO BANK, NA AS TRUSTEE**, its employees and/or agents, in writing, copy of any letters memoranda or other documents evidencing each and every conversation, meeting and/or communication that yo have had with **WELLS FARGO BANK, NA AS TRUSTEE**, it agents, attorneys and/or employees in this matter.

RESPONSE: Attached.

41. To the extent you have communicated with anyone else regarding this matter, including their employees and/or agents, in writing, produce a copy of any letters, memoranda or other documents evidencing each and every conversation, meeting and/or communication that you have had with that entity, person and/or anyone else, including their agents, attorneys and/or employees regarding this matter.

RESPONSE: None.

42. All trial exhibits you plan to offer at trial in this matter.

RESPONSE: Attached or will be supplemented prior to trial.

43. Copies of all documents evidencing communications with other people or entities regarding the facts in dispute and/or the loan(s) in dispute.

RESPONSE: None.

44. A copy of every insurance policy, other than automobile insurance) which identifies you as the insureds or loss payees.

RESPONSE: See Response to #3 above.

45. All documents concerning any investigation or review by you and by anyone else of the matters alleged in Plaintiffs' petition insofar as the investigation was conducted prior to you anticipating litigation. If you claim privilege regarding this documentation, then please produce a privilege log in the place of this documentation identifying the privileged documents in a sufficient manner to allow the court to conduct an *in camera* review of this document(s).

RESPONSE: None.

46. Copies of all documents between you and J. Beebe Construction Services and General Contractor or any other contractor that performed repair, renovation or any other work at your house on or after September 3, 2004.

RESPONSE: Will supplement.

47. Copies of all documents evidencing your knowledge of the improvements, repairs, and renovations done to the house.

RESPONSE: Will supplement.

48. Copies of all documents evidencing the present value of the improvements as well as all documents evidencing the value of the improvements both on or about the date they were done and today's date.

RESPONSE: Will supplement.

49. Copies of all documents quantifying your claim of economic damages as a result of the matters made the basis of this lawsuit.

RESPONSE: Will supplement on attorney fees or other economic damages. Plaintiff's damages are described in Plaintiffs' Original Petition and set by Texas Law.

50. Copies of all documents quantifying your claim of producing damages as a result of the matters made the basis of this lawsuit.

RESPONSE: See Response to #49 above.

51. Copies of all documents quantifying your claim of proximately caused damages as a result of the matters made the basis of this lawsuit.

RESPONSE: See Response to #49 above.

52. Copies of all documents quantifying your claim of consequential damages as a result of the matters made the basis of this lawsuit.

RESPONSE: See Response to #49 above.

53. Copies of all calculations upon which you or your experts will rely to show that the promissory note contains varying late charges on principal and interest.

RESPONSE: Will supplement on usury calculations.

54. Copies of all documents quantifying your claim for damages for conversion and cloud of title impermissibly imposed upon the Plaintiffs realty equal to the amount of its value as a result of the matters made the basis of this lawsuit.

RESPONSE: Plaintiff objects to this Request as outside the scope of Plaintiffs' Petition. Subject to this objection: No Responsive Documents.

55. Copies of all documents quantifying your claim of statutory damages allowed by State and Federal law as a result of the matters made the basis of this lawsuit.

RESPONSE: See Responses to #53 and #49 above.

56. Copies of all documents quantifying your claim for compensation for all unlawful or improper charges made by the Defendants as a result of the matters made the basis of this lawsuit.

RESPONSE: See Responses to #53 and #49 above.

57. Copies of all documents evidencing the alleged unlawful or improper charges made by the Defendants as a result of the matters made the basis of this lawsuit.

RESPONSE: See attached loan documents for usurious charges.

58. A copy of any and all brochures, warranties, representation, solicitations and/or any other documents provided by **WELLS FARGO BANK, NA AS TRUSTEE** in this lawsuit in connection with the loan made the basis of this lawsuit.

RESPONSE: Will supplement, if any.

59. Copies of any and all cancelled checks, vouchers, money orders and any other documents demonstrating that you, or anyone else, have paid money on the Note made the basis of this lawsuit.

RESPONSE: Will supplement. Defendant has the record of payments.

60. Copies of any and all insurance covering the house in dispute in this lawsuit for the last 3 years.

RESPONSE: Objection. Outside the scope of Plaintiff's pleadings.

61. A copy of all documents evidencing all of your correspondence exchanged by and between you and any other party regarding the loan in dispute.

RESPONSE: See attached.

62. A copy of all documents evidencing all of your correspondence exchanged by and between you and any other party regarding the loan in dispute.

RESPONSE: See attached.

63. True and correct copies of any and all documents/agreements you have or had with **WELLS FARGO BANK, NA AS TRUSTEE** concerning the default on the note and/or lien made the basis of this lawsuit.

RESPONSE: See attached.

64. True and correct copy(ies) of any and all documents which you plan to rely on at time of trial that show the total amount of attorney's fees you are seeking from **WELLS FARGO BANK, NA AS TRUSTEE**.

RESPONSE: See Responses to #1 and #2 above.

65. All reports of each expert which were prepared for the Plaintiffs or on behalf of Plaintiffs.

RESPONSE: No expert's reports except attorney fees.

66. Copies of all documents evidencing that either or both of you have been arrested and/or convicted for any felonies or misdemeanors for conduct involving moral turpitude within the past 10 years.

RESPONSE: None.

67. Copies of any and all statements previously made by the Plaintiffs concerning the subject matter of this lawsuit, including any written statement signed or otherwise adopted or approved by the Plaintiffs hereto and any stenographic, mechanical, electrical or other type of recording or any transcription containing or setting forth statements by Plaintiffs.

RESPONSE: Correspondence attached.

68. Copies of any statements given by other parties which relate to this case.

RESPONSE: Correspondence attached.

69. Any and all settlement, contributions and/or indemnity agreements, hold harmless agreements, "Mary Carter" agreements, releases, deals or understandings of any kind between you and any individual or entity if the agreement or understanding pertains to or bears on this lawsuit.

RESPONSE: None.

70. All notes, records, reports, memoranda, compilations of data, and letters of each person you will call as an expert witness in the trial of this case.

RESPONSE: None except attorney fees. Object to any request for attorney-client privileged documents.

71. All documents containing any consulting expert's opinions or impressions which have been reviewed by any of your testifying experts.

RESPONSE: No consulting expert.

72. All documents evidencing or pertaining to communications with each person you will call as an expert witness in the trial of this case.

RESPONSE: See Response to #70 above.

73. All documents, tangible things and visual representations reviewed or relied upon by each person you will call as an expert witness in the trial of this case.

RESPONSE: See Response to #70 above.

74. All documents, tangible things and visual representations that you have provided to each person you will call as an expert witness in the trial of this case.

RESPONSE: See Response to #70 above.

75. Copies of the curriculum vitae of your testifying experts.

RESPONSE: See attached.

76. All documents, visual representations and tangible things, including all tangible reports, physical models, compilations of data and other materials prepared by an expert or for an expert in anticipation of the expert's trial or deposition testimony.

RESPONSE: See Response to #70 above.

77. All papers, books, tests, writings, drawings, charts, photographs, literature, or learned treatises which you will introduce into evidence or upon your expert(s) will base opinion testimony in the trial of this case.

RESPONSE: See Response to #70 above.

78. All models, visual aids, experiments, documents, or other writings or any item of demonstrative evidence prepared or preserved by you, your experts or any other persons other than your attorney, acting on your behalf that will be exhibited to

the jury or offered into evidence in the trial of this lawsuit.

RESPONSE: See Response to #70 above.

LONZIE C. LEATH

936 Hickory Knob Circle ♦ Cedar Hill, Texas 75104

(972) 291-3485 ♦ Fax: (972) 293-7651

October 8, 2005

H&R Block
Customer Relations Dept.
Tel: 888-749-2400
Fax: 949-790-8505
Attn: Andrew Liu, ext. 2030

Re: Requested Information and Documents.

Dear Mr. Liu:

Consistent with our recent conversations regarding the property tax info, appraisal, release of liens and damage repair status, please find the following. My apology for the delay.

* On October 6, Ms. Yellow-wings, said that Arnold's Appraisal Service had done a drive-by appraisal that came out to be \$414,500.00. I advised, her that Crum Appraisal said that they would forward their appraisal to you guys in a few weeks.

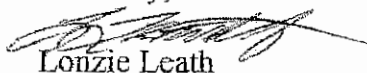
* Attached, is a copy of the Dallas County Appraisal District 2005 appraised value.

* On or about September 26, I faxed copies of the release of lien documents to Ms. Yellow-wings. Please contact her at 888-749-2400 ext. 2002.

* As Mentioned, to mitigate the roof leak damage I made partial repairs. Regarding the floor installation damage, Direct Buy said that they were going to make the repairs. If the repairs are not completed by the end of this year, I will file a property tax protest to get a reduction in my taxes.

Please do not hesitate to contact me if you have any questions.

Sincerely,


Lonzie Leath

FAX COVER SHEET

LONZIE C. LEATH

936 Hickory Knob Circle ♦ Cedar Hill, Texas 75104

(972) 291-3485 ♦ Fax: (972) 293-7656

Date:

10-9-05

To:

Andrew Liu @ 888-749-2400 X2036

From:

Louzie

No. of pages (inc. cover page):

3

fax number:

949-790-8505

Message:

Please see requested info.

Attached

Date	Time	Type	Identification	Duration	Pages	Result
Oct 9	12:18pm	Fax Sent	19497908505	1:52	3	OK

Last Transaction

Oct 9 2005 12:24pm

9722937656

Louzie Leath

Fax-History Report for

printer/fax/scanner/copier

hp officejet d135

UNIFORM RESIDENTIAL APPRAISAL REPORT

Case No. 04000000
File No. Kory Knob Dallas

Property Description
 Property Address **936 Hickory Knob Circle** City **Cedar Hill** State **TX** Zip Code **75104**
 Legal Description **BLK 5, Lot 1, Lake Ridge Village 2, Wildwood area** County **Dallas**
 Assessor's Parcel No. **16028000050010900** Tax Year **2005** R.E. Taxes **\$ 7,636** Special Assessments \$ none
 Borrower **Lorrie Leath** Current Owner **Same** Occupant: Owner Tenant Vacant
 Property rights appraised Fee Simple Leasehold Project Type PUD Condominium (HUD/VA only) HOA\$ **275** yr. /Mo.
 Neighborhood or Project Name **Lake Ridge Wildwood** Map Reference **B1A-P Dallas** Census Tract **165.05**
 Sale Price \$ **N/A** Date of Sale **N/A** Description and \$ amount of loan charges/concessions to be paid by seller
 Lender/Client **F & R Block Mortgage Corporation** Address **25510 Commerce Dr., Ste. 100, Lake Forest, CA 92630**
 Appraiser **Clyde Crum - ASA, CBA** Address **5333 E. Mockingbird #147862 Dallas, TX 75214**

Location Urban Suburban Rural
 Built up Over 75% 25-75% Under 25%
 Growth Rate Rapid Stable Slow
 Property values Increasing Stable Declining
 Demand/supply Shortage In balance Over supply
 Marketing time Under 3 mos. 3-6 mos. Over 6 mos.
 Predominant occupancy Owner Tenant Vacant (0-5%) Vacant (Over 5%)
 Single family housing PRICE \$(000) **150k** Low **High** **20** AGE (yrs) **20**
 Present land use % **80** Land use change Not likely Likely
 One family **80** In process Vacant Land
 2-4 family **20** Multi-family **20** to Single
 Commercial **20** (Land) **20** Family Res.

Note: Race and the racial composition of the neighborhood are not appraisal factors.
 Neighborhood boundaries and characteristics: **The neighborhood boundaries are described by the area Highway 67 on the east, Lakewood Parkway on the south and southwest, Mansfield Road and Beltline Road on the northern boundary.**
 Factors that affect the marketability of the properties in the neighborhood (proximity to employment and amenities, employment stability, appeal to market, etc.):
The subject is hilly and rolling topography of South Dallas Co. near lake Joe Pool. The neighborhood is located in the Cedar Hill ISD and is relatively close to employes, transportation, shopping, recreation, education, medical and business centers. The area is primarily composed of modern newer luxury homes which have been constructed in the last 15-20 years. The neighborhood appears relatively stable with longer marketing times for larger and upscale homes.
 Market conditions in the subject neighborhood (including support for the above conclusions related to the trend of property values, demand/supply, and marketing time - such as data on competitive properties for sale in the neighborhood, description of the prevalence of sales and financing concessions, etc.):
Most property values and demand in this neighborhood have remained stable over the last several years. Currently there appears adequate demand to maintain continued stability in the market. All forms of financing are available in the in the area with fixed rates the most popular. The area has newer homes to the west of the subject. Seller paid points, concessions and buydowns were considered in the market analysis as required. New construction competition was observed in the neighborhood. Foreclosures not observed in the market.

Project information for PUDs (if applicable) - Is the developer/builder in control of the Home Owners' Association (HOA)? Yes No
 Approximate total number of units in the subject project **N/A** Approximate total number of units for sale in the subject project **N/A**
 Describe common elements and recreational facilities: **N/A**

Dimensions **approx 110 X 108 DCAD - No survey provided** Topography **slopes to side, North**
 Site area **approx 11,800 +/-** Corner Lot Yes No Size **Typical for area**
 Specific zoning classification and description **single family Residential** Shape **Rectangular**
 Zoning Compliance Legal Legal nonconforming (Generalized use) Illegal No zoning Drainage **Appears Adequate**
 Highest & best use as improved: Present use Other use (explain) View **neighborhood /lake**
 Utilities Public Other Off-site improvements Type Public Private Landscaping **average for Neigh.**
 Electricity Street **poured concrete** Driveway Surface **Poured Concrete**
 Gas Curb/gutter **poured concrete** Apperent easements **None apparent**
 Water Sidewalk **poured concrete** FEMA Special Flood Hazard Area Yes No
 Sanitary sewer Street lights **yes** FEMA Zone **Zone C** Map Date **4-1-81**
 Storm sewer Alley **none** FEMA Map No. **480168 0015 B**

Comments (apparent adverse easements, encroachments, special assessments, etc.): **The survey should be the final determination of lot dimensions, hazards, easements, encroachments, or other adverse conditions. (survey required) A detailed survey and title opinion is recommended.**

GENERAL DESCRIPTION		EXTERIOR DESCRIPTION			FOUNDATION			BASEMENT		INSULATION		
No. of Units	One	Foundation	Concrete	Slab	Yes	Area Sq. Ft.	N/A	Roof	none			
No. of Stories	Two	Exterior Walls	Brick Ven.	Crawl Space	No	% Finished		Ceiling	yes	<input checked="" type="checkbox"/>		
Type (Det./Apt.)	Det.	Roof Surface	COMP	Basement	N/A	Ceiling		Walls	yes	<input checked="" type="checkbox"/>		
Design (Style)	Trad	Gutters & Downsp.	yes, metal	Sump Pump	N/A	Walls		Floor				
Existing/Proposed	Existing	Window Type	double PW	Dampness	none Ob.	Floor		None				
Age (Yrs.)	17remodal	Storm/Screen	sun screen	Settlement	none Ob.	Outside Entry		Unknown				
Effective Age (Yrs.)	4-7	Manufactured House	No	Infiltration	none Ob.							
ROOMS	Foyer	Living	Dining	Kitchen	Den	Family Rm.	Bed. Rm.	Bedroom	# Baths	Laundry	Other	Aren Sq. Ft.
Basement												
Level 1	X	1	1	1				3	2.1	X	HRK	2,595
Level 2						1	1		1		Offic	1,393

Finished area above grade contains: **10** Rooms: **3** Bedroom(s): **3-1** Bath(s): **3-988** Square Feet of Gross Living Area

INTERIOR	Materials/Condition	HEATING	Type	Central	KITCHEN EQUIP.	ATTIC	APPLIANCES	CAR STORAGE:
Floors	Carpet/HAL/tile	Type	Gas	Refrigerator	<input checked="" type="checkbox"/>	None	Fireplace(s) #5	None <input type="checkbox"/>
Walls	paint texture	Fuel	Gas	Range/Oven	<input checked="" type="checkbox"/>	Stairs	Patio Covered	<input checked="" type="checkbox"/>
Trim/Finish	wood/HallPaper	Condition	New	Disposal	<input checked="" type="checkbox"/>	Drop Stair	Deck 2 wood	<input checked="" type="checkbox"/>
Bath Floor	Carpet/HAL/tile	COOLING		Dishwasher	<input checked="" type="checkbox"/>	Scuttle	Porch cov. & un	<input checked="" type="checkbox"/>
Bath Wainscot	Tile	Central	yes	Fan/Hood	<input checked="" type="checkbox"/>	Floor	Fence Wood	<input checked="" type="checkbox"/>
Doors	Wood solid core	Other	Forced	Microwave	<input checked="" type="checkbox"/>	Heated	Pool none	<input type="checkbox"/>
Stain Glass Entry door	Condition New	Condition	New	Washer/Dryer	<input checked="" type="checkbox"/>	Finished	Hot Bar	<input checked="" type="checkbox"/>
							Driveway	concrete

Additional features (special energy efficient items, etc.): **The subject has been completely remodeled from studs and upgraded, the sheetrock was removed and new insulation and HVAC systems upgraded. (See Full List in Addendum)**
 Condition of the improvements, depreciation (physical, functional, and external), repairs needed, quality of construction, remodeling/additions, etc.: **The subject property was completely remodeled/upgraded and has no deferred maintenance. The property has a functional floor plan and no functional obsolescence was noted. See Addendum Comments for upgrades.**

Adverse environmental conditions (such as, but not limited to, hazardous wastes, toxic substances, etc.) present in the improvements, on the site, or in the immediate vicinity of the subject property: **None known, See Additional Assumptions and Limiting Conditions.**
 Environmental inspections are beyond the scope and ability of this appraiser.

UNIFORM RESIDENTIAL APPRAISAL REPORT

Table with columns for Valuation Section, Estimated Site Value, Estimated Reproduction Cost-New of Improvements, and Indicated Value by Cost Approach.

Comments on Cost Approach (such as, source of cost estimate, site value, square foot calculation and, for HUD, VA and FmHA, the estimated remaining economic life of the property):

Main comparison table with columns for Item, Subject, Comparable No. 1, Comparable No. 2, and Comparable No. 3. Includes rows for Address, Proximity, Sales Price, Price/Gross Liv. Area, etc.

Adjusted Sales Price of Comparable, Comments on Sales Comparison (including the subject property's comparability to the neighborhood, etc.):

Table with columns for Item, Subject, Comparable No. 1, Comparable No. 2, and Comparable No. 3. Includes rows for Date, Price and Date, Source for prior sales, etc.

INDICATED VALUE BY SALES COMPARISON APPROACH \$ 425,000.00
INDICATED VALUE BY INCOME APPROACH (if Applicable) Estimated Market Rent \$ 2,850 /Mo. x Gross Rent Multiplier 150.00 = \$ 427,500

This appraisal is made [X] as is subject to the repairs, alterations, inspections, or conditions listed below subject to completion per plans and specifications.
Conditions of Appraisal: This appraisal is subject to the assumptions and limiting conditions stated elsewhere in this report.

Final Reconciliation: Most weight was placed on the sales comparison/Market data approach substantiated by the cost approaches. No emphasis is given to the Income Approach to value due to insufficient market rental data in the subject's neighborhood.

The purpose of this appraisal is to estimate the market value of the real property that is the subject of this report, based on the above conditions and the certification, contingent and limiting conditions, and market value definition that are stated in the attached Freddie Mac Form 430/Fannie Mae Form 1004B (Revised).

I (WE) ESTIMATE THE MARKET VALUE, AS DEFINED, OF THE REAL PROPERTY THAT IS THE SUBJECT OF THIS REPORT, AS OF October 11, 2005 (WHICH IS THE EFFECTIVE DATE OF THIS REPORT) TO BE \$ 425,000

APPRaiser: Signature, Name Clyde Crum, Date Report Signed 10/12/05, State Certification # TX-1323786-G, State TX
SUPERVISORY APPRAISER (ONLY IF REQUIRED): Signature, Name, Date Report Signed, State Certification #, State

07-002693



DALLAS CENTRAL APPRAISAL DISTRICT
NOTICE OF RESIDENTIAL APPRAISED VALUE FOR YEAR 2005

Account No.: 16028000050010000
Ownership:

Property Address:
936 HICKORY KNOB CIR
CEDAR HILL

LEATH LONZIE C
936 HICKORY KNOB CIR
CEDAR HILL TX 75104-7838

Legal Description:
LAKE RIDGE VILLAGE 2
BLK 5 LOT 1
WILDWOOD SEC 2



Dear Property Owner,

State law requires that appraisal districts appraise all taxable property at its fair market value. For tax year 2005, we have appraised your land at \$50,000 and the structure(s) thereon at \$283,890 for a total market value of \$333,890. The previous year's appraised value was \$304,610 for land and structures.

The Texas Constitution provides that homestead property may not be increased in value more than 10% per year, up to a maximum of 30%, excluding any improvements made since the last appraisal. This provision takes effect the first year following the year the property qualified for a homestead. Because of this Constitutional limitation, if your property qualifies for a homestead, it will be "capped" at the appropriate limit.

Our records indicate that your property does qualify for this limitation. Since the property does qualify, the capped value of your homestead will be \$280,826. It was last appraised in 2004.

According to our records, the following information is applicable to your property:

taxing Jurisdiction	2004	2005	Homestead Exemption
	Taxable Value	Taxable Value	
Dallas County	\$204,238	\$224,661	\$56,165
Dallas Cnty Community Coll	\$204,238	\$224,661	\$56,165
Arkland Hospital	\$204,238	\$224,661	\$56,165
City of Cedar Hill	\$255,297	\$280,826	0
Cedar Hill ISD	\$240,297	\$265,826	\$15,000

Using the current year's proposed value and last year's tax rates, your estimated levy this year would be \$7,636. Please understand that the DCAD does not control the tax rate nor the amount of levy. That is the responsibility of each tax agency that taxes your property. Questions about the taxes, an agency's budget or other activities unrelated to the Appraisal District should be directed to the appropriate agency. We cannot assist you in these matters.

How to Protest: Please review the information provided on both the front and back of this correspondence. If you disagree with the value proposed or any other action of the Appraisal District, there are steps you are required to take. To protest, you must do so in writing no later than **May 31, 2005**. A protest form for this purpose is provided below. The Appraisal Review Board will begin hearings on May 16, 2005 and will complete deliberations no later than July 25, 2005. If you agree with the proposed value, you are not required to file a protest. If you wish to protest, you must mail the bottom of this form to the address below before the deadline date.

PROCEED PAST THIS POINT ONLY IF YOU WISH TO FILE A PROTEST. IF YOU DO NOT WISH TO FILE A PROTEST, NO FURTHER ACTION IS NECESSARY.

TAB 5

CAUSE NO. 08-07290

LONZIE LEATH § IN THE DISTRICT COURT
V. § DALLAS COUNTY, TEXAS
WELLS FARGO BANK, NA §
AS TRUSTEE § 95TH JUDICIAL DISTRICT

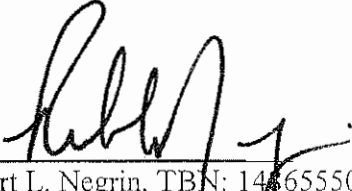
DEFENDANT WELLS FARGO BANK, NA AS TRUSTEE
REQUEST FOR PRODUCTION TO PLAINTIFF

TO: Plaintiff, LONZIE LEATH, by and through his attorney of record, Wendel A. Withrow Canada Withrow, LLP, 1120 Metrocrest, Ste. 200, Carrollton, TX 75006.

COMES NOW WELLS FARGO BANK, NA AS TRUSTEE, Defendant in the above entitled and numbered cause, and pursuant to Rule 196 of the Texas Rules of Civil Procedure, hereby requests Plaintiff, **LONZIE LEATH**, produce and permit the inspection and copying or photocopying of the following documents which are material to the trial of this cause in that they will reveal and disclose information solely within the possession, custody and control of the Plaintiff and tend to show or explain the circumstances surrounding the occurrences made the basis of this suit. Defendant, **WELLS FARGO BANK, NA AS TRUSTEE**, requests that pursuant to the Texas Rules of Civil Procedure, you are requested to Respond to this Request for Production, within 33 days of service of this request.

Respectfully submitted,

Codilis & Stawiarski, P.C.

By: 
Robert L. Negrin, TBN: 14665550
650 N. Sam Houston Parkway East, Ste. 450
Houston, Texas 77060
(281) 925-5200 - Phone
(281) 925-5300 - Fax
Attorney for
DEFENDANT WELLS FARGO BANK, NA AS
TRUSTEE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent as indicated to the following parties on this 26 day of November, 2008 via facsimile to:

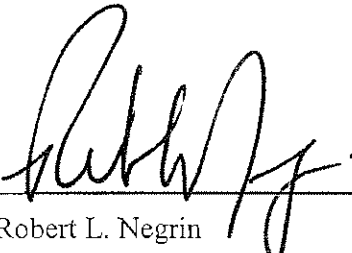
Via Facsimile 972/417-0685

Wendel A. Withrow

Canada Withrow, LLP

1120 Metrocrest, Ste. 200

Carrollton, TX 75006



Robert L. Negrin

I.

INSTRUCTIONS

1. Answer each request for documents separately by listing the documents and by describing them as defined below. If documents produced in response to this request are numbered for production, in each response provide both the information that identifies the document and the document's number.

2. For a document that no longer exists or that cannot be located, identify the document, state how and when it passed out of existence, or when it could no longer be located, and the reasons for the disappearance. Also, identify each person having knowledge about the disposition or loss of the document, and identify any other document evidencing the lost document's existence or any facts about the lost document.

3. Further, if you object to a request by asserting a privilege, then please state with specificity, the information or material responsive to the request that has been withheld, the request to which the information or material relates, and the privilege or privileges asserted. You are further requested to prepare a "privilege log" with all such objectionable items attached under seal for an *in camera* review by the judge in this case pursuant to Rule 193.3(b)(1)(2).

DEFINITIONS

The following definitions shall have the following meanings, unless the context requires otherwise:

1. "**WELLS FARGO BANK, NA AS TRUSTEE**" or "Shelley Ortolani, Mary Mancuso, and Jay Jacobs, Substitute Trustees" as well as a party's full or abbreviated name or a pronoun referring to a party, means the party, and where applicable, her, or its agents, representatives, officers, directors, employees, partners, corporate agents, subsidiaries, affiliates, or any other person acting in concert with him or under his control, whether directly or indirectly, including any attorney.

2. "You" or "your" means **LONZIE LEATH**, individually or collectively as the case may be, and all other persons acting on their behalf.

3. "Document" means all written, typed, or printed matters, and all magnetic, electronic, or other records or documentation of any kind or description (including, without limitation: letters, correspondence, telegrams, memoranda, notes, records, minutes, contracts, agreements, records or notations of telephone or personal conversations, conferences, interoffice communications, e-mail, microfilm, bulletins, circulars, pamphlets, photographs, facsimiles, invoices, tape recordings, computer printouts, and work sheets), including drafts and copies not identical to the originals, all photographs and graphic matter, however produced or reproduced, and all compilations of data from which information can be obtained, and any and all writings or recordings of any type or nature, in your actual possession, custody, or control, including those in the possession, custody, or control of any and all present or former directors, officers, employees, consultants, accountants, attorneys or other agents, whether or not prepared by you,

that constitute or contain matters relevant to the subject matter of the action. Further, for purposes of this request for production, the term "document(s)" shall include any data or electronic media stored in any computer system. We are specifically requesting that this data and these data files be produced on a DVD, CD or 3.5 inch floppy disk in a version compatible with any version of the Microsoft Windows operating system, Adobe Acrobat, Quicken, WordPerfect, Microsoft Word or any other Microsoft Office application (*eg* Outlook, PowerPoint or Excel). Please specify the program under which the data may be accessed.

4. "the Loan" means Loan Number 0019488717 dated October 26, 2005 in the principal amount of \$340,000.00.

5. "Possession, custody, or control" of an item means that the person either has physical possession of the item or has a right to possession that is equal or superior to the person who has physical possession of the item.

6. "File" means any collection or group of documents maintained, held, stored, or used together, including, without limitation, all collections of documents maintained, held, or stored in folders, notebooks, or other devices for separating or organizing documents.

7. "Person" means any natural person, corporation, firm, association, partnership, joint venture, proprietorship, governmental body, or any other organization, business, or legal entity, and all predecessors or successors in interest.

8. "Relating to" and "relates to" means, without limitation, embodying, mentioning, or concerning, directly or indirectly, the subject matter identified in the request.

9. "Concerning" means, in whole or in part, directly or indirectly, referring to, relating to, connected with, commenting on, responding to, showing, describing, analyzing, reflecting, or constituting.

10. "Communication" means any oral or written communication of which **LONZIE LEATH**, has/had knowledge, information, or belief.

12. "Date" means the exact date, month, and year, if ascertainable, or, if not, the best available approximation.

13. "Identify" or "describe," when referring to a person, means you must state the following:

- a. The full name.
- b. The present or last known residential address and residential telephone number.
- c. The present or last known office address and office telephone numbers.
- d. The present occupation, job title, employer, and employer's address at the time of the event or period referred to in each particular request.

- e. In the case of any entity, identify the officer, employee, or agent most closely connected with the subject matter of the request and identify the officer who is responsible for supervising that officer or employee.

14. "Identify" or "describe," when referring to a document, means you must state the following:

- a. The nature (*e.g.*, letter, handwritten note) of the document.
- b. The title or heading that appears on the document.
- c. The date of the document and the date of each addendum, supplement, or other addition or change.
- d. The identity of the author and of the signer of the document, and of the person on whose behalf or at whose REQUEST FOR PRODUCTION NO. or direction the document was prepared or delivered.
- e. The present location of the document, and the name, address, position or title, and telephone number of the person or persons having custody of the document.

15. The word "and" means "and/or."

16. The word "or" means "or/and."

REQUESTS FOR PRODUCTION

1. A true and correct copy(ies) of any and all cancelled checks, money orders, cashier's checks, paid receipts evidencing attorney's fee paid to date as a result of this lawsuit.
2. A true and correct copy(ies) of any and all outstanding invoices/bills/statements regarding attorney fees to be paid as a result of this lawsuit.
3. Financial statements prepared by or for you since October 1, 2005, 2006 and 2007, 2008, pertaining to any property in which you have or had an interest, regardless of whether the property was titled to you.
4. All documents reflecting conveyances, donations, gifts, transfers, and/or sales of property with a cost or value in excess of \$5,000.00 in which you have or had an interest in since October 1, 2005.
5. All documents of any financial institution where you have or had an interest or deposited checks or money(ies) received from any person or entity during the time period from October 1, 2005 through and including October 1, 2008, including, but not limited to:
 - All monthly or other periodic checking account statements;
 - All monthly or other periodic savings account statements;
 - All monthly or other periodic credit union statements;
 - All cancelled checks, negotiable orders of withdrawal, deposit slips, receipts, deposit items, transit items, or other documents from all financial institutions;
 - All monthly or other periodic 401(k) account statements;
 - All monthly or other periodic IRA account statements;
 - All monthly or other periodic certificate of deposit account statements;
 - All monthly or other periodic account statements regarding stocks, bonds, mutual funds.
9. All property insurance declaration page(s) from property insurance policies pertaining to the real property made the basis of this litigation.
10. Correspondence and/or notices you have sent or received from the Internal Revenue Service.
11. True and correct copies of any and all documents pertaining to any trust in which you are or were the settler, trustee, or beneficiary, including, but not limited to, trust agreements, list of assets held by each trust, trust tax returns, bank records and correspondence.
12. True and correct copies of any and all statements/invoices/ receipts indicating paid property taxes.

14. True and correct copies of any and all statements/invoices/receipts indicating unpaid property taxes.
15. True and correct copies of any and all homeowner's association fees indicating they have been paid.
16. True and correct copies of any and all homeowner's association fees which indicate they have not been paid.
17. True and correct copies of any and all statements/invoices/receipts indicating paid school district taxes.
18. True and correct copies of any and all statements/invoices/receipts indicating unpaid school district taxes
19. True and correct copies of any and all documents evidencing any loan or contract between you and **WELLS FARGO BANK, NA AS TRUSTEE** pertaining to the property made the basis of this lawsuit.
20. True and correct copies of any and all documents relating to any assignment or transfer of loan or contract to you relating to the property made the basis of this lawsuit.
21. True and correct copies of any and all documents which evidence any lien you have or had on the property made the basis of this lawsuit.
22. True and correct copies of any and all documents which evidence the appointment of any trustee to act on your behalf or for your benefit in any deed of trust pertaining to the property made the basis of this lawsuit.
23. True and correct copies of any and all documents/correspondence that you have sent to **WELLS FARGO BANK, NA AS TRUSTEE.**
24. True and correct copies of any and all documents/correspondence that you have received from **WELLS FARGO BANK, NA AS TRUSTEE.**
25. True and correct copies of any and all documents/correspondence, including telephone notes, e-mails, memos, letters, reports, etc. pertaining to the property made the subject of this lawsuit or any indebtedness on said property.
26. True and correct copies of any and all documents pertaining to your purchase of the property made the basis of this lawsuit.
27. True and correct copies of any and all documents pertaining to the re-financing of the property made the basis of this lawsuit.

28. True and correct copies of any and all documents pertaining to any other lien on the property made the basis of this lawsuit.
29. True and correct copies of any and all documents regarding the Note made by **LONZIE LEATH** and payable to Option One Mortgage.
30. True and correct copies of the Deed of Trust securing the note made by **LONZIE LEATH** and payable to Option One Mortgage.
31. True and correct copies of any and all documents that you contend contain or constitute evidence of an agreement between you and **WELLS FARGO BANK, NA AS TRUSTEE** concerning the default and/or foreclosure made the basis of this lawsuit.
32. True and correct copies of any and all documents that you contend contain or constitute evidence of an agreement between you and Codilis & Stawiarski, P.C. concerning the default and/or foreclosure made the basis of this lawsuit.
33. True and correct copies of any and all documents, billing statements, invoices, time slips or other documents evidencing the amount of time and/or money charged for services rendered in connection with this lawsuit or your claims made the basis of your request for attorney fees as set out in your pleadings.
34. True and correct copies of any and all documents/agreements (written or verbal) you have or had with **WELLS FARGO BANK, NA AS TRUSTEE** concerning the default on the note and/or lien the subject of the foreclosure made the basis of this lawsuit.
35. True and correct copies of any and all documents/agreements (written or verbal) you have or had with Codilis & Stawiarski, P.C. concerning the default on the note and/or lien the subject of the foreclosure made the basis of this lawsuit.
36. A copy, **with privileged information redacted**, of any information which otherwise evidences that amount of attorneys' fees incurred by you in this matter.
37. A copy of any letters which you believe supports your claims in this lawsuit.
38. To the extent you were previously involved in any civil litigation, please produce a copy of the most recent live pleading in such lawsuit.
39. A copy of any and all settlement agreements, releases, checks, wire transfers, letter agreements, Rule 11 Agreements, money orders, debit cards, annuities or other documents indicating that **WELLS FARGO BANK, NA AS TRUSTEE** or anyone else has settled or compromised any claim which has been asserted, or could have been asserted in this lawsuit or the lawsuit related to the claims at issue in this litigation.
40. To the extent you have communicated with **WELLS FARGO BANK, NA AS TRUSTEE**, its employees and/or agents, in writing, copy of any letters memoranda or other

documents evidencing each and every conversation, meeting and/or communication that you have had with **WELLS FARGO BANK, NA AS TRUSTEE**, its agents, attorneys and/or employees in this matter.

41. To the extent you have communicated with anyone else regarding this matter, including their employees and/or agents, in writing, produce a copy of any letters, memoranda or other documents evidencing each and every conversation, meeting and/or communication that you have had with that entity, person and/or anyone else, including their agents, attorneys and/or employees regarding this matter.

42. All trial exhibits you plan to offer at trial in this matter.

43. Copies of all documents evidencing communications with other people or entities regarding the facts in dispute and/or the loan(s) in dispute.

44. A copy of every insurance policy (other than automobile insurance) which identifies you as the insureds or loss payees.

45. All documents concerning any investigation or review by you and by anyone else of the matters alleged in Plaintiffs' Petition insofar as the investigation was conducted prior to you anticipating litigation. If you claim privilege regarding this documentation, then please produce a privilege log in the place of this documentation identifying the privileged documents in a sufficient manner to allow the court to conduct an *in camera* review of this document(s).

46. Copies of all documents between you and J. Beebe Construction Services and General Contractor or any other contractor that performed repair, renovation or any other work at your house on or after September 3, 2004.

47. Copies of all documents evidencing your knowledge of the improvements, repairs, and renovations done to the house.

48. Copies of all documents evidencing the present value of the improvements as well as all documents evidencing the value of the improvements both on or about the date they were done and today's date.

49. Copies of all documents quantifying your claim of economic damages as a result of the matters made the basis of this lawsuit.

50. Copies of all documents quantifying your claim of producing damages as a result of the matters made the basis of this lawsuit.

51. Copies of all documents quantifying your claim of proximately caused damages as a result of the matters made the basis of this lawsuit.

52. Copies of all documents quantifying your claim of consequential damages as a result of the matters made the basis of this lawsuit.

53. Copies of all calculations upon which you or your experts will rely to show that the promissory note contains varying late charges on principal and interest.
54. Copies of all documents quantifying your claim for damages for conversion and cloud of title impermissibly imposed upon the Plaintiffs realty equal to the amount of its value as a result of the matters made the basis of this lawsuit.
55. Copies of all documents quantifying your claim of statutory damages allowed by State and Federal law as a result of matters made the basis of this lawsuit.
56. Copies of all documents quantifying your claim for compensation for all unlawful or improper charges made by the Defendants as a result of the matters made the basis of this lawsuit.
57. Copies of all documents evidencing the alleged unlawful or improper charges made by the Defendants as a result of the matters made the basis of this lawsuit.
58. A copy of any and all brochures, warranties, representations, solicitations and/or any other documents provided by **WELLS FARGO BANK, NA AS TRUSTEE** in this lawsuit in connection with the loan made the basis of this lawsuit.
59. Copies of any and all cancelled checks, vouchers, money orders and any other documents demonstrating that you, or anyone else, have paid money on the Note made the basis of this lawsuit.
60. Copies of any and all insurance covering the house in dispute in this lawsuit for the last 3 years.
61. A copy of all documents evidencing all of your correspondence exchanged by and between you and any other party regarding the loan in dispute.
62. A copy of all documents evidencing all of your correspondence exchanged by and between you and any other party regarding the loan in dispute.
63. True and correct copies of any and all documents/agreements you have or had with **WELLS FARGO BANK, NA AS TRUSTEE** concerning the default on the note and/or lien made the basis of this lawsuit.
64. True and correct copy(ies) of any and all documents which you plan to rely on at time of trial that show the total amount of attorney's fees you are seeking from **WELLS FARGO BANK, NA AS TRUSTEE**.
65. All reports of each expert which were prepared for the Plaintiffs or on behalf of Plaintiffs.

66. Copies of all documents evidencing that either or both of you have been arrested and/or convicted for any felonies or misdemeanors for conduct involving moral turpitude within the past 10 years.
67. Copies of any and all statements previously made by the Plaintiffs concerning the subject matter of this lawsuit, including any written statement signed or otherwise adopted or approved by the Plaintiffs hereto and any stenographic, mechanical, electrical or other type of recording or any transcription containing or setting forth statements by Plaintiffs.
68. Copies of any statements given by other parties which relate to this case.
69. Any and all settlement, contribution and/or indemnity agreements, hold harmless agreements, "Mary Carter" agreements, releases, deals or understandings of any kind between you and any individual or entity if the agreement or understanding pertains to or bears on this lawsuit.
70. All notes, records, reports, memoranda, compilations of data, and letters of each person you will call as an expert witness in the trial of this case.
71. All documents containing any consulting expert's opinions or impressions which have been reviewed by any of your testifying experts.
72. All documents evidencing or pertaining to communications with each person you will call as an expert witness in the trial of this case.
73. All documents, tangible things and visual representations reviewed or relied upon by each person you will call as an expert witness in the trial of this case.
74. All documents, tangible things and visual representations that you have provided to each person you will call as an expert witness in the trial of this case.
75. Copies of the curriculum vitae of your testifying experts.
76. All documents, visual representations and tangible things, including all tangible reports, physical models, compilations of data and other materials prepared by an expert or for an expert in anticipation of the expert's trial or deposition testimony.
77. All papers, books, tests, writings, drawings, charts, photographs, literature, or learned treatises which you will introduce into evidence or upon your expert(s) will base opinion testimony in the trial of this case.
78. All models, visual aids, experiments, documents, or other writings or any item of demonstrative evidence prepared or preserved by you, your experts or any other person other than your attorney, acting on your behalf that will be exhibited to the jury or offered into evidence in the trial of this lawsuit.

TAB 6

08-0158

WENDEL A. WITHROW
BOARD CERTIFIED*
CIVIL TRIAL LAW
PERSONAL INJURY TRIAL LAW
ADA MARIE WITHROW
W. DAVID GRIGGS
ANNE C. ROWE

LAW OFFICE OF
WENDEL A. WITHROW
1120 METROCREST, SUITE 200
CARROLLTON, TEXAS 75006
(972) 416-2500
FAX (972) 417-0685
WWW.WITHROWLAW.COM

LEGAL ASSISTANT
DONNA M. ERVIN
OFFICE MANAGER
LUCY M. WITHROW

August 24, 2010

VIA FAX #281-925-5300
AND BY U. S. MAIL

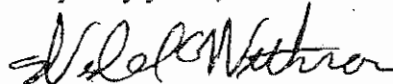
Mr. Robert N. Negrin
Codilis & Stawiarski, P.C.
650 N. Sam Houston Parkway East, Ste. 450
Houston, TX 77060

RE: Lonzie C. Leath v. Wells Fargo Bank, N.A. As Trustee
Cause No.: 08-07290

Dear Mr. Negrin:

Enclosed is the Plaintiff's Supplemental Discovery Responses.

Very truly yours,

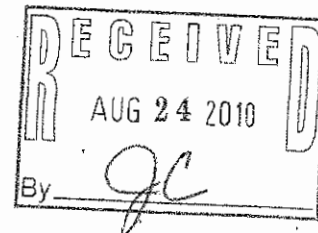


Wendel A. Withrow

WAW/dmc

Enclosure

cc: Client (w/encl.)



NO. 08-07290

LONZIE LEATH)	IN THE DISTRICT COURT
)	
Plaintiff,)	
)	
vs.)	95 TH JUDICIAL DISTRICT
)	
WELLS FARGO BANK, NA)	
AS TRUSTEE)	
)	
Defendant)	DALLAS COUNTY, TEXAS

PLAINTIFF'S SUPPLEMENTAL DISCOVERY RESPONSES

Now comes Plaintiff and files this Plaintiff's Supplemental Discovery Responses.

I.

Plaintiff hereby designates: Ann Piper as an expert witness.

Address: 5952 Royal Lane #205
Dallas, TX 75230
Phone Number: (214) 691-0816.

II.

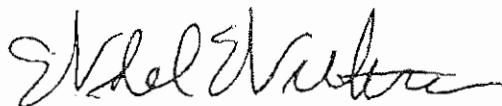
This expert appraiser will testify as to the value of the subject property on or about the date of refinance and the value at the present date.

III.

Plaintiff's expert will be made available for deposition pursuant to the Texas Rules of Civil Procedure.

Respectfully submitted,

LAW OFFICE OF WENDEL A. WITHROW

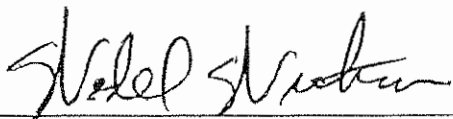
BY: 

WENDEL A. WITHROW
State Bar No. 21830800
1120 Metrocrest, Suite 200
Carrollton, Texas 75006
Phone: 972/416-2500
Fax: 972/417-0685

ATTORNEY FOR PLAINTIFF,
LONZIE LEATH

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record in accordance with the Texas Rules of Civil Procedure on this 27 day of August, 2010.


WENDEL A. WITHROW

TAB 7

WENDEL A. WITHROW
BOARD CERTIFIED*
CIVIL TRIAL LAW
PERSONAL INJURY TRIAL LAW
ADA MARIE WITHROW
W. DAVID GRIGGS
ANNE C. ROWE

LAW OFFICE OF
WENDEL A. WITHROW
1120 METROCREST, SUITE 200
CARROLLTON, TEXAS 75006
(972) 415-2500
FAX (972) 417-0685
WWW.WITHROWLAW.COM

LEGAL ASSISTANT
DONNA M. ERVIN
OFFICE MANAGER
LUCY M. WITHROW

December 20, 2010

VIA FAX #281-925-5300
AND BY U. S. MAIL

Mr. Robert N. Negrin
Codilis & Stawiarski, P.C.
650 N. Sam Houston Parkway East, Ste. 450
Houston, TX 77060

RE: Lonzie C. Leath v. Wells Fargo Bank, N.A. As Trustee
Cause No.: 08-07290

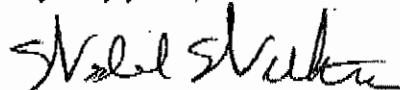
Dear Mr. Negrin:

Enclosed is the following:

1. Plaintiff's Second Supplemental Discovery Responses.

I will let you know when the Motion for Continuance is set for a hearing.

Very truly yours,



Wendel A. Withrow

WAW/dme

Enclosure

cc: Client (w/encl.)

NO. 08-07290

LONZIE LEATH)	IN THE DISTRICT COURT
)	
Plaintiff,)	
)	
vs.)	95 TH JUDICIAL DISTRICT
)	
WELLS FARGO BANK, NA)	
AS TRUSTEE)	
)	
Defendant)	DALLAS COUNTY, TEXAS

PLAINTIFF'S SECOND SUPPLEMENTAL DISCOVERY RESPONSES

Now comes Plaintiff, Lonzie Leath, and files this Plaintiff's Second Supplemental Discovery Responses.

I.

Attached is the complete Appraisal Report by Defendant's previously designated expert, Ann Piper. Said report was received on December 20, 2010 and is being faxed to opposing counsel the same day.

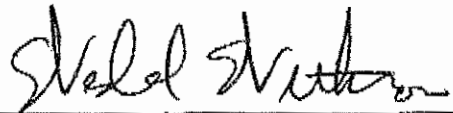
II.

- 1) The expert's name is: Ann Piper, 9052 Stone Creek Pl., Dallas, TX 75243, 214-591-0816.
- 2) The expert will testify as to the value of the house on or about October 26, 2005 and all matters contained in the attached Appraisal.
- 3) The mental impressions, opinions and a detailed summary are in the attached report. Generally, the expert will state the value of the house on or about the date of closing was \$268,000.00 based on the condition of the house at that time.

- 4A) All documents reviewed by the expert are attached to the report or previously produced.
- 4B) Attached.

Respectfully submitted,

LAW OFFICE OF WENDEL A. WITHROW

By: 
 WENDEL A. WITHROW
 State Bar No. 21830800
 1120 Metrocrest, Suite 200
 Carrollton, Texas 75006
 Phone: 972/416-2500
 Fax: 972/417-0685

ATTORNEY FOR PLAINTIFF,
LONZIE LEATH

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record in accordance with the Texas Rules of Civil Procedure on, via U. S. Mail and by Facsimile, this 20 day of December, 2010.


 WENDEL A. WITHROW



APPRAISAL OF REAL PROPERTY

LOCATED AT:

936 Hickory Knob Cir
Cedar Hill, TX 75104-7838
Lot 1 Wildwood Section 2, Block 4, Lake Ridge Village 2

FOR:

Lonzie Leath
936 Hickory Knob
Cedar Hill, TX 75104

AS OF:

October 26, 2005

BY:

Ann Piper
9052 Stone Creek Pl.
Dallas, TX 75243
Voice: 214-691-0816 Cell: 214-341-3884

Email: ann@annpiper.com

Ann Pifer

Market No. 936 Hickory Knob Page 27

RESIDENTIAL APPRAISAL SUMMARY REPORT

File No: 936 Hickory Knob

Property Address: 936 Hickory Knob Cir City: Cedar Hill State: TX Zip Code: 75104-7836

County: Dallas Legal Description: Lot 1 Wildwood Section 2, Block 4, Lake Ridge Village 2 Assessor's Parcel #: 16028000050010000

Tax Year: 2009 R.E. Taxes: \$ * Special Assessments: \$ 0 Borrower (if applicable):

Current Owner of Record: Loryna C. Leath Occupant: Owner Tenant Vacant Manufactured Housing

Project Type: PUD Condominium Cooperative Other (describe) HOA: \$ 275 per year per month

Market Area Name: Lake Ridge Map Reference: 214-P Census Tract: 9165-15

This purpose of this appraisal is to develop an opinion of Market Value (as defined), or Other type of value (describe)

This report reflects the following value (if not current, see comments): Current (the inspection date is the Effective Date) Retrospective Prospective

Approaches developed for this appraisal: Sales Comparison Approach Cost Approach Income Approach (See Reconciliation Comments and Scope of Work)

Property Rights Appraised: Fee Simple Leasehold Leased Fee Other (describe)

Intended Use: This appraisal is to be used to estimate the market value of the property as of the date of the closing of a loan, October 28, 2009.

*Taxes were based on an assessed value of \$333,890, capped at \$217,476.

Intended User(s) (by name or type): Property owner, Loryna Leath

Client: Loryna Leath Address: 936 Hickory Knob, Cedar Hill, TX 75104

Appraiser: Ann Pifer Address: 5052 Stone Creek Pl, Dallas, TX 75249

Location: Urban Suburban Rural One-Unit Housing Present Land Use Change in Land Use

Build up: Over 75% 25-75% Under 25% Predominant Occupancy: Single Duplex Triplex Other

Growth rate: Rapid Stable Slow Owner Tenant Vacant (0-5%) Vacant (>5%)

Property values: increasing Stable Declining New High Low Other

Demand/Supply: Shortage In Balance Over Supply Vacant (0-5%) Vacant (>5%)

Marketing time: Under 3 Mos. 3-6 Mos. Over 6 Mos. Vacant (0-5%) Vacant (>5%)

Market Area Boundaries, Description, and Market Conditions (including support for the above characteristics and trends):

Lake Ridge is a 1,500 acre planned community of 1,600 homesites on the east side of Joe Pool Lake. The lake, a golf course, a state park and municipal park are nearby but not part of the development. Development has been started/started for more than 15 years. The area is approximately 50% built out in 2008. Schools are rated Academically Acceptable or Higher.

Dimensions: 168x119x83x142 Site Area: 16,048

Zoning Classification: SFR Description: Single Family Residential

Are CC&Rs applicable? Yes No Unknown Have the documents been reviewed? Yes No Ground list (if applicable): S

Highest & Best Use as improved: Present use, or Other use (explain):

Actual Use as of Effective Date: Single Family Residential Use as appraised in this report: Single Family Residential

Summary of Highest & Best Use: The Highest and Best Use of the property is as developed for residential development.

Utilities: Public Other Provide/Description Off-site Improvements Type Public Private Topography Rolling

Electricity Street Concrete Site Larger than average

Gas Curbs/Gutter Concrete Shape Irregular

Water Sidewalk Concrete Drainage Appears to be adequate

Sanitary Sewer Street Lights Electric View Residential

Storm Sewer Alter Concrete Other (describe)

Off-site sewer: Inside Lot Corner Lot Cut de Sap Unsewered Utilities Other (describe)

FEMA Spec Flood Hazard Area: Yes No FEMA Flood Zone: X FEMA Map # 48113C0605 FEMA Map Date: 8/23/2001

Site Comments: Larger than average corner residential site. No special view amenities. Side street is Valley View Dr.

General Description: # of Units: 1 App. Unit Foundation: Slab Yes No Heating: Central

of Stories: 1 1/2 Exterior Walls: Brick/Average Drywall No Type: Det. AR Other

Type: Det. AR Other Foundation: Slab Yes No Heating: Central

Design (Style): Traditional Modern Other Other

Existing Proposed Und. Cons. Other

Actual Age (Yrs.): 22 Storm/Screen: Yes/Average No Other

Effective Age (Yrs.): 1995 None

Interior Description: Floors: tile, carpet/new Refrigerator: Stairs: Replace(s) # 5 Wood(s) #

Walls: Sr. Wood/Average Range/Oven: Drop Slat: Poly Open Attach: 2

Trim/Finish: Wood/Average Disposal: Soutie: Deck: Yes Detach: 0

Bath Floor: Tile/new Dishwasher: Doorway: Patch: Bl-in: 0

Bath/Watercot: Tile/Average Fan/Hood: Floor: Patch: Wood Privacy: 0

Doors: Average Microwave: Master: Pool: Carport: 0

Washing/Dryer: Finished: Balcony: Wood Surface: Concrete

Finished area above grade contains: 9 Rooms 4 Bedrooms 3.1 Baths 4,643 Square Feet of Gross Living Area Above Grade

Additional features: High efficiency HVAC, Central Vac, Plumbing for waterfall in stairway area, Intercom system, 18' chandeliers in living room and dining room.

Describe the condition of the property (including physical, functional and external observations): House had recently completed remediation for mold including replacing roof, insulation, ductwork, sheetrock, etc. Also replaced plumbing fixtures, granite countertops in kitchen, Jennair stainless appliances in kitchen, high efficiency HVAC 2 unit system. Floor tile and carpet were poorly installed causing damage to walls as well as flooring. Estimates to correct shoddy workmanship which ranged from \$131,117.06 to \$143,735.85 were supplied by the owner.



RESIDENTIAL APPRAISAL SUMMARY REPORT

File No.: 936 Hickory Knob

No research did not reveal any prior sales or transfers of the subject property for the three years prior to the effective date of this appraisal.

Data Source(s): NTR/EIS/DCAD/Realist

1st Prior Subject Sale/Transfer: Analysis of sales/transfer history and/or any current agreement of sale/leasing: Deed records indicate no change in ownership for more than 10 years.

Date: 4/28/1993

Price: Unknown

Source(s): DCAD/Realist

2nd Prior Subject Sale/Transfer:

Date:

Price:

Source(s):

SALES COMPARISON APPROACH TO VALUE (if developed)						
The Sales Comparison Approach was not developed for this appraisal.						
FEATURE	SUBJECT	COMPARABLE SALE # 1	COMPARABLE SALE # 2	COMPARABLE SALE # 3		
Address	636 Hickory Knob Cir Cedar Hill, TX 75104-7636	603 Tangle Way Ct. Cedar Hill, TX 75104	1823 Timber Ridge Dr Cedar Hill, TX 75104	213 Hickory Knoc Circle Cedar Hill, TX 75104		
Proximity to Subject		0.60 miles E	0.31 miles NE	0.10 miles NE		
Sale Price	\$	\$ 292,500	\$ 262,500	\$ 324,000		
See Price/EA	\$ /sq.ft.	\$ 86.62/sq.ft.	\$ 86.13/sq.ft.	\$ 104.95/sq.ft.		
Data Source(s)	Owner/Prior app.	MLS#10322254	MLS#10209011	MLS#10281142		
Verification Source(s)	DCAD/NTR/EIS	DCAD/NTR/EIS	DCAD/NTR/EIS	DCAD/NTR/EIS		
VALUE ADJUSTMENTS	DESCRIPTION	- (+) \$ Adjust	DESCRIPTION	- (+) \$ Adjust	DESCRIPTION	- (+) \$ Adjust
Style of Housing	Conv/263,250		Cash		Conv/177,000	
Accessories	None known		None known		None known	
Date of Sale/Time	10/26/2005		8/31/2005		9/23/2005	
Rights Appraised	Fee Simple		Fee Simple		Fee Simple	
Location	Lake Ridge		Lake Ridge		Lake Ridge	
Site	16,048		21,000	-5,000	15,730	
View	Residential		Residential lake		Residential	
Design Style	Traditional		Traditional		Traditional	
Quality of Construction	Good/Average		Good/Average		Good/Average	
Age	17/renovated		8		9	
Condition	Good/Floor Damage	-50,000	Average		Good	-70,000
Above Grade	Yes (3bms, 3bms)		Total (3bms, 3bms)		Total (3bms, 3bms)	
Room Count	9 4 3 1		8 4 3 1		8 4 3 1	
Gross Living Area	4,043 sq.ft.		3,280 sq.ft.	-23,000	3,105 sq.ft.	+36,000
Basement & Finished	None		None		None	
Rooms Below Grade	None		None		None	
Financial Liability	Larger than avg.		Guest House	-9,000	Average size	
Heating/Cooling	Efficient	+1,000	Average		Average	+1,000
Energy Efficient Items	5 Fireplaces		0 Fireplaces	+1,000	2 Fireplaces	0
Garage/Carport	2 Garage		3 Garage	-10,000	3 Garage	-10,000
Porch/Patio/Deck	2 Balcony/Patio		0 Balcony/Patio		0 Patio	0
Kitchen Package	Granite/SS	+10,000	Average appliances	+10,000	Updated	+5,000
Pool	No pool		No pool		Pool	-10,000
Days on Market	83		261		145	
Net Adjustment (Total)		\$ -23,000	\$ -15,000	\$ -48,000		
Adjusted Sale Price of Comparables		\$ 269,500	\$ 267,500	\$ 276,000		

Summary of Sales Comparison Approach: All comparables are recent sales of similar quality improvements located in the same neighborhood. The sale price is typical of the area and because of the recent renovations, the subject has a similar effective age. Sale #1 was located on a wooded lot adjacent to a greenbelt and has a view of Joe Pool lake. Marble and tile floors and recently installed inlaid carpets. Original appliances and countertops. Plantation shutters and fresh paint. Sale #2 has been well maintained and was in great shape but had no recent updates. Separate living quarters with full kitchen, bedroom and bath. Extra parking for RV. Steam shower and jet tub. View of lake. Sale #3 had recent updates and replaced appliances.

Also considered is a foreclosure which sold 4/26/2005: MLS#10239525, 1947 Wood Dale Ct. sold for \$251,500. Similar size wooded lot 3,300 sq. ft. living area, 4 bedrooms, 2.1 baths, 3 car garage, 2 fireplaces, 8 years old. Average condition, no recent upgrades.

Indicated Value by Sales Comparison Approach \$ 268,000

93a, 93b, 93c, 93d, 93e, 93f, 93g, 93h, 93i, 93j, 93k, 93l, 93m, 93n, 93o, 93p, 93q, 93r, 93s, 93t, 93u, 93v, 93w, 93x, 93y, 93z

RESIDENTIAL APPRAISAL SUMMARY REPORT

File No: 930 Hickory Knob

COST APPROACH TO VALUE (if developed) The Cost Approach was not developed for this appraisal.
Provide adequate information for replication of the following cost figures and calculations.
Support for the opinion of site value (summary of comparable land sales or other methods for extraordinary site value):

COST APPROACH	ESTIMATED REPRODUCTION OR REPLACEMENT COST NEW	OPINION OF SITE VALUE		
	Source of cost data	DWELLING	Sq. Ft. @ \$	= \$
	County rates from cost service: Effective date of cost data		Sq. Ft. @ \$	= \$
	Contents of Cost Approach (gross living area calculations, depreciation, etc.)		Sq. Ft. @ \$	= \$
			Sq. Ft. @ \$	= \$
			Sq. Ft. @ \$	= \$
			Sq. Ft. @ \$	= \$
			Sq. Ft. @ \$	= \$
			Sq. Ft. @ \$	= \$
			Sq. Ft. @ \$	= \$
Estimated Remaining Economic Life (if required):		Years INDICATED VALUE BY COST APPROACH		

INCOME APPROACH TO VALUE (if developed) The Income Approach was not developed for this appraisal.
Estimated Monthly Market Rent \$ X Gross Rent Multiplier = \$ Indicated Value by Income Approach
Summary of Income Approach (including support for market rent and GRM):

PROJECT INFORMATION FOR PUDs (if applicable) The Subject is part of a Planned Unit Development.
Legal Range of Project:
Describe restrictions, easements and recreational facilities:

Indicated Value by: Sales Comparison Approach \$ 268,000 Cost Approach (if developed) \$ Income Approach (if developed) \$
Final Recommendation For a preowned home, the sale from one owner-occupant to another owner-occupant is the best indication of market value. The cost approach does not directly translate from cost to value. These properties are not purchased for income production.

This appraisal is made "as is", subject to completion per plans and specifications on the basis of a Hypothetical Condition that the improvements have been completed, subject to the following repairs or alterations on the basis of a Hypothetical Condition that the repairs or alterations have been completed, subject to the following required inspection based on the Extraordinary Assumption that the condition or deficiency does not require alteration or repair:

This report is also subject to other hypothetical Conditions and/or Extraordinary Assumptions as specified in the attached addenda.
Based on the degree of inspection of the subject property, as indicated below, defined Scope of Work, Statement of Assumptions and Limiting Conditions, and Appraiser's Certifications, my (our) Opinion of the Market Value (or other specified value type), as defined herein, of the real property that is the subject of this report is: \$ 268,000 as of: October 26, 2005, which is the effective date of this appraisal.
If indicated above, this Opinion of Value is subject to Hypothetical Conditions and/or Extraordinary Assumptions included in this report. See attached addenda.

Approved: Inspection of Subject: Interior & Exterior Exterior Only None; Co-Appraiser Inspection of Subject: Interior & Exterior Exterior Only None
Date of Inspection: July 8, 2010 Date of Inspection:

A true and complete copy of this report contains 11 pages, including exhibits which are considered an integral part of the report. This appraisal report may not be properly understood without reference to the information contained in the complete report.
Attached Exhibits:
 Scope of Work Lending Cond. Certifications Photograph Addenda Hypothetical Conditions Extraordinary Assumptions
 Narrative Addendum Sketch Addendum Location Maps Flood Addendum Additional Sales
 Cost Addendum Maint. House Addendum

This appraiser did not physically measure the subject property. At the time of inspection, certain measurements were compared with those made by appraiser G.W. Lane, SRA in an appraisal report prepared April 18, 2003 and found to be accurate.

Estimates to repair/replace tile floors, carpet, damage to base trim and walls were furnished by the owner. The market value adjustment for correcting the deficiencies reflects actions of a typical purchaser and is not a dollar for dollar adjustment.

This appraisal is made for litigation purposes, not for mortgage financing transaction. Comparable sales were chosen to best reflect the action of buyers in the market for a house similar to the subject. Some adjustments are larger than those typically found in mortgage appraisal underwriting guidelines, such as age variance. The living area of the subject improvement is larger than others in the neighborhood which sold within the relevant time period.

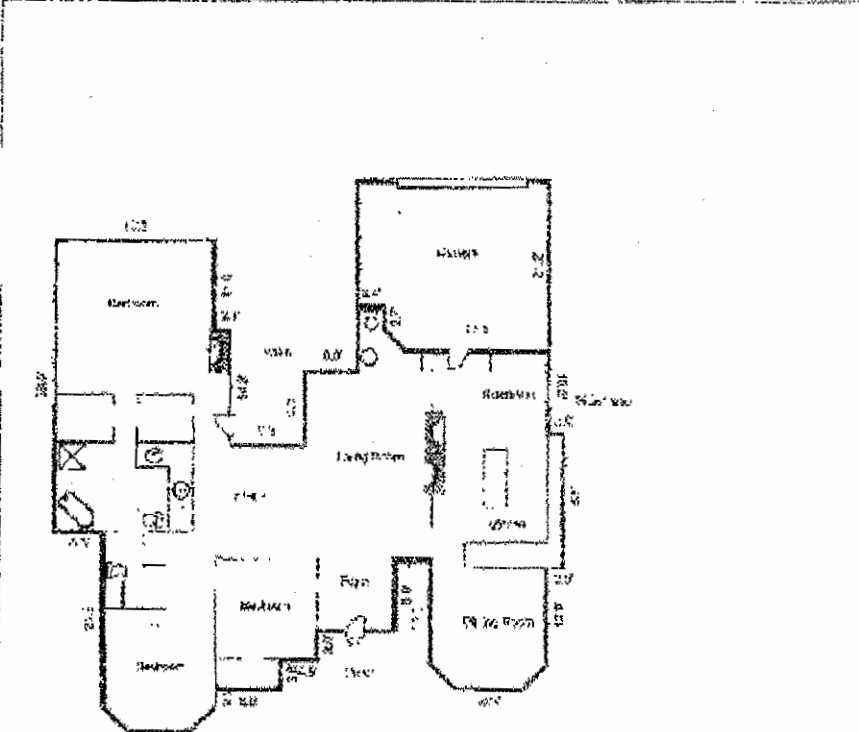
Exam File No. 985, Hickory Knob Page 2 of 5

Building Sketch

Client	Lorrie Leath				
Property Address	939 Hickory Knob Cir				
City	Cedar Hill	County	Dallas	State	TX
Zip Code	75104-7838				
Lease	Lorrie Leath				

FLOORPLAN

Client	Lorrie Leath	Project No.	20100007
Property Address	939 Hickory Knob Cir	Scale	As Shown
City	Cedar Hill	Sheet No.	1 of 1
Client	Lorrie Leath	Drawn By	W.A. Withrow

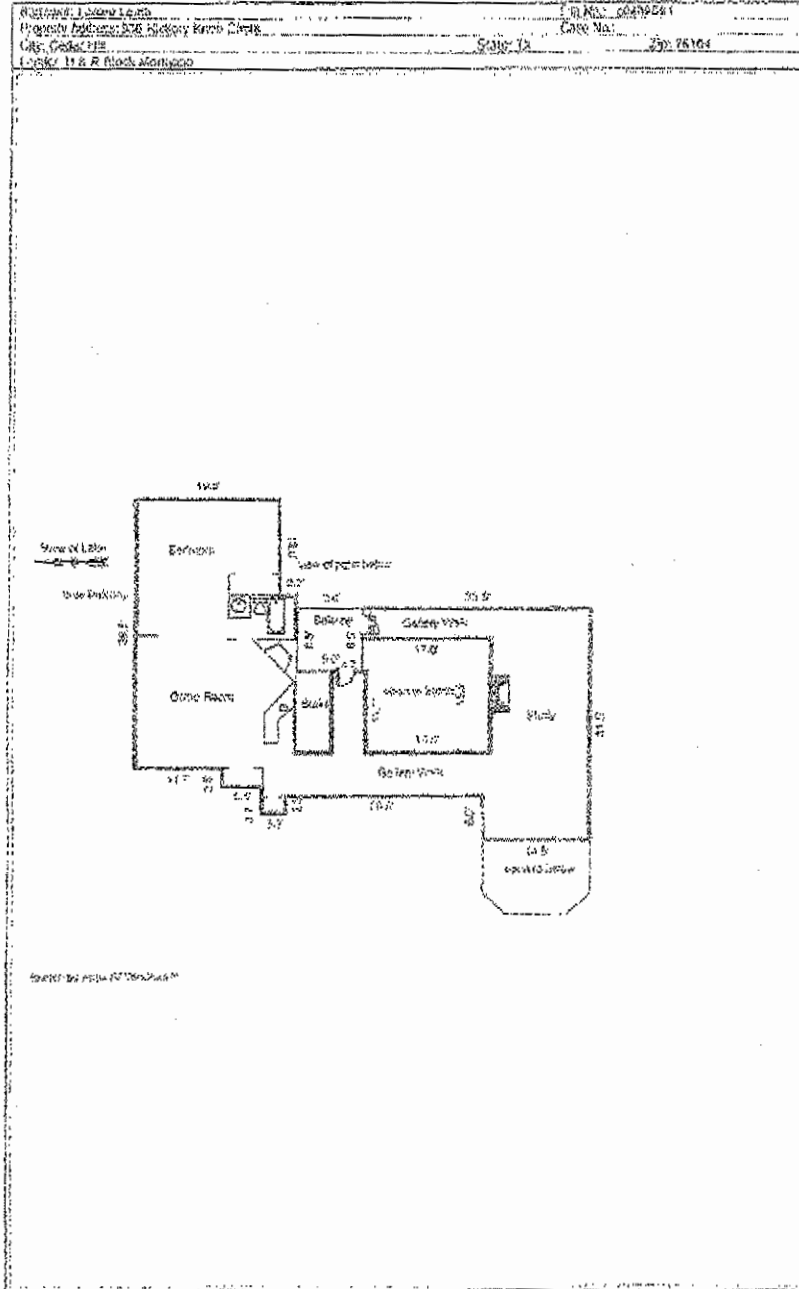


AREA CALCULATIONS SUMMARY				LIVING AREA BREAKDOWN		
Code	Description	Area	Total	Room	Area	Total
100	Living Area	144.00	144.00	Living Room	144.00	144.00
200	Bedroom	144.00	288.00	Bedroom	144.00	288.00
300	Bathroom	35.00	323.00	Bathroom	35.00	323.00
400	Kitchen	100.00	423.00	Kitchen	100.00	423.00
500	Hallway	72.00	495.00	Hallway	72.00	495.00
TOTAL LIVING AREA				495.00		

Building Sketch

Cliant	Lonzie Leath				
Property Address	936 Hickory Knob Cir				
City	Cedar Hill	County	Dallas	State	TX
Zip Code	75104-7836				
Locker	Lonzie Leath				

FLOORPLAN



Subject Photo Page

Client	Lonzie Leath				
Property Address	936 Hickory Knob Cir				
City	Cedar Hill	County	Dallas	State	TX Zip Code 75104-7838
Lender	Lonzie Leath				



Subject Front

936 Hickory Knob Cir
 Sales Price
 Gross Living Area 4,043*
 Total Rooms 9
 Total Bedrooms 4
 Total Bathrooms 3.1
 Location Lake Ridge
 View Residential
 Sec 16.048
 Quality Good/Average
 Age 17
 Faces West
 Photos Taken 12/3/2010



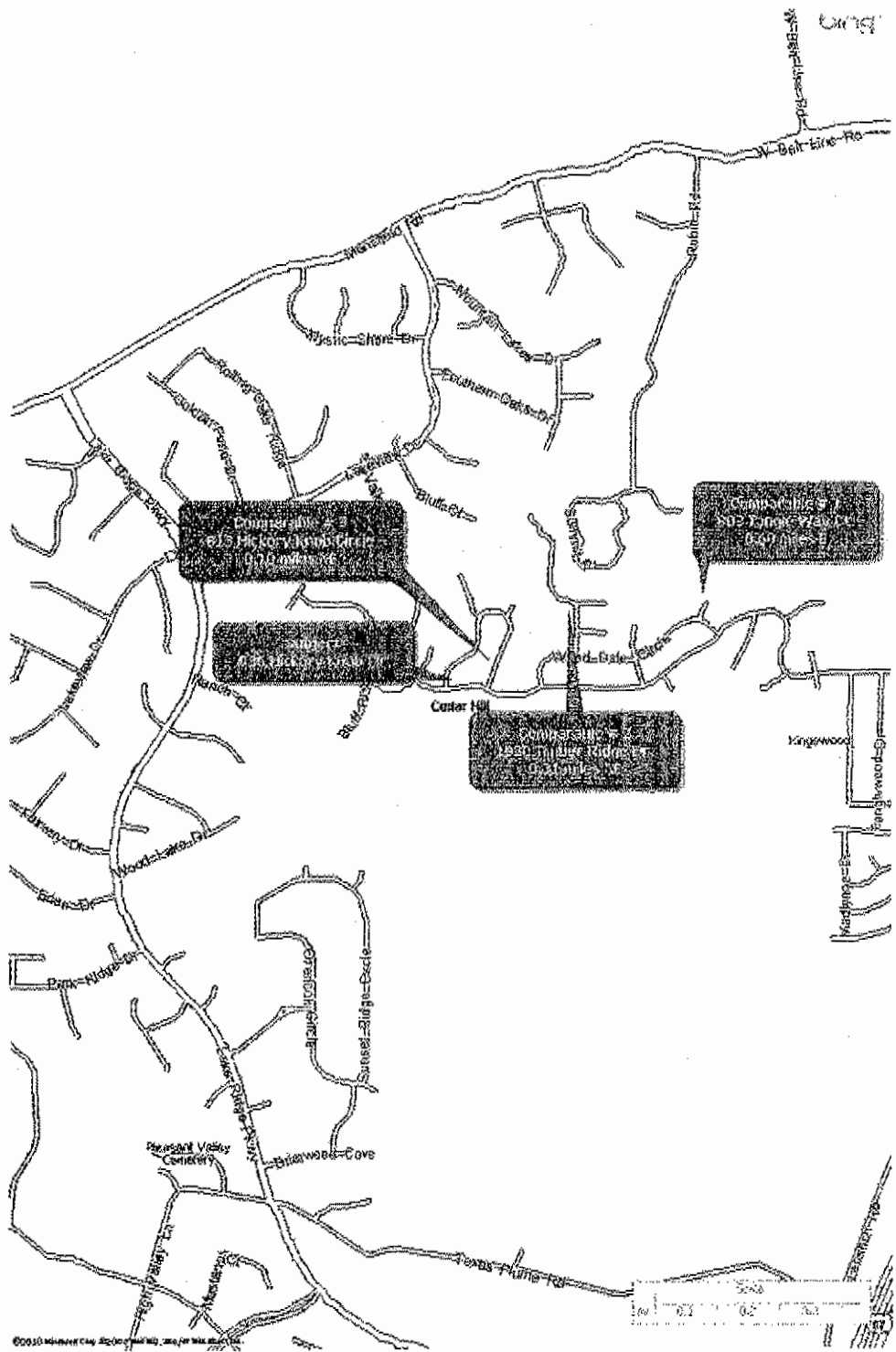
Subject Rear



Subject Street
Facing South

Location Map

Client	Loride Leath		
Property Address	936 Hickory Knob Cir		
City	Cedar Hill	County	Dallas
State	TX	Zip Code	75104-7836
Lender	Loride Leath		



Main File No. 336 Hickory Knob, Page #5

Comparable Photo Page

Client	Lonzie Leath				
Property Address	536 Hickory Knob Cir				
City	Cedar Hill	County	Dallas	State	TX
Zip Code	75104-7336				
Lender	Lonzie Leath				

**Comparable 1**

003 Tangle Way Ct.
 Prox. to Subject 0.60 miles E
 Sales Price 282,500
 Gross Living Area 3,377
 Total Rooms 9
 Total Bedrooms 4
 Total Bathrooms 3
 Location Lake Ridge
 View Greenbelt/Lake
 Site 16,700
 Quality Good/Average
 Age 9

MLS Photo

**Comparable 2**

1920 Timber Ridge Dr.
 Prox. to Subject 0.31 miles NE
 Sales Price 282,500
 Gross Living Area 3,280
 Total Rooms 8
 Total Bedrooms 4
 Total Bathrooms 3.1
 Location Lake Ridge
 View Residential/Lake
 Site 21,000
 Quality Good/Average
 Age 8

MLS Photo

**Comparable 3**

813 Hickory Knob Circle
 Prox. to Subject 0.10 miles NE
 Sales Price 324,000
 Gross Living Area 3,105
 Total Rooms 8
 Total Bedrooms 4
 Total Bathrooms 3.1
 Location Lake Ridge
 View Residential
 Site 15,730
 Quality Good/Average
 Age 9

Photo Taken 12/3/2010

Main File No. 936 Hickory Knob, Page #10

Assumptions, Limiting Conditions & Scope of Work

Property Address: 936 Hickory Knob Cir	City: Cedar Hill	File No: 936 Hickory Knob
Client: Lynzie Leath	Address: 936 Hickory Knob, Cedar Hill, TX 75104	State: TX Zip Code: 75104-7838
Appraiser: Ann Pflor	Address: 5952 Royal Lane, Suite 205, Dallas, TX 75230	

STATEMENT OF ASSUMPTIONS & LIMITING CONDITIONS

- The appraiser will not be responsible for matters of a legal nature that affect either the property being appraised or the title to it. The appraiser assumes that the title is good and marketable and, therefore, will not render any opinions about the title. The property is appraised on the basis of it being under responsible ownership.
- The appraiser may have provided a sketch in the appraisal report to show approximate dimensions of the improvements, and any such sketch is included only to assist the reader of the report in visualizing the property and understanding the appraiser's determination of its size. Unless otherwise indicated, a Land Survey was not performed.
- If so indicated, the appraiser has examined the available flood maps that are provided by the Federal Emergency Management Agency (or other data sources) and has noted in the appraisal report whether the subject site is located in an identified Special Flood Hazard Area. Because the appraiser is not a surveyor, he or she makes no guarantees, express or implied, regarding this determination.
- The appraiser will not give testimony or appear in court because he or she made an appraisal of the property in question, unless specific arrangements to do so have been made beforehand.
- If the cost approach is included in this appraisal, the appraiser has estimated the value of the land at the cost approach at its highest and best use, and the improvements at their contributory value. These separate valuations of the land and improvements must not be used in conjunction with any other appraisal and are invalid if they are so used. Unless otherwise specifically indicated, the cost approach value is not an insurance value, and should not be used as such.
- The appraiser has noted in the appraisal report any adverse conditions (including, but not limited to, needed repairs, depreciation, the presence of hazardous wastes, toxic substances, etc.) observed during the inspection of the subject property, or that he or she became aware of during the normal research involved in performing the appraisal. Unless otherwise stated in the appraisal report, the appraiser has no knowledge of any hidden or unapparent conditions of the property, or adverse environmental conditions (including, but not limited to, the presence of hazardous wastes, toxic substances, etc.) that would make the property more or less valuable, and has assumed that there are no such conditions and makes no guarantees or warranties, express or implied, regarding the condition of the property. The appraiser will not be responsible for any such conditions that do exist or for any engineering or testing that might be required to discover whether such conditions exist. Because the appraiser is not an expert in the field of environmental hazards, the appraisal report must not be considered as an environmental assessment of the property.
- The appraiser obtained the information, estimates, and opinions that were expressed in the appraisal report from sources that he or she considers to be reliable and believes them to be true and correct. The appraiser does not assume responsibility for the accuracy of such items that were furnished by other parties.
- The appraiser will not disclose the contents of the appraisal report except as provided for in the Uniform Standards of Professional Appraisal Practice, and any applicable federal, state or local laws.
- If this appraisal is indicated as subject to satisfactory completion, repairs, or alterations, the appraiser has based his or her appraisal report and valuation conclusion on the assumption that completion of the improvements will be performed in a workmanlike manner.
- An appraiser's client is the party (or parties) who engage an appraiser in a specific assignment. Any other party acquiring this report from the client does not become a party to the appraiser-client relationship. Any persons receiving this appraisal report because of disclosure requirements applicable to the appraiser's client do not become intended users of this report unless specifically identified by the client at the time of the assignment.
- The appraiser's written consent and approval must be obtained before this appraisal report can be conveyed by anyone to the public, through advertising, public relations, news, sales, or by means of any other media, or by its inclusion in a private or public database.
- An appraisal of real property is not a 'home inspection' and should not be construed as such. As part of the valuation process, the appraiser performs a non-invasive visual inventory that is not intended to reveal defects or detrimental conditions that are not readily apparent. The presence of such conditions or defects could adversely affect the appraiser's opinion of value. Clients with concerns about such potential negative factors are encouraged to engage the appropriate type of expert to investigate.

The Scope of Work is the type and extent of research and analyses performed in an appraisal assignment that is required to produce credible assignment results, given the nature of the appraisal problem, the specific requirements of the intended user(s) and the intended use of the appraisal report. Reliance upon this report, regardless of how acquired, by any party or for any use, other than those specified in this report by the Appraiser, is prohibited. The Opinion of Value that is the conclusion of this report is credible only within the context of the Scope of Work, Effective Date, the Date of Report, the Intended User(s), the Intended Use, the stated Assumptions and Limiting Conditions, any Hypothetical Conditions and/or Extraordinary Assumptions, and the Type of Value, as defined herein. The appraiser, appraisal firm, and related parties assume no obligation, liability, or accountability, and will not be responsible for any unauthorized use of this report or its conclusions.

Additional Comments (Scope of Work, Extraordinary Assumptions, Hypothetical Conditions, etc.): Information was not available as to what were current listings 5 years ago. The extended market times for closed sales indicates an oversupply of listings. Only closed sales were considered. Research for this appraisal was in the time period of December 2-9, 2010.



Model Form No. 936 Hickory Knob, Page #11

Certifications

Property Address: 936 Hickory Knob Cir	City: Cedar Hill	File No.: 936 Hickory Knob
Client: Lonzie Leath	Address: 936 Hickory Knob, Cedar Hill, TX 75104	State: TX Zip Code: 75104-7836
Appraiser: Ann Piner	Address: 5952 Royal Lane, Suite 205, Dallas, TX 75230	

APPRAISER'S CERTIFICATION

I certify that, to the best of my knowledge and belief:

- The statements of fact contained in this report are true and correct.
- The credibility of this report, for the stated use by the stated user(s), of the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- I have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties involved.
- I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
- My engagement in this assignment was not contingent upon developing or reporting predetermined results.
- My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
- My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice that were in effect at the time this report was prepared.
- I did not base, either partially or completely, my analysis and/or the opinion of value in the appraisal report on the race, color, religion, sex, handicap, familial status, or national origin of either the prospective owners or occupants of the subject property, or of the present owners or occupants of the properties in the vicinity of the subject property.
- Unless otherwise indicated, I have made a personal inspection of the property that is the subject of this report.
- Unless otherwise indicated, no one provided significant real property appraisal assistance to the person(s) signing this certification.

Additional Certifications:

DEFINITION OF MARKET VALUE *:

Market value means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. Buyer and seller are typically motivated;
2. Both parties are well informed or well advised and acting in what they consider their own best interests;
3. A reasonable time is allowed for exposure in the open market;
4. Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

* This definition is from regulations published by federal regulatory agencies pursuant to Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989 between July 5, 1990, and August 24, 1990, by the Federal Reserve System (FRS), National Credit Union Administration (NCUA), Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and the Office of Comptroller of the Currency (OCC). This definition is also referenced in regulations jointly published by the OCC, OTS, FRS, and FDIC on June 7, 1994, and in the Interagency Appraisal and Evaluation Guidelines, dated October 27, 1994.

Client Contact: E-Mail: 63750@msn.com	Client Name: Lonzie Leath Address: 936 Hickory Knob, Cedar Hill, TX 75104
APPRAISER	SUPERVISORY APPRAISER (if required) or GO-APPRAISER (if applicable)
Appraiser Name: Ann Piner Company: Phone: (214) 691-9815 Fax: E-Mail: ann@annpiner.com Date Report Signed: December 14, 2010 License or Certification #: TX-1320699 State: TX Designation: Historic House Specialist Expiration Date of License or Certification: 5/31/11 Inspection of Subject: <input checked="" type="checkbox"/> Interior & Exterior <input type="checkbox"/> Exterior Only <input type="checkbox"/> None Date of Inspection: July 9, 2010	Supervisory or Co-Appraiser Name: Company: Phone: Fax: E-Mail: Date Report Signed: License or Certification #: State: Designation: Expiration Date of License or Certification: Inspection of Subject: <input type="checkbox"/> Interior & Exterior <input type="checkbox"/> Exterior Only <input type="checkbox"/> None Date of Inspection:

SIGNATURES

Five Star Flooring

127 West Main Street
Grand Prairie, TX 75052

Estimate

DATE	ESTIMATE NO.
6/25/2008	1345

NAME / ADDRESS
Lonzie Leath 136 Hickory Knob Circle Cedar Hill, TX 75140

Item # 2

P.O. NO.	TERMS	FOB	PROJECT
	50%Down/50% On...		

ITEM	DESCRIPTION	QTY	COST	TOTAL
21 Cabinets & Vn...	GAME ROOM Cherry Stained Red Oak Wood Paneling & Trim - Repair, Refinish (Includes Remove & Reinstall Of Berber Carpet (Lump Sum)	1	12,995.00	12,995.00
22 Specialty	Remove, Storage and Replacement of all furniture, appliances, pictures, books, computers, etc. throughout (Lump Sum)	1	15,325.00	15,325.00
22 Specialty	PORCELAIN TILE REPLACEMENT Dust Containment and Negative Atmosphere - Walls, Open Ceiling, Open Stair Case, Cabinets, Bedrooms - Extensive (Lump Sum)	1	6,912.00	6,912.00
02.10 Demo	Demo Existing Porcelain Floor Tile (SqFt)	1,152	1.65	5,336.80
Scrape Away	Scrape Away Existing Thinset and Floor Prep (SqFt)	1,152	3.25	3,744.00
Floor Prep	Floor Prep - Leveling (Per Bag)	56	175.00	9,800.00
Porcelain 20x20 1...	Custom Install 20x20 Porcelain Tile On 45 Diagonal (SqFt)	1,152	8.75	10,080.00
Porcelain 6x6 Deco...	Custom Install 6x6 Deco Porcelain Tile (Each)	500	6.50	1,950.00
Mapei Quick Sand...	Mapei Sanded Grout (Per Bag)	6	19.66	117.96
Tosca 20X20	Marazzi Porcelain Tile - Tosca 20X20/Color Ivory (SqFt)	1,152	3.99	4,596.48
Tosca Deco 6X6	Marazzi Tosca Deco 4(LB6X) (EACH)	300	7.58	2,274.00

(8.25%)
TOTAL

SIGNATURE _____

Phone #	Fax #
972-262-7176	972-262-7174

Five Star Flooring
 127 West Main Street
 Grand Prairie, TX 75052

Estimate

DATE	ESTIMATE NO.
6/25/2008	1345

NAME / ADDRESS
Lorrie Lenth 536 Hickory Knob Circle Cedar Hill, TX 75140

2A

P.O. NO.	TERMS	FOB	PROJECT
	50%Down/50% On...		

ITEM	DESCRIPTION	QTY	COST	TOTAL
C-Tile Grout Seal	Ceramic Tile Grout Seal (SqFt)	1,152	1.25	1,440.00
22 Specialty	Custom Fountain Area - Bush Down and Float (Lump Sum)	1	850.00	850.00
Base Boards	Base Boards (Now 3" Materials/Prime, Paint Oil Base & Install) (LnFt)	275	7.25	1,993.75
12 Doors & Trim	Paint All Doors, Trim, Base and Columns To Match (SqFt)	4,400	1.85	8,140.00
REPLACE ALL BERBER CARPET - UPSTAIRS (HIGH GRADE BERBER CARPET)				
02.10 Demo	Demo Existing Carpet (Sqft)	1,500	0.25	375.00
Carpet Install	Berber Carpet W/Pattern Install (SqFt)	1,500	0.75	1,125.00
Show Industries	Berber Carpet High Grade W/Pattern (SqFt)	1,500	3.99	5,985.00
Floor Prep	Upstairs Hall - Floor Prep - Level (Per Bag)	7	175.00	1,225.00
REPLACE ALL PLUSH CARPET - DOWNSTAIRS (HIGH GRADE PLUSH CARPET)				
02.10 Demo	Demo Existing Carpet (SqFt)	1,272	0.25	318.00
Carpet Install	High Grade Plush Carpet Install (SqFt)	1,272	0.65	826.80
Show Industries	High Grade Plush Carpet (SqFt)	1,272	4.29	5,456.88
			(8.25%)	
			TOTAL	

SIGNATURE _____

Phone #	Fax #
972-262-7176	972-262-7174

Five Star Flooring

127 West Main Street
Grand Prairie, TX 75052

Estimate

DATE	ESTIMATE NO.
6/25/2008	1345

NAME / ADDRESS
Lonsie Leath 936 Hickory Knob Circle Cedar Hill, TX 75140

ZB

P.O. NO.	TERMS	FOB	PROJECT
	50% Down/50% On...		

ITEM	DESCRIPTION	QTY	COST	TOTAL
13 HVAC	HVAC Cleaning & Conditioning (Lump Sum)	1	5,555.00	5,555.00
22 Specialty	Dump Fees, Profit & Overhead, Supervision - 22% (Lump Sum)	1	23,240.44	23,240.44
NOTE OF EXCLUSION: ESTIMATE COSTS DOES NOT INCLUDE FINAL RESIDENTIAL CLEANING OF ALL INTERIOR CONTENTS, WINDOW TREATMENTS AND/OR FLOOR COVERING - DETERMINED UPON COMPLETION OF ALL CONSTRUCTION TO DETERMINED COSTS				
				\$129,602.11
			(8.25%)	\$8,515.95
TOTAL				\$131,117.66

SIGNATURE _____

Phone #	Fax #
972-262-7176	972-262-7174

Like it never even happened.

Here #3

Fire & Water - Cleanup & Restoration

9 September 2008

Mr. Lonzie Leath
936 Hickory Knob
Cedar Hill, Texas

RE: RESIDENCE: Reconstruction or Residence

Attached herewith:

- Scope of Work (See attached Exhibit "A")
- Scope of Work -- (See attached Exhibit "B")
- Pricing Associated with SCOPE of WORK
 - o 143,739.86
 - o Includes material allowance of \$25 per sq yd for carpet
 - o Includes material allowance of \$6.50 per sq ft for tile
 - o Owner to provide selections for carpet and tile
 - o Pricing to be adjusted when cost per sq yd or sq ft identified
- Alternate Pricing requested by Owner
(wood flooring material allowance of \$10.50 per sq ft)
 1. Paint entire interior of Residence add \$ 7,213
 2. Install wood flooring at 2nd Floor instead of carpet add \$12,929
 3. Install wood flooring at 1st Floor instead of carpet add \$15,451
 4. Install wood flooring at 1st Floor instead of tile add \$ 9,969
 5. Install tile flooring at 1st Floor instead of carpet add \$12,614

Owner (Leath) to select: carpet
pad
tile
grout (color)
paint (color)

12000 E. Highway 175
Suite 100
Cedar Hill, TX 75091
(972) 495-1111
www.fireandwater.com

Independently Owned and Operated

12000 E. Highway 175
Suite 100
Cedar Hill, TX 75091
(972) 495-1111
www.fireandwater.com

Like it never even happened.

Item 3A

Fire & Water - Cleanup & Restoration

Following selections by Owner [Leath]: Exhibit "B" pricing will have to be adjusted to reflect actual cost of materials in comparison to "allowances" included in pricing

Payment Schedule: One-half of the costs of the entire project will be paid upon customer's executing the Authorization To Perform Services of Servpro of Lake Arlington and Servpro of Southwest Fort Worth. The remainder of the costs for the entire project will be payable prior to customer's contents being moved back into customer's home.

Inspection of Work: Owner (or Owner's designee) to inspect samples of work (prior to installation by contractor) and accept / approve: materials, colors, level of finish; periodic inspections as work progresses, final inspection when contractor apprises Owner that work is complete.

Any changes to the Scope of Work must be in writing via a Change Order signed by both parties.

Jackie Hall

Jackie Hall, President
Servpro of Lake Arlington and
Servpro of Southwest Fort Worth
2517 Gravel Drive
Fort Worth, Texas 76118
817/460-7766 o/s
817/483-0192 fax

12/20/10 15:41 FROM-Wendel A. Withrow
9724170685
T-273 P019/020 F-589

12/20/10 15:41 FROM-Wendel A. Withrow
9724170685
T-273 P019/020 F-589

Independently Owned and Operated

QUALIFICATIONS OF Ann Piper

GENERAL EDUCATION

Attended Baylor University, Waco, Texas
 Graduated Woodrow Wilson High School, Dallas, Texas

RECENT REAL ESTATE SEMINARS

Relocation Appraisal Seminars	Professional Practice	USPAP
Update on Appraisal Standards	Mediation & Property Inspection	
Appraising Historic Properties	Green Building	

EXPERIENCE

Appraiser, Self-employed	1983-Present
Instructor, Commercial College, Inc.	1980-1988
Associate Appraiser, W.A. Galbraith	1977-1983
Broker Associate, Lou Smith REALTORS, Inc.	1975-1977
Owner and Manager, Piper Properties	1967-1981

PROFESSIONAL MEMBERSHIPS

Appraisal Institute, SRA Designation 1983-2002
 Board of Directors, 1992-1997
 National Association of REALTORS,
 North Texas Information Systems, Inc.
 Employee Relocation Council, CRP Designation, 1990-2010
 Relocation Appraisers and Consultants, Inc. Secretary, 1995-96
 Board of Directors, 2000-2003
 North Texas Relocation Professionals, Texas Relocation Network
 Preservation Dallas, Historic House Specialist Designation, 1995, 2006

PUBLIC SERVICE

City of Irving Cultural Affairs Council, 1980-82
 City of Dallas Landmark Commission, 1987-91, 99-2003, 2003-2009, 2009-2011
 Preservation Dallas, Inc., Board of Trustees 1992-98
 Dallas Lighthouse for the Blind, Board of Governors, 1993-2004, Director 2009- 2012
 First Vice Chairman 2010-2011
 American Foundation for the Blind, SW, Board of Directors. 1995-2001
 Healing Hands Ministries, Board Member 2007-2010

PRESERVATION TRAINING

Educational Conference of The National Trust for Historic Preservation, 2001,
 2002, 2003, 2005, 2006, 2007, 2008
 Certified Local Government Training, Austin, TX, January 2002
 Preservation Commissioners Training, Baltimore , MD August 2006

LICENSE

State Certified Residential Real Estate Appraiser
 Certificate Number: TX-1320899-R Expires 5/31/11

TAB 8

WENDEL A. WITHROW
BOARD CERTIFIED*
CIVIL TRIAL LAW
PERSONAL INJURY TRIAL LAW
ADA MARIE WITHROW
W. DAVID GRIGGS
ANNE C. ROWE

LAW OFFICE OF
WENDEL A. WITHROW
1120 METROCREST, SUITE 200
CARROLLTON, TEXAS 75006
(972) 416-2500
FAX (972) 417-0685
WWW.WITHROWLAW.COM
May 31, 2011

LEGAL ASSISTANT
DONNA M. ERVIN
OFFICE MANAGER
LUCY M. WITHROW

VIA FAX #281-925-5300
AND BY U. S. MAIL

Mr. Robert N. Negrin
Codilis & Stawiarski, P.C.
650 N. Sam Houston Parkway East, Ste. 450
Houston, TX 77060

RE: Lonzie C. Leath v. Wells Fargo Bank, N.A. As Trustee
Cause No.: 08-07290

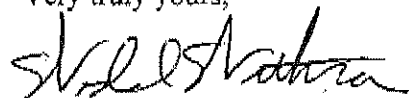
Dear Mr. Negrin:

Enclosed are the following:

1. Draft Motion for Final Judgment.
2. Draft Final Judgment for your review.

Please review and send any proposed changes.

Very truly yours,



Wendel A. Withrow

WAW/dme

Enclosures

cc: Client (w/encl.)

NO. DC-08-07290-D

LONZIE C. LEATH

IN THE 95TH

V.

JUDICIAL DISTRICT COURT

WELLS FARGO BANK, N.A. AS TRUSTEE

OF DALLAS COUNTY, TEXAS

MOTION FOR FINAL JUDGMENT

Comes now, Lonzie C. Leath, and after trial on the merits asks this Court sign the attached Final Judgment as Exhibit A.

Respectfully submitted,

LAW OFFICE OF WENDEL A. WITHROW

WENDEL A. WITHROW
State Bar No.: 21830800
1120 Metrocrest, Suite 200
Carrollton, Texas 75006
Telephone: (972) 416-2500
FAX: (972) 417-0685

Attorney for Plaintiff

I, the undersigned attorney of record, swear under oath that the above Motion for Final Judgment is true and correct.

WENDEL A. WITHROW

SUBSCRIBED AND SWORN to this _____ day of May, 2011.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

CERTIFICATE OF CONFERENCE

This is to certify that

"A conference was held on May 31, 2011 with counsel for Defendant, Wells Fargo Bank, N.A. as Trustee for Option One Mortgage Loan Trust 2006-1 Asset-Backed Certificates, Series 2006-1 on May 31, 2011, on the merits of this motion, and agreement was not reached. Therefore it is presented to the Court for determination."

WENDEL A. WITHROW
ATTORNEY FOR PLAINTIFF

FIAT

The above Motion for Final Judgment is set for a hearing on the ____ day of _____, 2011, at _____ o'clock, ____m. in the District Court, 95th Judicial District, Dallas County, Texas.

JUDGE PRESIDING

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record in accordance with the Texas Rules of Civil Procedure on this ____ day of May, 2011.

WENDEL A. WITHROW

NO. DC-08-07290-D**LONZIE C. LEATH****IN THE 95TH****V.****JUDICIAL DISTRICT COURT****WELLS FARGO BANK, N.A. AS TRUSTEE****OF DALLAS COUNTY, TEXAS****FINAL JUDGMENT**

On the 9th day of May, 2011, the above-styled and numbered cause was called for Jury trial. Plaintiff, Lonzie Leath appeared in person and through his attorney of record. Defendant, Wells Fargo Bank, N.A. as Trustee for Option One Mortgage Loan Trust 2006-1 Asset-Backed Certificates, Series 2006-1 appeared by corporate representative and attorney of record. All parties announced ready. A jury trial was requested, and one question of fact was submitted by the Court to the Jury. After due deliberation, the Jury returned its verdict as follows: What was the fair market value of 936 Hickory Knob Circle, Cedar Hill, Dallas County, Texas, on October 26, 2005 - Answer: \$421,400.00.

The Court, having considered the pleadings, evidence and official records on file in this cause, is of the opinion that Judgment should be rendered for Plaintiff. The Court finds and hereby declares that the home equity loan made in the amount of \$340,000.00 on October 26, 2005 is greater than 80% of the Fair Market Value on October 26, 2005 in violation of the Texas Constitution.

It is therefore ORDERED, ADJUDGED, DECREED, and DECLARED that Lonzie Leath, Plaintiff, recover from Defendant, Wells Fargo

Bank, N.A. as Trustee for Option One Mortgage Loan Trust 2006-1
Asset-Backed Certificates, Series 2006-1, Judgment as follows:

1. The Deed of Trust lien dated October 26, 2005 on the Plaintiff's homestead, 936 Hickory Knob Circle, Cedar Hill, Texas 75104, is hereby voided and of no effect on said property at 936 Hickory Knob Circle, Cedar Hill, Texas 75104.
2. The Principal and Interest on the Home Equity Adjustable Rate Note dated October 26, 2005 is hereby forfeited.
3. \$15,000.00 for attorney fees up through the trial of this cause.
4. \$2,500.00 for attorney fees if appealed to the Court of Appeals.
5. \$5,000.00 if appealed to the Texas Supreme Court.
6. Costs for Court.

FURTHER, it is ordered that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment.

All relief not expressly granted herein is denied.

SIGNED this ____ day of _____. 2011.

JUDGE PRESIDING

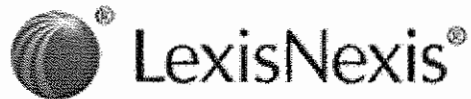
APPROVED AND ENTRY REQUESTED:

Wendel A. Withrow
Attorney for Plaintiff

APPROVED AS TO FORM ONLY:

Robert L. Negrin
Attorney for Defendant

TAB 9



VERA F. WILSON, Appellant v. AAMES CAPITAL CORPORATION, Appellee

NO. 14-06-00524-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

2007 Tex. App. LEXIS 8345

October 23, 2007, Judgment Reuderred
October 23, 2007, Memorandum Opinion Filed

PRIOR HISTORY: [*1]

On Appeal from the 125th District Court, Harris County, Texas. Trial Court Cause No. 05-51877.

COUNSEL: For Appellants: Joseph H. Pedigo, Houston, TX.

For Appellees: Henry A. Jakob, Houston, TX.

JUDGES: Panel consists of Justices Yates, Seymore, and Edelman.*

* Senior Justice Richard H. Edelman sitting by assignment.

OPINION BY: Richard H. Edelman

OPINION

MEMORANDUM OPINION

In this homestead foreclosure case, Vera F. Wilson appeals a judgment entered in favor of Aames Capital Corporation ("Aames") on the grounds that the evidence was insufficient to prove that the loan closing took place at the office of the lender, an attorney, or a title company or that the lender was qualified to make the home equity loan. We affirm.

Wilson entered into a home equity loan of \$ 115,500 by executing a note and security agreement with One Stop Mortgage, Inc. ("One Stop"), which assigned the note and security agreement to Aames. After Wilson defaulted on the note, Aames brought a judicial foreclosure proceeding against her.¹ A bench trial was held, and

the court rendered judgment, awarding Aames: (1) recovery of the note balance; (2) a declaration that the security agreement created an enforceable lien on Wilson's homestead; and (3) a foreclosure of that lien. The trial court also entered findings of fact and conclusions of law. [*2]

1 See *Tex. R. Civ. P.* 735.

In 1997, the Texas Constitution was amended to allow "home-equity" loans. See *Tex. Const. art. XVI, § 50(a)(6)*; *Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342, 343 (Tex. 2001). However, strict criteria were imposed in order for a lien to "attach" to a homestead, thereby giving its holder the right to foreclosure. See *Tex. Const. art. XVI, §50 (a)(6)(A)-(Q)*. If any of these requirements are not met, the lien against the homestead is not valid, and the loan is treated as an unsecured extension of credit. *Doody*, 49 S.W.3d at 345-46.

Wilson's challenge to the evidence supporting the judgment relies on her contention that, as the party seeking to enforce the lien, Aames had the burden to plead and prove that its lien on Wilson's homestead satisfied the many requirements set forth in *subsections 50(a)(6)(A)-(Q)*. However, Wilson cites no authority, and we have found none, indicating that a home equity lender, seeking to enforce its lien, has the burden of proof on those requirements.² If anything, judicial economy would dictate that a failure to comply with any of these requirements is in the nature of an affirmative defense so that judicial resources are spent [*3] litigating the few requirements that are contested rather than the many that are not.³ Because Wilson fails to demonstrate that Aames had the burden to prove that it met the contested constitutional requirements, Wilson's challenge to the

evidence to prove that compliance affords no basis for relief. Accordingly, Wilson's issues are overruled, and the judgment of the trial court is affirmed.

2 Wilson cites *Hruska v. First State Bank of Deanville* to support her claim that Aames had the burden to plead and prove that it had a valid lien. 747 S.W.2d 783, 785 (Tex. 1988). However, *Hruska* holds only that a lien cannot be created by estoppel and thus has no application here. See *id.* In addition, the holding of *Hruska* that a defect in a lien cannot be cured is not longer valid. See *Doody*, 49 S.W.3d at 346.

3 See generally *Greathouse v. Charter Nat'l Bank-Sw.*, 851 S.W.2d 173, 175-176 (Tex. 1992)(describing considerations affecting the allocation of burdens of proof); see also 2 William V. Dorsaneo, III et al., *Tex. Real Estate Guide* §§ 53.130[1][b] & 53.131 (2001) (stating that invalidity of lien based on noncompliance with the constitutional requirements is an affirmative defense).

/s/Richard [*4] H. Edelman

Senior Justice

Judgment rendered and Memorandum Opinion filed
October 23, 2007.

1384DJ

***** Print Completed *****

Time of Request: Thursday, August 11, 2011 19:00:23 EST

Print Number: 1827:300805551

Number of Lines: 80

Number of Pages:

Send To: NEGRIN, ROB
CODILIS & STAWIARSKI, P.C.
650 N SAM HOUSTON PKWY E STE 450
HOUSTON, TX 77060-5908

Affirmed and Memorandum Opinion filed October 23, 2007.

In The
Fourteenth Court of Appeals

NO. 14-06-00524-CV

VERA F. WILSON, Appellant

V.

AAMES CAPITAL CORPORATION, Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 05-51877

MEMORANDUM OPINION

In this homestead foreclosure case, Vera F. Wilson appeals a judgment entered in favor of Aames Capital Corporation (AAames@) on the grounds that the evidence was insufficient to prove that the loan closing took place at the office of the lender, an attorney, or a title company or that the lender was qualified to make the home equity loan. We affirm.

Wilson entered into a home equity loan of \$115,500 by executing a note and security agreement with One Stop Mortgage, Inc. (AOne Stop@), which assigned the note and security agreement to Aames. After Wilson defaulted on the note, Aames brought a judicial foreclosure proceeding against her.^[1] A bench trial was held, and the court rendered judgment, awarding Aames: (1) recovery of the note balance; (2) a declaration that the security agreement created an enforceable lien on Wilson=s homestead; and (3) a foreclosure of that lien. The trial court also entered findings of fact and conclusions of law.

In 1997, the Texas Constitution was amended to allow Ahome-equity@ loans. See Tex. Const. art. XVI, ' 50.(a)(6); *Doody v. Ameriquest Mortgage. Co.*, 49 S.W.3d 342, 343 (Tex. 2001). However, strict criteria were imposed in order for a lien to Aattach@ to a homestead, thereby giving its holder the right to foreclosure. See Tex. Const. art. XVI, '50 (a)(6)(A)-(Q). If

any of these requirements are not met, the lien against the homestead is not valid, and the loan is treated as an unsecured extension of credit. *Doody*, 49 S.W.3d at 345B46.

Wilson's challenge to the evidence supporting the judgment relies on her contention that, as the party seeking to enforce the lien, Aames had the burden to plead and prove that its lien on Wilson's homestead satisfied the many requirements set forth in subsections 50(a)(6)(A)-(Q). However, Wilson cites no authority, and we have found none, indicating that a home equity lender, seeking to enforce its lien, has the burden of proof on those requirements.^[2] If anything, judicial economy would dictate that a failure to comply with any of these requirements is in the nature of an affirmative defense so that judicial resources are spent litigating the few requirements that are contested rather than the many that are not.^[3] Because Wilson fails to demonstrate that Aames had the burden to prove that it met the contested constitutional requirements, Wilson's challenge to the evidence to prove that compliance affords no basis for relief. Accordingly, Wilson's issues are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Senior Justice

Judgment rendered and Memorandum Opinion filed October 23, 2007.

Panel consists of Justices Yates, Seymore, and Edelman.*

[1] See Tex. R. Civ. P. 735.

[2] Wilson cites *Hruska v. First State Bank of Deanville* to support her claim that Aames had the burden to plead and prove that it had a valid lien. 747 S.W.2d 783, 785 (Tex. 1988). However, *Hruska* holds only that a lien cannot be created by estoppel and thus has no application here. See *id.* In addition, the holding of *Hruska* that a defect in a lien cannot be cured is not longer valid. See *Doody*, 49 S.W.3d at 346.

[3] See generally *Greathouse v. Charter Nat'l Bank-Sw.*, 851 S.W.2d 173, 175-176 (Tex. 1992) (describing considerations affecting the allocation of burdens of proof); see also 2 William V. Dorsaneo, III et al., *Tex. Real Estate Guide* " 53.130[1][b] & 53.131 (2001) (stating that invalidity of lien based on noncompliance with the constitutional requirements is an affirmative defense).

* Senior Justice Richard H. Edelman sitting by assignment.

