**IN THE SUPREME COURT OF MISSOURI**

**No. SC91639**

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**BONNIE HARGIS,**

***Plaintiff-Appellant,***

**v.**

**JLB CORPORATION d/b/a GOLDEN OAK LENDING,**

***Defendant-Respondent.***

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# DEFENDANT-RESPONDENT'S SUBSTITUTE BRIEF

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**SUBMITTED BY**

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## STATEMENT OF FACTS

JLB Corporation ("JLB") is a Missouri corporation engaged in the business of mortgage brokering and providing mortgages to home purchasers and homeowners. (L.F. 9.) JLB is licensed by the United States Department of Housing and Urban Development as a loan correspondent mortgagee. (L.F. 12.) At all relevant times, JLB was authorized to act as a mortgage broker and provider of mortgages but exempt from licensure under the Missouri Residential Mortgage Brokers License Act. (L.F. 8.)

During January, 2009, Plaintiff Hargis refinanced her home loan with JLB. (L.F. 9.) JLB did not prepare the note, the mortgage, or the deed. (L.F. 18). JLB did not prepare any legal document. (L.F. 35.) JLB did prepare or fill in the loan application and various disclosures which JLB was required to prepare by federal law and regulations. JLB did not charge any separate fee for document preparation. (L.F. 35.)

One month later in February, 2009, Plaintiff filed a three count petition against JLB:

Count 1 alleged that JLB had illegally prepared and processed documents which constituted the practice of law according to Missouri Revised Statutes § 484.010; (L.F. 9.)

Count 2 realleged the allegations of Count 1 and pled that the aforementioned actions were in violation of Missouri's Merchandising Practices Act; (L.F. 13.)

Count 3 realleged the preceding allegations of Count 1 and Count 2 and alleged that the aforementioned actions constituted the cause of action of money had and

received. (L.F. 14.) No additional factual allegations were contained in Count 3. (L.F. 14.)

On April 3, 2009, JLB answered the petition. (L.F. 16.)

On August 5, 2009, JLB filed its motion for summary judgment. (L.F. 33.) The basis for JLB's motion was that JLB had not practiced law, JLB had not drafted legal documents, and JLB had not separately charged for the preparation of documents. (L.F. 33.) JLB inadvertently did not file a separate statement of undisputed facts.

On August 7, 2009, at the case management conference with Judge Cohen, the case was set for trial on April 26, 2010. (L.F. 41.)

On September 3, 2009, Plaintiff filed a response to JLB's motion for summary judgment and, in the alternative, Plaintiff asked for an extension of time to file another response to JLB's motion for summary judgment. (L.F. 42.) Plaintiff did not object nor mention that no statement of undisputed facts had been filed. (L.F. 42-44.)

On October 9, 2009, the motion for summary judgment was first argued. (L.F. 84.)

On October 15, 2009, Judge Cohen granted Plaintiff the opportunity to take additional discovery before reargument of JLB's motion for summary judgment. (L.F. 85.)

On November 18, 2009, Plaintiff took the depositions of JLB employees John Paci and Tim Mennemeyer.

At the next motion hearing date of December 11, 2009, Plaintiff filed and handed to Defense Counsel another response to JLB's motion for summary judgment. (L.F.

113.) In this response, Plaintiff objected that no statement of undisputed facts had been filed. (L.F. 114.) In the second response to JLB's motion for summary judgment, Plaintiff now charged that JLB had conducted the unauthorized practice of law by:

preparing a mortgage loan application form; (L.F. 118)

not preparing but obtaining mortgage documents from other persons; (L.F. 118) and,

practicing the mortgage broker business. (L.F. 119.)

At the December 11 hearing, Judge Cohen granted leave for JLB to file a statement of undisputed facts on or before December 18, 2009, granted leave for Plaintiff to file a response to the statement of undisputed facts on or before December 29, 2009, and granted leave for Defendant to file its reply to Plaintiff's response on or before December 28, 2009. (L.F. 121.) Judge Cohen set the next hearing on JLB's motion for summary judgment on January 15, 2010. (L.F. 121.)

On December 17, 2009, JLB filed its statement of undisputed facts. (L.F. 133.) JLB truthfully stated that it had not prepared any legal documents nor had it billed for preparation of legal documents. (L.F. 133.)

On December 28, 2009, JLB filed its reply in support of its motion for summary judgment. (L.F. 137.)

On December 29, 2009, Plaintiff filed its response to JLB's statement of undisputed facts. (L.F. 146.) Plaintiff stated that JLB had prepared a legal document - the loan application - and that JLB had charged for preparing associated documents such as the loan application and required loan disclosures. (L.F. 146, 154.)

On January 7, 2010, Plaintiff filed a new lawsuit against JLB in the United States District Court for the Eastern District of Missouri. (L.F. 313-35.) In the federal lawsuit, Plaintiff alleged that JLB had committed the unauthorized practice of law, had violated the federal Real Estate Settlement Practices Act and the federal Truth in Lending Act. (L.F. 313-26.)

On January 22, 2010, JLB's motion for summary judgment was again argued before Judge Cohen. (L.F. 234.) Judge Cohen took the motion under submission but allowed Plaintiff to file another memorandum opposing the motion by January 29th. (L.F. 234.)

On February 1, 2010, Plaintiff filed another brief in opposition to JLB's motion for summary judgment. (L.F. 235.)

On February 2, 2010, Plaintiff filed a request for leave to amend the petition and assert the same claims as had been pled in its recently filed federal lawsuit. (L.F. 273-90.)

On February 26, 2010, Plaintiff's motion to file the amended petition and JLB's motion for summary judgment was again argued before Judge Cohen. (L.F. 336.)

On March 8, 2010, Judge Cohen denied Plaintiff's leave to file an amended petition and granted JLB's motion for summary judgment. (L.F. 337.)

## POINTS RELIED ON

**1. CONTRARY TO THE ARGUMENTS SET FORTH IN SECTIONS A, B, AND C OF PLAINTIFF'S BRIEF, THIS SUPREME COURT SHOULD AFFIRM THE GRANT OF SUMMARY JUDGMENT FOR THE FOLLOWING INDEPENDENT REASONS:**

**A. JLB DID NOT PRACTICE LAW AND DID NOT DRAFT ANY LEGAL DOCUMENTS; AND**

**B. JLB DID NOT SEPARATELY CHARGE FOR THE DRAFTING OF ANY LEGAL DOCUMENT.**

1. Carpenter v. Countrywide Home Loans, Inc., 250 S.W.3d 697 (Mo. banc 2008)

2. In re First Escrow, Inc., 840 S.W.2d 839 (Mo. banc 1992)

3. Hulse v. Criger, 247 S.W.2d 855, 857 (Mo. banc 1952)

**2. CONTRARY TO THE ARGUMENTS SET FORTH IN SECTIONS A, B, AND C OF PLAINTIFF'S BRIEF, THIS SUPREME COURT SHOULD AFFIRM THE SUMMARY JUDGMENT ENTERED BY JUDGE COHEN BECAUSE JLB DID NOT PRACTICE LAW AS DEFINED BY THE STATUTES AND COURTS OF THE STATE OF MISSOURI FOR THE FOLLOWING INDEPENDENT REASONS:**

**A. BECAUSE FILLING OUT A LOAN APPLICATION IS NOT THE PRACTICE OF LAW;**

**B. BECAUSE OBTAINING LEGAL DOCUMENTS FROM ANOTHER PERSON IS NOT THE PRACTICE OF LAW; AND**

**C. BECAUSE BEING A MORTGAGE BROKER IS NOT THE PRACTICE OF LAW.**

1. Hulse v. Criger, 247 S.W.2d 855, 857 (Mo. banc 1952)

2. Carpenter v. Countrywide Home Loans, Inc., 250 S.W.3d 697, 702 (Mo. banc 2008)

3. Richter v. Union Pac. R. Co., 265 S.W. 3d 294, 297 (Mo. App. 2008)

**3. CONTRARY TO THE ARGUMENTS SET FORTH IN SECTIONS A, B, AND C OF PLAINTIFF'S BRIEF, THIS SUPREME COURT SHOULD AFFIRM THE SUMMARY JUDGMENT ENTERED BY JUDGE COHEN OF THE ST. LOUIS COUNTY CIRCUIT COURT BECAUSE JLB'S ACTIONS WERE EXPRESSLY AUTHORIZED BY CHAPTER 443 OF THE MISSOURI STATUTES.**

1. Burns v. Smith, 305 S.W.3d 505, 509 (Mo. banc 2010);

2. In re Estate of Blodgett, 95 S.W.3d 79, 81 (Mo. banc 2003).

3. Missouri Revised Statutes §§ 443.701-443.893

4. 20 C.S.R. 1140-30; 20 C.S.R. 1140-31.

**4. CONTRARY TO THE ARGUMENTS SET FORTH IN SECTIONS A, B, AND C OF PLAINTIFF'S BRIEF, THIS SUPREME COURT SHOULD AFFIRM THE SUMMARY JUDGMENT ENTERED BY JUDGE COHEN OF THE ST. LOUIS COUNTY CIRCUIT COURT BECAUSE JLB'S ACTIONS WERE EXPRESSLY AUTHORIZED BY FEDERAL REGULATIONS.**

1. De Pass v. Harris Wool Co., 144 S.W.2d 146 (Mo. banc 1940)

2. 24 C.F.R. §3500.2(b)

3. 24 C.F.R. §3500.7 (a, b, d)

4. 24 C.F.R. §3500.8(b)

**5. CONTRARY TO THE ARGUMENTS SET FORTH IN SECTION D OF PLAINTIFF'S BRIEF, THIS SUPREME COURT SHOULD AFFIRM THE SUMMARY JUDGMENT ENTERED ON COUNT 3 (MONEY HAD AND RECEIVED) OF PLAINTIFF'S PETITION FOR THE FOLLOWING INDEPENDENT REASONS:**

**A. COUNT 3 CONTAINS NO ADDITIONAL FACTUAL ALLEGATIONS AND IS ENTIRELY DEPENDENT ON THE WRONGS SET FORTH IN COUNTS 1 AND 2;**

**B. THE TRIAL COURT ACTED PROPERLY IN DENYING LEAVE TO AMEND COUNT 3 BECAUSE THE REQUEST FOR LEAVE WAS PRESENTED TO THE CIRCUIT COURT ON FEBRUARY 26, 2010, AND TRIAL WAS SCHEDULED TWO MONTHS THEREAFTER; AND,**

**C. THE TRIAL COURT ACTED PROPERLY IN DENYING LEAVE TO AMEND COUNT 3 BECAUSE PLAINTIFF WAS SEEKING TO ADD CLAIMS TO THE STATE CASE WHICH PLAINTIFF HAD ALREADY FILED AGAINST JLB IN FEDERAL COURT.**

1. Schwartz v. Custom Printing Co., 926 S.W.2d 490 (Mo. App. 1996)
2. Hudson v. Riverport Performance Art Centre, 37 S.W.3d 261 (Mo. App. 2000)
3. Stewart Title Guar. Co. v. WKC Rests. Venture Co., 961 S.W.2d 874 (Mo. App. 1998)
4. Lunn v. Anderson, 302 S.W.3d 180 (Mo. App. 2009)

## LEGAL ARGUMENT

The Circuit Court, Judge Cohen, after three oral arguments and after Plaintiff was given the opportunity to file at least three briefs in opposition, granted Defendant JLB's motion for summary judgment. This case and appeal boils down to three legal disputes.

1. Plaintiff contends that filling out a loan application constitutes the practice of law in spite of the fact that no court in America has ever so held.

2. Plaintiff contends that the person getting legal documents from a third party is practicing law in spite of the fact that no court in America has ever so held.

3. Plaintiff contends that conducting the business of mortgage brokering constitutes the practice of law in spite of the fact that no court in America has ever so held.

There are no disputed issues of material fact and this case and this appeal present this Supreme Court with three invalid claims set forth above.

Aside from the lack of support for Plaintiff's claims, Plaintiff's brief is a mess.

Missouri Supreme Court Rule 84.04 prescribes the form for an appellant's points relied upon. Plaintiff in this case has ignored Rule 84.04 and her points relied upon do not follow the required form, are directed more to the decision of the court of appeals which is not subject to review here, and do not clearly state wherefore and why the circuit court erred in entering summary judgment for JLB.

In addition, Plaintiff irrelevantly devotes most of her brief to attacking the proper decision of the court of appeals. In reviewing a circuit court's grant of summary

judgment, this Supreme Court reviews the decision of the circuit court and once this Supreme Court grants transfer the decision of the court of appeals is of no importance.

Finally, Plaintiff incorrectly states that the Court of Appeals considered the validity of or nullified a statute, i.e., Mo. Rev. Stat. §484.010. Section 484.010 is a criminal statute providing that practicing law without a license is a crime. JLB was never charged with a crime and Section 484.010 was never directly at issue in this matter nor was the validity or constitutionality of Section 484.010 ever at issue.

As the sole determiner and regulator of the practice of law are this Supreme Court and its court of appeals and circuit courts. The circuit court and court of appeals in this civil matter merely rejected Plaintiff's unreasonable and irresponsible definitions of what constitutes the practice of law.

The validity, constitutionality, or application of Section 484.010 was never at issue in this matter, and the court of appeals did not invalidate nor determine the constitutionality of Section 484.010. This Supreme Court reviews grant of summary judgment de novo. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). If the summary judgment moving party makes a prima facie showing that it is entitled to judgment as a matter of law, then nonmoving part than has a specific burden:

> A denial may not rest upon the mere allegations or denials of the party's pleading. Rather the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.

Mo. S. Ct. R. 74-04(c)(2).

A summary judgment may be affirmed under any theory that is supported by the record. Burns v. Smith, 303 S.W.3d 505, 509 (Mo. banc 2010).

**1. CONTRARY TO THE ARGUMENTS SET FORTH IN SECTIONS A, B, AND C OF PLAINTIFF'S BRIEF, THIS SUPREME COURT SHOULD AFFIRM JUDGE COHEN'S GRANT OF SUMMARY JUDGMENT FOR THE FOLLOWING INDEPENDENT REASONS:**

**A. JLB DID NOT PRACTICE LAW AND DID NOT DRAFT ANY LEGAL DOCUMENTS; AND**

**B. JLB DID NOT SEPARATELY CHARGE FOR THE DRAFTING OF ANY LEGAL DOCUMENT.**

According to the Missouri Supreme Court, in order to be liable under the alleged circumstances for the unauthorized practice of law, JLB must have done two things: 1) prepare legal documents; and, 2) specifically levy a separate fee for document preparation. Carpenter, 250 S.W.3d at 702; In re First Escrow, Inc., 840 S.W.2d at 849.

Contrary to Plaintiff's assertions, JLB raised these issues in its motion for summary judgment.

In 2008, the Missouri Supreme Court restated the two elements necessary for Plaintiff's claim:

> Further this Court has previously held in the analogous context of real estate brokers and escrow companies that the act of charging a separate fee for the completion of legal forms by non-lawyers constitutes the

> unauthorized practice of law business. *See In re First Escrow, Inc.*, 840 S.W.2d 839, 849 (Mo. banc 1992); *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855, 861 (1952). In *In re First Escrow, Inc*, this Court stated that escrow companies "may not charge a separate fee for document preparation, or vary their customary charges for closing services based upon whether documents are to be prepared in the transaction."

Carpenter, 250 S.W.3d at 702.

The Missouri Supreme Court emphasized and explained that for liability a company must prepare the legal documents and charge a "separate fee" for the legal document preparation. Id. The Missouri Supreme Court explained and stated:

> In striking a workable balance between public convenience and protection, the Court allowed completion of certain standardized legal forms so long as the preparing party has a personal interest in the transaction and no separate fee is assessed. *See In re First Escrow, Inc.*, 840 S.W.2d at 846-47; *Hulse*, 247 S.W.2d at 860-63.

Carpenter, 250 S.W.3d at 702.

Missouri cases have held promissory notes, deeds and mortgages to be legal documents. Id. at 699 (promissory note and deed of trust are legal documents); contra Hulse v. Criger, 247 S.W.2d 855, 857 (Mo. banc 1952) (real estate brokers may fill out contract forms).

In the instant case it is undisputed that JLB did not prepare (or fill in the blanks) on any legal documents such as the loan, note, deed, or mortgage. Conceding this,

Plaintiff mistakenly argues that helping to fill out a loan application or providing the required federal loan disclosures must be done by an attorney.

First, no Missouri case so holds. Requiring an attorney to fill out an application for a loan or mortgage is senseless and goes far beyond any Missouri or American decision. Plaintiff does not cite any decision from any other state or place so holding. Plaintiff's argument would require bank loan officers or credit card application takers to be attorneys. Second, the documents held in the past to be legal documents were classical legal documents such as promissory notes, deeds, and mortgages (deeds of trust). Plaintiff does not assert that JLB prepared any of the promissory note, deeds, mortgages (deeds of trust) for Plaintiff, and consequently, under Missouri precedent, JLB did not conduct the unauthorized practice of law.

Second, recognizing the JLB did not prepare any legal documents, Plaintiff argues, without any authority, since none exists, that gathering or obtaining the legal documents properly prepared by others constitutes the unauthorized practice of law. This argument, if accepted, really puts JLB in a trick box. JLB is now charged with properly having others prepare legal documents. It makes no sense to argue that JLB properly had others prepare the legal documents but by receiving these properly prepared documents JLB committed the unauthorized practice of law. JLB is entitled to summary judgment because it did not prepare any legal documents. Hargis asks this Court to stretch the practice-of-law prohibition beyond where any court in America has ever gone. While statutes at times may be instructive in determining what constitutes the practice of law, "[t]he judiciary is necessarily the sole arbiter of what constitutes the practice of law."

Eisel v. Midwest BankCentre, 230 S.W.3d. 335, 338 (Mo banc. 2007). "Statutes are merely in aid of, and do not supersede or detract from, the power of the judiciary to define and control the practice of law." Id. at 338-39. Moreover, Missouri statutes are not to be interpreted unreasonably. Richter v. Union Pac. R. Co., 265 S.W.3d 294, 297 (Mo.App. E.D. 2008).

Procuring or obtaining documents prepared by others *ipso facto* does not constitute the unauthorized practice of law. If procuring or obtaining such documents constituted the practice of law, the result would be absurd. Under Hargis's expansive theory, any person who goes to a lawyer and walks away with an attorney-drafted legal document, such as a will, an employment contract, or a real estate lease, will have procured a legal document and thereby practiced law. No Missouri court has held that merely procuring or obtaining documents prepared by others constitutes the law business. As such, the trial court did not error in granting summary judgment to JLB, and the Court of Appeals properly affirmed. See ITT Commercial Fin., 854 S.W.2d 371 at 376.

Third, Plaintiff makes the unsupported argument and unpled that the entire mortgage broker business constitutes the practice of law. Hargis asserts that "key to the determination of whether or not an action constitutes the practice of law is the amount of legal skill, knowledge and discretion that is required." (Appellant's Br. at 28.) Specifically, she claims that "[m]atching a borrower with a loan based upon assets and liabilities requires legal knowledge and sophisticated consideration of legal issues." (Id. at 29.) At the same time, however, Hargis "takes no issue with [JLB]'s role in . . . matching a borrower with an investor." (Id.)

The consequences to consumers if Hargis's outlandish theory—that matching a borrower with a loan requires legal knowledge—were accepted would be severe. Because no one but a lawyer would be able to broker a loan, the supply of brokers would be slashed and the increased costs for obtaining a loan would be borne by consumers. In addition, even if brokering a loan without a lawyer were the practice of law, it would not be actionable under Section 484.020 absent the charge of a separate fee charged for the legal services. See Bray v. Brooks, 41 S.W.3d 7, 14 (Mo.App. W.D. 2001).

In any event, none of the cases cited by Hargis control nor do the cases support her claim. For example, United States v. Sanders, 343 F.3d 511 (5th Cir. 2003), was a criminal bank-fraud case. Moreover, the language which Hargis quotes about a loan officer handing a man a form requiring the disclosure of assets and liabilities (Appellant's Br. at 28) not only comes from a non-majority opinion,[1] but does nothing for Hargis's argument as the context had nothing to do with the practice of law. Likewise, Hargis cites a bankruptcy case in which the debtor listed as a $6,000.00 asset cattle that he later admitted he did not own. (Id. (citing In re Morris, 302 B.R. 728 (Bkrtcy. N.D. Okla. 2003)). It too, has nothing to do with the practice of law. No case holds that the discretion exercised by JLB—matching Hargis with a lender—requires *legal* skills.

[1] Hargis would have this Court believe she was citing a concurrence in an out-of-jurisdiction case, but forgot to inform this Court that the case indicated Judge Garza was "concurring in part and dissenting in part." Sanders, 343 F.3d at 528.

In addition, Hargis's reliance on Hulse v. Criger, 247 S.W.2d 855, 863 (Mo. banc 1952), is misplaced. Hulse suggests that choosing between a warranty deed and a contract for deed involves legal judgment, id. at 860-63, but Hargis has not alleged, much less provided any evidence, that JLB engaged such decision making. It is undisputed that JLB did not prepare (or fill in the blanks) on any legal documents for the loan, note, deed, or mortgage. Faced with these irrefutable facts, Hargis is left with vague references to JLB's matching a client to a loan, negotiating with a lender, and gathering documents as constituting the unauthorized practice of law.

Hargis correctly notes the Supreme Court has attempted to maintain a "workable balance" between routine services and those that require legal discretion and advice. (Appellant's Br. at 28 (citing In re Mid-Am. Living Trust Assocs., Inc., 927 S.W.2d 855, 859 (Mo. banc 1996)).) Hargis's contention that JLB's actions, e.g., matching a client to a loan, were "not routine" (Id. 28) is simply not accurate. Allowing a mortgage broker to engage in routine services constitutes such a balance. As such, the trial court properly granting summary judgment to JLB. See ITT Commercial Fin., 854 S.W.2d at 376.

JLB should receive summary judgment because it did not prepare any legal documents for Plaintiff nor practice law.

In addition, JLB is also entitled to summary judgment because it did not separately charge for the preparation of any legal documents. Carpenter, 250 S.W.3d at 702. As the Missouri Supreme Court has repeatedly made clear, the second necessary element of Plaintiff's claim is that JLB must have charged a separate fee specifically for the preparation of legal documents. Id.

JLB raised the point, and supported it with affidavit and a statement of undisputed fact in its motion for summary judgment, that JLB never billed nor charged for document preparation. Plaintiff mistakenly argues that JLB had to restate or state with a different emphasis in its reply brief that JLB did not separately charge for document preparation. There was no need to submit another statement of undisputed fact since the statement for the motion for summary judgment said JLB never charged for document preparation.

It is undisputed that JLB did not charge Hargis a separate fee for its challenged services and Hargis does make such an argument in the points-relied-on section of her brief. Therefore, such issue is not before this Court. See Mo. S. Ct. R. 84.04(e) (argument portion of appellate brief "shall be limited to those errors included in 'Points Relied On.'"); Helmig v. State, 42 S.W.3d 658, 666 (Mo.App. E.D. 2001) ("[W]e do not consider arguments and issues raised in the argument portion of the brief which are not encompassed by the points relied on."). In any event, the HUD-1 Settlement Statement, filed by Hargis, shows no charge on line 1105 for "Document Preparation Fee" (L.F. 50) and lack of a specified charge extinguishes Hargis's claim. See Mitchell v. Residential Funding Corp., 334 S.W.3d 477, 499 (Mo.App. W.D. 2010) (because HUD–1As "conclusively" listed certain fees as "loan discount" fees, trial court was entitled to refuse to allow defendants attempt to re-characterize such fees by arguing to jury that "loan discount" fees paid by borrowers was not really "loan discount" fee but instead represented permissible "origination fee").

Hargis instead urges reversal on the ground that a separate fee is not necessary to find JLB liable for the unauthorized practice of law. (Appellant's Br. at 30.) The only

evidence cited by Hargis, however, in support of her argument is the alleged "admission" from JLB's vice president, John Paci, that JLB "lumped together" charges for preparing mortgage documents. (Id. at 30.) Mr. Paci's actual deposition testimony follows:

> Q. . . . [F]illing out loan application forms, that's certainly a service that's provided by your corporation, correct?
>
> A. Yes.
>
> Q. Okay. And that's one of the services for which you charge, your corporation charges, correct?
>
> A. Well, we don't have a loan application fee.
>
> Q. Sure.
>
> A. But I guess it would all get lumped together.

(L.F. 96 (Paci Dep. at 24:17-25).)

Contrary to Hargis's suggestion, Mr. Paci's testimony confirms that JLB did not specifically and separately charge for the preparation of documents (legal or otherwise). Absent a separate fee, there is no basis for finding that JLB placed an emphasis on the preparation of any legal documents. See Eisel, 230 S.W.3d at 338 ("[T]he charging of a separate additional charge tends to place emphasis on conveyancing and legal drafting as a business."); Hulse, 247 S.W.3d at 863.

Plaintiff points to Paci's testimony where he testified that part of processing a loan is gathering documents and making copies.

> Q. Gathering forms and documents, that means obtaining forms and documents, correct?

A. Yes.

Paci Dep. page 16 (L.F. 178.)

There is nothing wrong with gathering forms and no case has held that gathering documents constitutes the unauthorized practice of law.

Finally, Plaintiff points to the Paci testimony where he testified about getting loan offers for JLB's customers.

Q. [T]he administration fees, the broker fees, and the loan origination fees, these are all fees charged by Defendant for actions taken on behalf of its clients, correct, in obtaining a mortgage.

A. These are charges for services we provide, which is matching up with an investor to get a loan.

Q. And in matching them up with an investor, you're acting on behalf - Defendant is acting on behalf of its clients, Correct?

A. Yes.

Paci Dep. page 35 (L.F. 183).

Acting on behalf of someone else, as an agent, employee, contractor, or fiduciary does not make someone the unauthorized practitioner of law.

Hargis also did not find or cite any evidence that JLB varied or increased charges to account for the preparation of any legal documents. This Court has recently moved away from the language in In re First Escrow, Inc., 840 S.W.2d 839, 849 (Mo. banc 1992), concerning the varying of charges. See Carpenter, 250 S.W.3d at 702 n.4 ("In striking a workable balance between public convenience and protection, the Court [in In

re First Escrow, Inc.,] allowed completion of certain standardized legal forms so long as the preparing party has a personal interest in the transaction and no separate fee is assessed.").

The public policy implications of Hargis's position loom large, for if the cost of procuring legal documents cannot be covered by general overhead, then lenders will have to hire outside lawyers to fill in the forms, all at the expense and detriment of consumers.

Hargis now complains to this Court that she did not perform discovery on the separate-fee argument, because the issue was raised in JLB's summary judgment reply brief. JLB's reply brief, however, was filed in December 2009 and Hargis did not file her untimely sur-reply until February 1, 2010. (L.F. 234-35.) Significantly, Hargis did not even plead in her Petition that JLB had varied its fees. (L.F. 8-15.) Variance of fees is a separate issue from whether JLB charged separate fees. Moreover, although in February 2010, after deadlines had passed and with an April trial looming, Hargis sought to amend her Petition to add language about variance of fees, she also sought to add RESPA and TILA claims that were pending the federal lawsuit she had just filed in January 2010. (L.F. 319-25.)

Not only did Hargis fail to address the variance-of-fees issue in Mr. Paci's deposition so as to allow her to address it in response to JLB's motion for summary judgment, she also did not file a requisite affidavit seeking to take further discovery on the issue. See Mo. S. Ct. R. 74.04(f); Cain v. Hershewe, 777 S.W.2d 298, 301 (Mo.App. S.D. 1989) ("If the plaintiff was not prepared to counter the affidavits and other proofs which the defendants proposed to offer, plaintiff could have asked for a continuance in

the manner prescribed by paragraph (f) of Rule 74.04."). The trial court cannot be faulted for moving forward and finally granting the summary judgment motion, which had been pending for eight months.

Hargis contends that JLB engaged in the unauthorized practice of law by charging to prepare her "loan application because preparation of her statement of assets and liabilities required considerable legal knowledge and discretion" reserved for licensed attorneys. (Appellant's Br. at 35.) Hargis acknowledges that no courts have held that preparing such a statement in a loan application constitutes the unauthorized practice of law, but urges this Supreme Court to be the first. (Id. at 36.)

Hargis primarily relies upon In re Ellingson, 230 B.R. 426 (Bkrtcy. D. Mont. 1999), which concerned a "non-attorney bankruptcy petition preparer" and '"independent paralegal'" named Connie L. Monroe, who prepared a bankruptcy petition, not a statement of assets and liabilities in a loan application. Id. at 428. One document at issue in *Ellingson* was Exhibit 8, a "Client Questionnaire" given to the debtor by the bankruptcy petition preparer. Id. at 428. Exhibit 8 was a printed form calling for information about the debtor's assets, liabilities, income and expenses and "other matters." Id. It also included a listing of available Montana exemption statutes taken from a "How to File Bankruptcy" manual and a description of each statute. Id. The debtor testified that Monroe advised the debtor she could use a '"wild card exemption'" on the debtor's vehicle. Id. In holding that Monroe engaged in the unauthorized practice of law, the bankruptcy court was influenced by the fact that Monroe advised the debtor about available exemptions, provided a comprehensive list of available exemptions,

determined where property and debts were to be scheduled, summarized and reformulated information solicited from clients, and generated the completed bankruptcy forms for the debtor's completion. Id. at 433-34. These tasks, the court held, required the exercise of legal judgment beyond the capacity and knowledge of lay persons. Id. at 434. The bankruptcy court added that by soliciting information in Exhibit 8 and preparing Schedules and Statements on her computer, Monroe rendered legal advice. Id.

*Ellingson* is easily distinguishable from the instant action, because *Ellingson* concerns preparation of forms to be filed in a bankruptcy court, not the filing in numbers in a mortgage loan application. The actions of the non-attorney bankruptcy practitioner/independent paralegal Monroe, as described by the bankruptcy court, went well beyond the collecting of numbers regarding an individual's assets and liabilities. In addition, Exhibit 8 in *Ellingson*, which Hargis suggests is legally indistinguishable from Hargis loan application, called for information not only about the debtor's assets and liabilities, but also about "other matters," which the bankruptcy court did not even identify.

Moreover, *Ellingson* does not control. Regardless of whether Montana courts believe that filling in blanks on legal forms constitutes the practice of law, Missouri courts do not. In Missouri's statutes, legal form-filling can only constitute the "law business" under Section 484.010.2, not the "practice of law" under Section 484.010.1, which is limited to actions as an advocate in connection with proceedings before a court or adjudicative entity. See Mo. Rev. Stat. § 484.010. The law business is legal if there is no separate charge.

In any event, a law degree is not needed to enable a person to list assets and liabilities. Although requiring Missourians to engage an attorney to fill out a mortgage loan application would be a boom for the legal industry, doing so would be a senseless, undue burden on the public. The logical extension of Hargis's argument would be to require a law degree from bank loan officers and even credit card application takers at shopping-mall kiosks and baseball stadiums. Under Hargis's theory, even a borrower completing such applications would be engaging in the practice of law, albeit *pro se*.

Accountants and stockbrokers would be surprised to learn that according to Hargis their professions are each engaged in the illegal practice of law

The policy consequences of agreeing with Hargis would be directly contrary to the consumer interests that Section 484.020 is intended to protect. Under her theory, brokers cannot assist borrowers to disclose assets and liabilities, because that is the practice of law. They cannot charge any kind of administrative fee to defray the cost of providing these non-legal services, even if it is not separately broken out to emphasize the legal drafting nature of the business. If that were the law, the only way a broker could arrange a loan and the only way a lender could make it, would be to hire outside counsel to undertake these non-legal duties. The lawyer's fees will necessarily be a part of the closing costs, so they will ultimately be paid by the borrower.

Finally, Hargis attempts to raise an argument she waived by not making it to the trial court. She now argues JLB *assisted* in drawing her mortgage documents. (Appellant's Br. at 38.) She did not even plead in her Petition that JLB assisted in the

drawing of legal documents. The only logical and practical conclusion for this Court to make is that summary judgment was warranted.

Therefore this Supreme Court should enter affirm the summary judgment for JLB since there is no genuine dispute as to any material fact, because JLB did not prepare legal documents, and because JLB did not separately and specifically charge for preparing any legal document.

**2. CONTRARY TO THE ARGUMENTS SET FORTH IN SECTIONS A, B, AND C OF PLAINTIFF'S BRIEF, THIS SUPREME COURT SHOULD AFFIRM THE SUMMARY JUDGMENT ENTERED BY JUDGE COHEN BECAUSE JLB DID NOT PRACTICE LAW AS DEFINED BY THE STATUTES AND COURTS AND STATUTES OF THE STATE OF MISSOURI FOR THE FOLLOWING INDEPENDENT REASONS:**

**A. BECAUSE FILLING OUT A LOAN APPLICATION IS NOT THE PRACTICE OF LAW;**

**B. BECAUSE OBTAINING LEGAL DOCUMENTS FROM ANOTHER PERSON IS NOT THE PRACTICE OF LAW; AND**

**C. BECAUSE BEING A MORTGAGE BROKER IS NOT THE PRACTICE OF LAW.**

Plaintiff argued that JLB practiced law by preparing the loan application and required disclosures for Plaintiff, and, that JLB practiced law by simply being a mortgage broker. Plaintiff based its argument not on any Missouri Supreme Court precedent but by a convoluted and unreasonable interpretation of Section 484.010.

Section 484.010 defines the practice of law for the criminal misdemeanor of practicing law without a license. JLB was never charged with a crime and Section 484.010 was never directly at issue in this case.

The Section 484.010 definition does not apply to other proceedings and actions since the courts, and not the legislature, set the boundaries of the practice of law. In re Thompson, 574 S.W.2d 365, 367 (Mo. banc 1978); Hulse v. Criger, 247 S.W.2d 855, 857 (Mo. banc 1952); Automobile Club of Missouri v. Hoffmeister, 338 S.W.2d 348, 355 (Mo.App. 1960).

> The power to regulate and define the practice of law and the doing of law business is a prerogative of the judicial department. The legislative department, under the police power, may enact laws declaring certain acts constitute unauthorized practice of law and are punishable. But such statutes are merely in aid of, and do not supersede or detract from the power of the judicial department to define and control the practice of law.

Automobile Club of Mo., 338 S.W.2d at 355; accord In re Thompson, 574 S.W.2d at 367; Hulse, 247 S.W.2d at 857.

In 2008, Missouri Supreme Court reiterated, that practicing law requires preparing legal documents and separately charging for the document preparation. Carpenter, 250 S.W.3d at 702. In the instant case, JLB did not prepare the note, mortgage, or deeds and JLB did not separately bill or charge for any document preparation.

In 1952, the Missouri Supreme Court held that real estate brokers, as part of their work, could fill in standard contract forms and deeds. Hulse, 247 S.W.2d at 85. In Hulse, the Supreme Court declared:

> Viewing the problem before us in that light, we do not think it would be in the interest of the public welfare to restrain brokers from drafting the ordinary instruments necessary to effectuate the closing of the ordinary real estate transaction in which they are acting. We do not think the possible harm which might come to the public from the rare instances of defective conveyances in such transactions is sufficient to outweigh the great public inconvenience which would follow if it were necessary to call in a lawyer to draft these simple instruments.
>
> * * *
>
> This court finds itself in agreement with the reasoning and conclusion of the lower courts to the effect that the supplying of simple, factual material such as the date the price, the name of the purchaser, the location of the property, the date of giving possession and the duration of the offer requires ordinary intelligence rather than the skill peculiar to one trained and experienced in the law.

Hulse, 247 S.W.2d at 858-59 (quoting In re Gore, 15 N.E.2d 968, 970 (1937)).

Plaintiff asks this Court to overextend the practice of law prohibition farther than any court has ever gone. In the Circuit Court and before the Court of Appeals, Plaintiff argued that JLB's receiving legal documents drafted by an attorney constitutes the

practice of law. According to Plaintiff, JLB filling in a loan applications, like those filled in at sporting events for credit cards, constitutes the practice of law. Finally, according to Plaintiff, the entire mortgage broker business may only be done by attorney as it constitutes the practice of law.

Missouri statutes are not to be interpreted unreasonably. Richter v. Union Pac. R. Co., 265 S.W. 3d 294, 297 (Mo.App. 2008). Using a definition of "procure," which converts everyone who hires a lawyer and receives documents from a lawyer into an illegal practitioner of law, is unreasonable. According to the dictionaries relied upon by Plaintiff, the meaning of "procuring" involves taking an active role in the creation of a document. From Section 484.010, it is clear that "procuring" is part of the process of drafting or assisting in the drafting of legal documents. Once again, JLB did not draft any legal documents.

Now before this Supreme Court, Plaintiff changes her argument and now argues that "procure" as used in Section 484.010.2 means getting or receiving legal documents from a nonlawyer. Plaintiff cites no cases from Missouri or from any jurisdiction supporting this unreasonable interpretation.

First, presenting an argument to the Missouri Supreme Court, which was not presented to the circuit court is barred.

Second, Plaintiff's new interpretation is as twisted as her first. According to plaintiff, everyone who receives or obtains legal documents from a nonlawyer is also an illegal practitioner of law. The words of Section 484.010 do not say anything about receiving documents from a nonlawyer. Anyone who innocently receives legal

documents from a nonlawyer is now an illegal practitioner of law and subject to imprisonment. Plaintiff's new argument and interpretation would condemn anyone who receives legal documents from non-lawyers including those who are plaintiffs in pending suits against unlicensed practitioners of law. According to Hargis' new argument, Hargis herself has illegally practiced law by receiving legal documents from JLB.

If someone illegally practices law, they should be subject to punishment, but punishing the innocent or those who have done nothing illegal is wrong.

However, even accepting Plaintiff's mistaken argument, JLB is still not in violation of §484.010 & §484.020 since JLB did not separately charge for the document preparation or document procurement. Carpenter, 250 S.W.3d at 702.

Unlike Plaintiff, the courts of Missouri have taken a balanced reasonable approach to this issue. In 2008, the Missouri Supreme Court stated that, for document preparation, the practice of law requires the preparation of classical legal documents and a separate charge for the document preparation. Id. Of course, JLB did not prepare any legal documents and did not separately bill for any document preparation.

In 1952, the Missouri Supreme Court stated that licensed real estate brokers may prepare simple legal documents such as standard contracts, deeds, and mortgages. Hulse, 247 S.W.2d at 862.

In 1978, the Missouri Supreme Court stated that standardized divorce kit advertising and sales did not constitute the illegal practice of law. In re Thompson, 574 S.W.2d 365, 367 (Mo. banc 1978)

Plaintiff's overextension of the prohibition against the practice of law is not only unreasonable, unsupported by precedent, but inconsistent with Missouri Supreme Court precedent.

Hargis waived her "loophole" argument, i.e., "anyone can charge for the creation of legal documents by a non-lawyer third party so long as the person charging the fee gather but did not draft the documents" (Appellant's Br. at 33), by not raising it in response to JLB's summary judgment motion. See Lyon Fin. Serv., Inc. v. Harris Cab Co., 303 S.W.3d 589, 591 (Mo.App. E.D. 2010) (proper time for appellant to raise argument opposing summary judgment was in response to motion for summary judgment; appellant failed to do so and cannot raise it on appeal); D.E. Props. Corp. v. Food for Less, 859 S.W.2d 197, 201 (Mo.App. E.D. 1993) ("Since Lessor did not raise this issue in the trial court on the motion for summary judgment, it is precluded from making this argument on appeal."). She also did not present this argument to the Court of Appeals.

In any event, the evidence does not support Hargis's loophole argument. In opposing summary judgment, Hargis submitted no admissible evidence that the "legal documents" to which she refers were not prepared by attorneys or were not reviewed by attorneys. In the deposition of Mr. Paci, upon which Hargis so heavily relies, she elicited general testimony about the third-party companies from whom JLB is sent documents (L.F. 95), but never bothered to enquire whether those third parties had attorneys on staff. Moreover, portion of the deposition testimony Hargis references refutes her argument that JLB charged for the creation of legal documents.

Q Well, you don't charge for – certainly you don't charge any fees for documents you didn't prepare, do you?

A. No. I don't.

Q. Any by you, you understand I'm referring to Defendant.

A. Okay, yes.

(L.F. 95 at 18:15-20.)

In addition, Hargis's diatribe against LegalZoom.com (Appellant's Br. at 33), "an online legal document preparation service," Janson v. LegalZoom.com, Inc., 271 F.R.D. 506, 508 (W.D.Mo. 2010), is not on point, as the instant action is not about online legal document preparation. Hargis misconstrues Mr. Paci's deposition testimony as evidence that DocMagic is "a computer program that creates the legal documents." (Id. at 33.) Mr. Paci merely testified that "[a]s far as the closing documents, they either get prepared by either the title company or the investor . . . or there's another document company called Document Systems or DocMagic." (L.F. 95 at 18:11-14.)

Hargis's interpretation of the procurement language of Section 401.010.2 would lead to absurd results. If legal documents are prepared or approved by lawyers, regardless whether such documents are ultimately provided by a bank or a "document company," the public is protected. See Hulse, 247 S.W.2d at 863 ("The duty of this Court is . . . to protect the public from being advised or represented in legal matters by incompetent or unreliable persons.").

The policy consequences of agreeing with Hargis would be directly contrary to the consumer interests that Section 484.020 is intended to protect. Under her theory, brokers

cannot assist borrowers to disclose assets and liabilities, because that it the practice of law. They cannot charge any kind of administrative fee to defray the cost of providing these non-legal services, even if it is not separately broken out to emphasize the legal drafting nature of the business. If that were the law, the only way a broker could arrange a loan and the only way a lender could make it, would be to hire outside counsel to undertake these non-legal duties. The lawyer's fees will necessarily be a part of the closing costs, so they will ultimately be paid by the borrower.

Nowhere in her Response to Statement of Undisputed Facts (L.F. 146-48), which included Hargis's purported additional material facts "a." through "f.," did Hargis reference any discovery identifying the individuals who prepared the "legal documents," whether such persons were attorneys, or whether they were supervised by attorneys. Therefore, even if this Court addresses Hargis's argument first raised on appeal, under the facts presented, summary judgment was properly granted. See ITT Commercial Fin., 854 S.W.2d at 376.

Therefore, because JLB did not prepare any legal documents nor practice law as defined by the Missouri Supreme Court and because JLB did not separately charge for the preparation of any documents, JLB did not unlawfully practice law and this Court of Appeals should affirm the summary judgment entered by Judge Cohen of the St. Louis County Circuit Court.

**3. CONTRARY TO THE ARGUMENTS SET FORTH IN SECTIONS A, B, AND C OF PLAINTIFF'S BRIEF, THIS SUPREME COURT SHOULD AFFIRM THE SUMMARY JUDGMENT ENTERED BY JUDGE COHEN OF THE ST. LOUIS COUNTY CIRCUIT COURT BECAUSE JLB'S ACTIONS WERE EXPRESSLY AUTHORIZED BY CHAPTER 443 OF THE MISSOURI STATUTES.**

Plaintiff contends, as set forth on page 19 of her brief, that the Missouri Legislature in Chapter 484 of the Missouri Statutes outlawed the mortgage broker business, outlawed JLB's proper acquisition of mortgage documents, and outlawed JLB's preparation of a loan application and required financial disclosure documents.

However, Plaintiff ignores the Missouri Legislature's explicit authorization of the mortgage broker business, and explicit authorization in Chapter 443 of the Revised Statutes of Missouri of all of JLB's actions as challenged by Plaintiff in this case.

JLB raised this argument in its reply brief in legal answer to Plaintiff's assertions in her brief that the entire mortgage broker business constitutes the practice of law, that preparing nonlegal disclosure documents constitutes the practice of law, and that the gathering of documents constitutes the practice of law. Hargis had not pled in her petition that the entire mortgage broker business or that receiving legal documents from another constituted the practice of law. No new factual issues were raised by JLB. Plaintiff filed her surreply brief in response after JLB filed its reply brief in support of summary judgment. A reply brief is an appropriate forum to raise a new legal argument. The Taggart decision cited by Plaintiff involves new factual and legal arguments raised in a

reply brief. Taggart, 242 S.W.3d 755. However in the instant case, no new factual assertions were raised in the reply brief, and Plaintiff did file a surreply brief. In addition, Supreme Court Rule 74.04 allows new issues to be raised in the reply brief. Supreme Court Rule 74.04(c)(3). Furthermore, according to the Missouri Supreme Court, summary judgment may be affirmed on appeal upon any theory supported by the record. Burns v. Smith, 305 S.W.3d 505, 509 (Mo. banc 2010); In re Estate of Blodgett, 95 S.W.3d 79, 81 (Mo. banc 2003).

Plaintiff, in her brief, has not set forth any substantive response to the fact that Missouri law authorized JLB to take the challenged actions.

In Chapter 443, the Missouri Legislature expressly authorized the mortgage broker business. Section 443.803 R.S.Mo.; §443.805 R.S.Mo. As a profession authorized and subject to licensing by the State of Missouri without any requirement of an attorney license, whatever rule of statutory interpretation employed [specific controls over general (Parktown Imports, Inc. v. Audi of Am, Inc., 278 S.W.3d 670, 673 (Mo. banc 2009))] or new controls over old [Cub Cadet Corp. v. Mopec Inc., 78 S.W.3d 205, 215 (Mo. App. 2002)]. Plaintiff's argument that only lawyers may be mortgage brokers is nonsense. The Missouri Legislature has recently authorized and reauthorized the profession of mortgage broker with administrative regulations and supervision by the State of Missouri. No requirement that only lawyers may be mortgage brokers has been imposed by the Missouri Legislature, by the Statutes of Missouri, or by regulations.

In addition, contrary to Plaintiff's argument, Missouri Statutes specifically empowered JLB, as a mortgage broker, to prepare applications, prepare mortgage

documents, and prepare mortgage closing documents. Mo. Rev. Stat. §§ 443.803 (17, 22, 29, 33) & 443.805 (2007 & 2008).

Hargis refinanced her home loan with JLB during January 2009. (L.F. 48.) At that time Missouri statutes expressly empowered mortgage brokers to take and prepare applications, to process and negotiate terms of a loan, and to prepare residential mortgage loan closing documents. Mo. Rev. Stat. §§ 443.803 (17, 22, 29, 33), 443.805, & 443.812 (2007 & 2008).

Missouri Statute Section 443.803(33) defined "Soliciting, processing, placing or negotiating a residential mortgage loan" to include all of the actions Plaintiff now claims are wrongful.

Section 443.803(33) provided:

> (33) "Soliciting, processing, placing or negotiating a residential mortgage loan", for compensation of gain, either, directly or indirectly, accepting or offering to accept an application for a residential mortgage loan, assisting or offering to assist in the processing of an application for a residential mortgage loan on behalf of a borrower, or negotiating or offering to negotiate the terms or conditions of a residential mortgage loan with a lender on behalf of a borrower including, but not limited to, the submission of credit packages for the approval of lenders, the preparation of residential mortgage loan closing documents, and including a closing in the name of a broker.

Mo. Rev. Stat. § 443.803(33) (2007 & 2008).

In 2009, the Missouri Legislature enacted a new comprehensive regulatory program for mortgage brokers including state licensing of mortgage brokers, 20 hours of required coursework and education, written license testing, continuing education, state supervision and enforcement, and insurance and bonding requirements. Mo. Rev. Stat. §§ 443.701-443.893. The extensive Missouri statutes on mortgage broker licensure and conduct are supplemented with Missouri Regulations issued by the Missouri Division of Finance. 20 C.S.R. 1140-30; 20 C.S.R. 1140-31.

The Missouri statutes and regulations establish mortgage brokers as a regulated profession independent of attorneys or the practice of law. It cannot be argued, that as a matter of statutory interpretation, mortgage brokerage as a profession constitutes the practice of law. If Plaintiff were right, and she is not, then the extensive statutes and regulations for mortgage brokers would all be void since only the Missouri Supreme Court may regulate attorneys.

Chapter 443 expressly empowered JLB, as a mortgage broker, to do everything of which Plaintiff complains. Therefore, because JLB was authorized by Missouri law, this Court of Appeals should affirm the summary judgment entered by Judge Cohen of the St. Louis County Circuit Court for JLB.

**4. CONTRARY TO THE ARGUMENTS SET FORTH IN SECTIONS A, B, AND C OF PLAINTIFF'S BRIEF, THIS SUPREME COURT SHOULD AFFIRM THE SUMMARY JUDGMENT ENTERED BY JUDGE COHEN OF THE ST. LOUIS COUNTY CIRCUIT COURT BECAUSE JLB'S ACTIONS WERE EXPRESSLY AUTHORIZED BY FEDERAL REGULATIONS.**

Missouri law may not thwart, contradict, or interfere with Federal Laws or regulatory systems through the guise of applying Missouri rules on the practice of law. De Pass v. Harris Wool Co., 144 S.W.2d 146, 148-149 (Mo. banc 1940); see also Casey v. F.D.I.C., 583 F.3d 586. 592-96 (8th Cir. 2009) (mortgagors' claims against federal savings associations under Mo. Rev. Stat. §§ 407.010 and 420.020, alleging such associations violated statutes by charging fees for legal document preparation by non-lawyers, were preempted by federal regulation).

Plaintiff contends that the Missouri Legislature in Chapter 484 of the Missouri Statutes outlawed the mortgage broker business, outlawed JLB's proper acquisition of mortgage documents, and outlawed JLB's preparation of a loan application and required financial disclosure documents.

In addition to the express authorization from Missouri statutes, Federal regulations also expressly empowered JLB to do everything of which Plaintiff complains. See 24 C.F.R. §3500.2(b); §3500.7(a, b, d); §3500.8 (b); §3500.21(b); §3500 App. A & § MS-1.

Code of Federal Regulations Section 3500.2 expressly allows a mortgage broker to originate loans and do "any service involved in the creation of a mortgage loan, including but not limited to the taking of the loan application, loan processing, and the underwriting

and funding of the loan, and the processing and administrative services required to perform these functions." 24 C.F.R. §3500.02.

Code of Federal Regulations Section 3500.8 not only authorizes but requires the mortgage broker to prepare and provide the application (HUD-1) for the proposed loan.

Code of Federal Regulations Section 3500.7 not only authorizes but requires the mortgage broker to prepare and provide the disclosure documents (good faith estimates of loan costs and charges) for the proposed loan.

Code of Federal Regulations Section 3500.17 not only authorizes but requires the mortgage broker to prepare and provide the disclosure documents (initial escrow account statement) for the proposed loan.

Code of Federal Regulations Section 3500.21 not only authorizes but requires the mortgage broker to prepare and provide the disclosure documents (servicing disclosure statement) for the proposed loan.

Alongside Missouri's regulations, the Federal Government has enacted an extensive set of statutes and regulations governing the mortgage loan business. According to the United States Department of Housing and Urban Development, mortgage brokers may and must prepare the standard loan disclosure documents. Contrary to Plaintiff's wish, Missouri cannot cancel federal regulations and state that only lawyers may do what federal regulations allow and require mortgage brokers to do. See,, e.g., De Pass, 144 S.W.2d at 148-49.

JLB raised this argument in its reply brief in legal answer to Plaintiff's (new and unpled) assertions in her brief that the entire mortgage broker business constitutes the

practice of law, that preparing nonlegal disclosure documents constitutes the practice of law, and that the gathering of documents constitutes the practice of law. No new factual issues were raised. Plaintiff filed her surreply brief in response after JLB filed its reply brief in support of summary judgment. A reply brief is an appropriate forum to raise a new legal argument. The Taggart decision cited by Plaintiff involves new factual and legal arguments raised in a reply brief. Taggart, 242 S.W.3d 755. However in the instant case, no new factual assertions were raised in the reply brief, and Plaintiff did file a surreply brief. In addition, Supreme Court Rule 74.04 expressly allows new issues to be raised in the reply brief. Supreme Court Rule 74.04(c)(3). Furthermore, according to the Missouri Supreme Court, summary judgment may be affirmed on appeal upon any theory supported by the record. Burns v. Smith, 305 S.W.3d 505, 509 (Mo. banc 2010); In re Estate of Blodgett, 95 S.W.3d 79, 81 (Mo. banc 2003).

Plaintiff, in her appellate brief, has not set forth any substantive response to the fact that federal regulations authorized the challenged actions of JLB.

JLB acted with the express authorization of Missouri statutes and Federal regulations and this Court should affirm the summary judgment entered by Judge Cohen because JLB's complained of actions were expressly authorized by Missouri and Federal law.

**5. CONTRARY TO THE ARGUMENTS SET FORTH IN SECTION D OF PLAINTIFF'S BRIEF, THIS SUPREME COURT SHOULD AFFIRM THE SUMMARY JUDGMENT ENTERED ON COUNT 3 (MONEY HAD AND RECEIVED) OF PLAINTIFF'S PETITION FOR THE FOLLOWING INDEPENDENT REASONS:**

**A. COUNT 3 CONTAINS NO ADDITIONAL FACTUAL ALLEGATIONS AND IS ENTIRELY DEPENDENT ON THE WRONGS SET FORTH IN COUNTS 1 AND 2;**

**B. THE TRIAL COURT ACTED PROPERLY IN DENYING LEAVE TO AMEND COUNT 3 BECAUSE THE REQUEST FOR LEAVE WAS PRESENTED TO THE CIRCUIT COURT ON FEBRUARY 26, 2010, AND TRIAL WAS SCHEDULED TWO MONTHS THEREAFTER; AND,**

**C. THE TRIAL COURT ACTED PROPERLY IN DENYING LEAVE TO AMEND COUNT 3 BECAUSE PLAINTIFF WAS SEEKING TO ADD CLAIMS TO THE STATE CASE WHICH PLAINTIFF HAD ALREADY FILED AGAINST JLB IN FEDERAL COURT.**

The petition filed by Plaintiff, and the petition upon which summary judgment was granted was filed on February 13, 2009, and had not been amended.

Count 3 of the petition contained no factual allegations or allegations or wrongdoing but only restated the allegations of the preceding two counts and, in a conclusory manner, stated that the aforesaid actions entitled Plaintiff to the return of her money and punitive damages.

Count 3, as pled by Plaintiff, reads as follows:

> 32. Plaintiff incorporates by reference all preceding paragraphs of this Petition as if fully set forth herein.
>
> 33. Defendant has received monies which in equity and good conscience ought to be paid to Plaintiff.
>
> 34. The conduct of Defendant was malicious, corrupt, and intentional and/or reckless to a degree sufficient to support an award of punitive damages against Defendant.
>
> WHEREFORE, Plaintiffs and their Class pray for the relief requested in the Request for Relief set forth below in this Amended Class Action Petition.

(L.F. 14.)

From the Petition, a count which merely incorporates by reference the facts and alleged wrongdoing of a previous count is dependent on the sufficiency of the preceding counts' allegations. In this case, Count 3 as pled had no new or independent wrongs or facts. Plaintiff appears to be mistakenly arguing that although leave to amend was not granted, she should be entitled to argue the merits of her amended petition for which leave to file was denied.

Therefore, when JLB showed that JLB was entitled to judgment because JLB did not draft legal documents, because JLB did not separately charge or bill for legal documents, that JLB's actions were authorized by Missouri statutes Chapter 443

R.S.Mo., and that JLB's actions were authorized by Federal regulations 24 C.F.R. §3500, JLB showed it was entitled to judgment as a matter of law on Count 3.

In addition, Plaintiff's claim that Count 3 stated an independent claim not grounded in the illegal practice of law claims of Counts 1 and 2, was not mentioned in any of Plaintiff's three briefs opposing summary judgment. An argument in opposition to summary judgment, not raised in the briefs opposing summary judgment may not be made for the first time on appeal. Schwartz v. Custom Printing Co., 926 S.W.2d 490, 493 (Mo. App. 1996).

Hargis's argument that the trial court erred by granting summary judgment on Count III for unjust enrichment, because JLB allegedly failed to provide a legal basis for summary judgment to Count III, was waived and fails on the merits. Hargis waived this argument by not raising it in response to JLB's summary judgment motion. See Lyon Fin. Serv., Inc., 303 S.W.3d at 591 (proper time for appellant to raise argument opposing summary judgment was in response to motion for summary judgment; appellant failed to do so and cannot raise it on appeal); see also D.E. Props. Corp., 859 S.W.2d at 201. Hargis tries to circumvent the fatal waiver issue by arguing that in her Motion to Amend, Vacate, Correct or Modify Judgment, filed under Missouri Supreme Court Rule 75.01, she did raise the argument. (Appellant's Br. at 42-43; L.F. 338-40.) But she cites no authority for the novel proposition that raising a summary-judgment-related issue in a post-judgment motion cures the failure to raise it in a timely manner *in response* to a summary judgment motion. Moreover, Hargis is not appealing the denial of her Rule 75.01 motion and such an appeal would be governed by a more deferential standard of

review. See K.O. Real Estate, LLC v. O'Toole, 291 S.W.3d 780, 793 (Mo.App. E.D. 2009) (Rule 75.01 ruling is reviewed for abuse of discretion).

Even if Hargis had not waived her argument that JLB failed to state the legal basis for its entitlement to summary judgment on Count III, the argument fails, because JLB stated such a basis. The lead-in sentence of JLB's summary judgment motion states a legal basis, because it cites Missouri Supreme Court Rule 74.04(c)(6) (L.F. 33), which provides that if the summary judgment documents "show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith." Mo. S. Ct. R. 74.04(c)(6). JLB was not required by Rule 74.04 to use the words "money had and received" or "unjust enrichment" in its summary judgment motion in order to state a basis for summary judgment on Count III, which it did. JLB additionally did so, by stating that its employees do not draft or prepare legal documents, that it did not levy a charge for document preparation, and that it did not engage in the unauthorized practice of law or law business. (L.F. 33-34.) In Count III, Hargis merely (1) incorporated by reference all preceding paragraphs of the Petition, (2) alleged JLB "received monies which in equity and good conscience ought to be paid to Plaintiff," and (3) claimed entitlement to punitive damages. (L.F. 14.) Because Hargis made no allegations of fact or wrongdoing specific to Count III, JLB was not required to provide any separate or additional legal basis for summary judgment on Count III. In other words, JLB was entitled summary judgment on Hargis's parasitic claim in Count III, which merely incorporated Counts I and II, because by defeating Counts I and II, JLB demonstrated that it was just to keep

the money it justly earned. See Pitman v. City of Columbia, 309 S.W.3d 395, 402 (Mo.App. W.D. 2010) (action for money had and received lies for restitution of money that belongs in good conscience to plaintiff, but was obtained by defendant by duress or other means making it unjust for defendant to keep money).

Finally, Hargis's argument that JLB failed to file a statement of undisputed material facts with respect to Count III lacks merit. JLB filed a Statement of Undisputed Facts, with separately numbered paragraphs, in accordance with Rule 74.04(c)(1).[2] Such a statement was never filed by the defendants in the two easily distinguishable cases cited by Hargis, each of which concerned motions to dismiss being converted to motions for summary judgment and prejudice to the plaintiff. See Wallingsford v. City of Maplewood, 287 S.W.3d 682, 685, 687 (Mo. banc 2009) (defendant filed motion to dismiss, which trial court treated as summary judgment, without requiring statement of facts and memorandum in support, then denied plaintiff leave to file supplemental affidavit addressing issue raised for first time in defendant's reply memorandum); Adams v. USAA Cas. Ins. Co., 317 S.W.3d 66, 73 (Mo.App. E.D. 2010) (trial court announced it

[2] While Hargis takes issue with JLB's statement of facts, when she alleged additional disputed material facts, she lumped all six of her additional facts into one numbered paragraph, in violation of Rule 74.04(c)(2). (L.F. 146-47.) See Mo. S. Ct. R. 74.04(c)(2) ("The response may also set forth additional material facts that remain in dispute, which *shall be presented in consecutively numbered paragraphs* and supported in the manner prescribed by Rule 74.04(c)(1)" (emphasis added).).

would treat motions to dismiss as motions for summary judgment, yet did not require formalities of Rule 74.04 and plaintiff suffered prejudice, as it was not permitted to conduct any discovery before having case summarily adjudicated).

The trial court correctly denied Plaintiff's motion to amend her petition and amend and add new claims to Count 3.

As Plaintiff states in her brief, about two months before trial, after discovery had been completed and after further discovery, Plaintiff requested leave to add Federal Real Estate Settlement and Procedure Act ("RESPA") and Truth in Lending Act ("TILA") claims to her petition. (L.F. 273-308.)

However, Plaintiff filed this case on February 13, 2009. (L.F. 1.) Plaintiff presented her request for leave to the Circuit Court on February 26, 2010. (L.F. 336.) The trial was scheduled for April 26, 2010. (L.F. 141.) The deadline for depositions of parties was September 15, 2009. (L.F. 41.) Expert disclosure dates had passed. (L.F. 41.) Defendant's motion for summary judgment had been on file for months, argued several times, and was ready for decision.

Allowing the amendment would have prejudiced JLB and required a trial continuance, new and repeated discovery, and vastly greater expense. Circuit Judge Cohen correctly denied the late amendment. See, e.g., Hudson v. Riverport Performance Art Centre, 37 S.W.3d 261, 266 (Mo. App. 2000)(circuit court may consider prejudice to opposing party in denying leave to amend); Stewart Title Guar. Co., 961 S.W.2d at 887-88.

Additionally, the claims Plaintiff wanted to add through the amendment were already the subject of a federal complaint filed earlier by Plaintiff against JLB. (L.F. 313-335). Plaintiff cannot file suit in federal court and then, when it suits her, file the same pending claims in state court. Leave to amend should be denied when the claim is without merit. See, e.g., Hudson, 37 S.W.3d at 266 (circuit court may deny leave to amend adding a meritless claim); Stewart Title Guar. Co., 961 S.W.2d at 887-88. Since the claims Plaintiff wanted to add were already pending in federal court, the new claims are meritless and would be dismissed according to the doctrine of abatement. See Golden Valley Disposal, LLC v. Jenkins Power, Inc., 183 S.W.3d 635, 641, 642 (Mo. App. 2006); Mo. S. Ct. R. 55.27(a)(9). Plaintiff cannot sue JLB in Federal court and then claim some right to file the same claims in state court.

A denial of leave to amend is only reversible if the trial court abused its discretion, and Judge Cohen did not abuse his discretion. See Lunn v. Anderson, 302 S.W.3d 180, 190 (Mo. App. 2009).

Therefore, because Count 3, as it existed in the original petition, did not include any independent facts or claims of wrongdoing, and because leave to amend Count 3 was properly denied, this Court of Appeals should affirm Judge Cohen's entry of summary judgment.

## CONCLUSION

Defendant JLB Corporation respectfully asks this Court of Appeals to affirm the summary judgment entered by Judge Cohen of the St. Louis County Circuit Court for the following independent reasons:

A. JLB did not prepare the note, deeds, or any other legal documents as found by Missouri cases;

B. JLB did not charge or separately bill for document preparation;

C. JLB was authorized by both Missouri and Federal Law to prepare the Uniform Residential Loan Application and required disclosure documents;

D. JLB did not illegally practice law by properly receiving legal documents from a third person; and

E. The mortgage broker business is a profession specifically authorized and regulated by Missouri and Federal Law and does not constitute the illegal practice of law.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I, Robert Schultz, certify to the following. The attached substitute brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word with Times New Roman 13-point font. Excluding the cover page, the signature block, and this Certificate of Compliance and Service, the brief contains 11,800 words.

The CD ROM filed with this substitute brief contains a complete copy of this brief. It has been scanned and is virus free.

Two true and correct copies of the attached brief, the substitute appendix and a CD ROM containing a copy of the brief were mailed, postage prepaid, this 18th day of August, 2011, to

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