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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CA FLORIDA HOLDINGS, LLC,
Publisher of the *PALM BEACH POST*,

Plaintiff,

v. CASE NO.: 19-CA-014681

DAVE ARONBERG, as State Attorney of Palm Beach County, Florida; SHARON R. BOCK, as Clerk and Comptroller of Palm Beach County, Florida.

Defendants.
_____/

CLOSING ARGUMENT OF DEFENDANT, DAVE ARONBERG

The matter of Defendant, DAVE ARONBERG's Amended Motion for Attorneys' Fees, brought pursuant to § 57.105, Florida Statutes, was heard on September 6, 2022 and September 8, 2022, before the Honorable Luis Delgado. Plaintiff, CA FLORIDA HOLDINGS, LLC, Publisher of the *PALM BEACH POST*, appeared and was represented by Lauren R. Whetstone, Esq., Mark F. Bideau, Esq., and Gerard Buitrago, Esq. of Greenberg Traurig. Defendant, DAVE ARONBERG, as State Attorney of Palm Beach County, Florida, appeared and was represented by Douglas A. Wyler of Jacobs Scholz & Wyler, LLC.

I. INTRODUCTION

The instant lawsuit against the State Attorney was misguided and improper from the start. The material facts showing that Plaintiff's claim has no reasonable expectation of success in either fact or law has been open, obvious, and apparent to everyone involved in this matter – except Plaintiff and its attorneys. Specifically, Mr. Aronberg's position has been consistent: neither he nor his office has possession, custody, or control of the Requested Materials and therefore the declaratory judgment sought by Plaintiff seeks materials that are impossible for the State Attorney or his office to produce and he is not a proper party to this action.

Although Mr. Aronberg's position has been continuous throughout the litigation, Plaintiff is unable to assert the same position. Despite suing Mr. Aronberg to provide access and disclose the requested

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records, during the evidentiary hearing Plaintiff's witness disingenuously contended that once Mr. Aronberg said he had no objection to the Clerk releasing the records pursuant to a court order, "the Post accomplished everything that it needed from the State Attorney in the amended complaint." [2022-09-08 Transcript, 6-13]. For all intents and purposes, Plaintiff and its lawyers attempted to amend their complaint on the stand and reframe it as though it sought something entirely different from Mr. Aronberg: a voiced non-objection vs. access to and disclosure of confidential court records of which the state attorney has no possession, custody, or control.

Moreover, this Court, at the conclusion of the evidentiary hearing on September 8, 2022, made several requests to the parties concerning issues and case authorities it wished to have addressed in the parties' written closing arguments and proposed judgments. One of those issues directed to Mr. Aronberg requested a discussion of *Lago v. Kame By Design, LLC*, 120 So. 3d 73, 75 (Fla. 4th DCA 2013) (holding that "if a party files a subsequent or amended motion for sanctions under section 57.105 and raises an argument that was not raised in the original motion for section 57.105 sanctions, the subsequent motion must independently comply with the twenty-one-day 'safe harbor' provision of Section 57.105(4)."). Plaintiff attempts to persuade the Court under the authority of *Lago* that Mr. Aronberg is not entitled to § 57.105 sanctions because his Amended Motion for Attorneys' Fees was not served before filing, and therefore allegedly failed to comply with the 21-day notice provision.

Because this issue concerns one of jurisdiction[1], Mr. Aronberg wishes to be abundantly clear at the outset: *It makes no difference whether the Court proceeds on the original Motion for Attorneys' Fees or on the Amended Motion for Attorneys' Fees, and if the Court has any concerns over the efficacy of the Lago case in this matter, Mr. Aronberg encourages the Court to proceed on the original Motion for Attorneys' Fees.* Such was the remedy directed by the Fourth District Court of Appeal in *Lago,* and such would be the simple remedy in this case, should the Court find a lack of compliance with the Amended Motion for Attorneys' Fees' 21-day safe harbor provision. Certainly, however, *Lago* does not compel the Court to

[1]*See Pomeranz & Landsman Corp. v. Miami Marlins Baseball Club, L.P.*, 143 So. 3d 1182, 1183 (Fla. 4th DCA 2014).

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disregard the Amended Motion. First, in contrast to *Lago,* no new arguments were raised in the Amended Motion for Attorneys' Fees that were no already raised in the original motion for section 57.105 sanctions. *Lago,* 120 So. 3d at 75. Although the original Motion was more condensed in its form than the Amended Motion, it clearly stated Mr. Aronberg's intention to seek attorneys' fees under § 57.105, and it discussed the 21-day safe harbor provision that commenced on June 8, 2020 with the service of the motion together with a letter demanding dismissal of the First Amended Complaint. Notably, the original Motion for Attorneys' Fees expressly referenced, thereby incorporating, the June 8, 2020 letter, in which the Defendant's attorney advised the Plaintiff of the facts which establish that the First Amended Complaint is without support in fact or law. The June 8, 2020 letter was introduced into evidence at the evidentiary hearing by stipulation. This letter laid out in detail the specific reasons Mr. Aronberg is entitled to attorneys' fees as a sanction under § 57.105, the same reasons argued at the evidentiary hearing and in the Amended Motion.

Second, unlike *Lago*, the moving party (Kame) had *not* been dismissed or dropped from the case at the time his amended motion for attorneys' fees was filed, which entitled the Lagos to a second notice and an opportunity to change their position and withdraw their offending motion before being sanctioned. Here, in contrast, Plaintiff had *already dropped* Mr. Aronberg as a Defendant at the time the Amended Motion for Attorneys' Fees was filed. More specifically, the timeline of events in the instant action stands in stark contrast to that of *Lago* and necessitates a different result.

Here, Plaintiff was served with the State Attorney's § 57.105 Demand and its accompanying First Motion for Attorneys' Fees on June 8, 2020. On June 23, 2020, Plaintiff's counsel sent a letter in response indicating Plaintiff's refusal to drop Count I of the First Amended Complaint against the State Attorney. After waiting for the requisite 21-day safe harbor period to pass, the State Attorney properly filed its First Motion for Attorneys' Fees. Over four months later, after settlement negotiations failed and after the State Attorney's Motion for Summary Judgment was filed, Plaintiff dropped the State Attorney as a party on October 21, 2020. Significantly, *only after Plaintiff dropped the State Attorney as a party, and thus had no ability to change its position*, was the Amended Motion filed. Thus, the *Lago* rule does not apply here and

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Plaintiff is unable to provide any case law or authority that fits the fact pattern of the instant case.

In short, Mr. Aronberg's § 57.105 Demand Letter and fee motions follow the proper statutory procedures and do not violate the 21-day safe harbor provision set forth in § 57.105(4) because Plaintiff dropped Mr. Aronberg as a party prior to the filing of the Amended Motion for Attorneys' Fees. The safe harbor provisions became meaningless and irrelevant once Plaintiff dropped Mr. Aronberg from its lawsuit. Plaintiff and its attorneys no longer needed notice and an opportunity to withdraw their claim for declaratory relief as they had already done so by dropping Mr. Aronberg. Their instant claim of entitlement to such notice is disingenuous, considering the impossibility and redundancy of dropping Mr. Aronberg from the same lawsuit twice.

As further set forth below, the record evidence shows that Plaintiff and its lawyers *knew or should have known* prior to filing this lawsuit that the declaratory relief claim fails under 57.105(1)(a), because it is unsupported by the material facts necessary to establish it; and under 57.105(1)(b) because it is unsupported by the application of the law to the material facts. Alternatively, Mr. Aronberg contends that Plaintiff and its attorneys' *knew or should have known* the declaratory relief claim lacks any basis in law or fact following Judge Marx's comments during the June 3, 2020 hearing. Moreover, Plaintiff and its attorneys certainly *knew or should have known* that there were no justiciable issue of law or fact regarding their declaratory relief claim when they were served with the § 57.105 Demand Letter on June 8, 2020.

The record evidence further demonstrates that Mr. Aronberg properly complied with § 57.105 in serving his demand letter and filing the requisite fee motions. There was nothing improper or violative as to Mr. Aronberg's pursuit of attorneys' fees for defending against a claim with no basis in fact or law. Consequently, Plaintiff and its attorneys have exposed themselves to sanctions under § 57.105 and Mr. Aronberg prays the Court find that he is entitled to such relief.

II. STATEMENT OF FACTS

1. On November 14, 2019, Plaintiff filed a Complaint against the State Attorney and Clerk seeking to create a private right of action under Fla. Stat. § 905.27, in the interest of "furthering

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justice", to compel disclosure of the testimony, minutes, and other evidence presented in 2006 to the Palm Beach County grand jury, as to Jeffrey Epstein, (the "Requested Materials").

2. On November 26, 2019, the State Attorney and his office received a contingency fee engagement letter and attorney-client contract from his counsel Douglas A. Wyler and the law firm of Jacobs Scholz & Wyler, LLC, which was executed by the State Attorney's office.

3. On December 6, 2019, the State Attorney filed his Motion to Dismiss, which put Plaintiff on notice that *"Defendant Aronberg is not in custody or control of the [Requested Materials] and is therefore not a proper party to this action."*

4. On January 17, 2020, Plaintiff filed its First Amended Complaint, which in addition to its original claim under§ 905.27 Fla. Stat., ("Count II"), added a claim for Declaratory Relief, ("Count I"), that sought an order declaring that the State Attorney and the Clerk disclose and release the Requested Materials.

5. On January 24, 2020, the State Attorney filed an Answer to Count I of the First Amended Complaint and a Motion to Dismiss Count II, which again notified Plaintiff that:

> Defendant Aronberg and the Office of the State Attorney for the Fifteenth Judicial Circuit are not in custody or control of the records sought herein, and therefore Defendant Aronberg is not a proper party to this action. In fact, Defendant, Sharon R. Bock, as Clerk and Comptroller of Palm Beach County, Florida, admits that it is the custodian in possession of the documents that are the subject of this action.

6. On June 3, 2020, Chief Judge Marx held a hearing on the State Attorney's and Clerk's Motions to Dismiss Count II.

7. During that hearing, Judge Marx's made several statements putting Plaintiff on notice of the State Attorney's impossibility of performance as to Plaintiff's lawsuit in its entirety. See, Ex.J13, pgs. 227-231.

8. On June 8, 2020, the Court entered its Order Granting Defendants' Motions to Dismiss Count II of Plaintiffs First Amended Complaint with Prejudice, leaving only Plaintiff's Count I seeking declaratory relief.

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9. Immediately following the Court's Order, on June 8, 2020, Plaintiff was served with a demand, pursuant to § 57.105 Fla. Stat., to voluntarily dismiss/withdraw the First Amended Complaint and the claims against the State Attorney, along with a Motion for Attorneys' Fees ("§ 57.105 Demand").

10. In serving his § 57.105 Demand, the State Attorney put Plaintiff on notice that he would seek sanctions by filing the § 57.105 Motion for Attorneys' Fees if Plaintiff failed to dismiss the remainder of the First Amended Complaint within 21 days of service of the § 57.105 Demand.

11. The State Attorney's June 8, 2020, § 57.105 Demand specifically informed Plaintiff that:

> First and foremost, the Complaint is not supported by the material facts necessary to establish the claims asserted because neither Defendant Aronberg, nor The Office of the State Attorney for the Fifteenth Judicial Circuit is in custody or control of the 2006 grand jury materials sought therein. Simply put, the declaratory relief sought by the Plaintiff, seeks records from my client that are impossible for him or his office to produce. Accordingly, Defendant Aronberg is not a proper party to this action because no matter what, he and his office do not have possession, custody, or control of the requested materials.
>
> In addition to the foregoing material facts that negate the claims asserted in the Complaint, your claims are also not supported by the application of current law. Specifically, your action for declaratory relief fails based on the clear, unambiguous statutory language found in Section 905.27(2), Florida Statutes, which states:
>
> When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil case, it may be disclosed to all parties to the case and to their attorneys and by the latter to their legal associates and employees. However, *the grand jury testimony* afforded such persons by the court *can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever*.
>
> Moreover, even if the Plaintiff were to prevail in the declaratory action, Mr. Aronberg would be unable to comply with any court order granting disclosure of the requested documents because neither Mr. Aronberg nor The Office of the State Attorney for the Fifteenth Judicial Circuit have possession, custody, or control of the 2006 Epstein grand jury records.

12. On June 23, 2020, Plaintiff's counsel, Stephen Mendelsohn, sent a response to the § 57.105 Demand refusing to withdraw the remainder of the First Amended Complaint.

13. After receiving Plaintiff's response and waiting the requisite "21 days after service of the motion," the State Attorney's § 57.105 Motion for Attorneys' Fees was filed with the Court on July 1, 2020, ("First Motion for Attorneys' Fees").

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14. On August 18, 2020, the State Attorney filed his Motion for Summary Judgment, which includes an Affidavit made by the State Attorney.

15. Mr. Aronberg's affidavit confirms that (a) neither the State Attorney nor his office is in possession, custody, or control of the Requested Materials; (b) the declaratory relief sought by Plaintiff seeks materials that are impossible for the State Attorney or his office to produce; (c) neither the State Attorney nor his office have legal authority to obtain and deliver the Requested Materials; (d) the State Attorney repeatedly made these facts evident to Plaintiff and the public not only through the pleadings and correspondence in this matter, but also through an office press release and the State Attorney's public social media accounts; (e) neither the State Attorney nor his office have the authority to demand that the Clerk grant the State attorney access to grand jury materials after a criminal case has concluded; (f) neither the State Attorney nor his office has accessed the Requested Materials from the Clerk's office in this or any other instance; and (g) the Clerk has sole custody and possession of the Requested Materials.[2]

16. On October 21, 2020, Plaintiff filed its Notice of Dropping the State Attorney, pursuant to Rule l.250(b), Fla.R.Civ.P.

17. On November 9, 2020, the State Attorney filed his Amended Motion for Attorneys' Fees, ("Amended Motion"), pursuant to § 57.105, Fla. Stat., which included the entirety of the State Attorney's legal fees up to that date.

18. Likewise, Mr. Aronberg's counsel, Mr. Wyler filed his Affidavit of Attorneys' Fees on November 9, 2020 and a Verified Affidavit of Reasonable Attorneys' Fees by Mr. Robert Winess, Esq.

19. On April 22, 2021, Plaintiff filed its Motion for Summary Judgment against the Clerk as the sole remaining Defendant in this action.

20. The hearing on Plaintiff's Motion for Summary Judgment took place October 22, 2021 and final judgment was entered in favor of the Clerk on December 20, 2021.

[2] Mr. Aronberg testified and confirmed the contents of his Affidavit during the evidentiary hearing that was held September 6, 2022 and September 8, 2022.

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21. On April 13, 2022, Mr. Aronberg's counsel, Mr. Wyler filed his Amended & Supplemental Affidavit of Attorneys' Fees and Costs as well as Mr. Aronberg's Notice of Dropping Claim for Attorney Fee Multiplier.

22. On April 14, 2022, the Amended and Supplemental Affidavit of Reasonable Attorney's Fees and costs, verified by Mr. Robert Winess, Esq., was filed with the Court.

III. ENTITLEMENT TO § 57.105 ATTORNEYS' FEES AS SANCTIONS

A. Legal Standard

"The central purpose of section 57.105 is, and always has been, to deter meritless filings and thus streamline the administration and procedure of the courts. Thus, the post-1999 version of section 57.105 has expanded the circumstances where fees should be awarded and the purpose is to deter meritless filings. Our supreme court has also stated that section 57.105 creates an opportunity to avoid the sanction of attorney's fees by creating a safe period for withdrawal or amendment of meritless *allegations* and claims." *Davis v. Bailynson*, 268 So. 3d 762, 769 (Fla. 4th DCA 2019). Accordingly, § 57.105, Fla. Stat. provides the following language authorizing the award of attorneys' fees as sanctions in actions such as the present litigation:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

Fla. Stat. § 57.105(1).

Thus, "[s]ection 57.105(1) clearly and explicitly confers upon the trial court the authority to award attorney's fees to the prevailing party upon the courts initiative, if the court finds that the losing party . . . *knew or should have known* that a claim or defense when initially presented to the court or at any time before trial . . . [w]as not supported by the material facts necessary to establish the claim or defense" or would not

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be supported by the application of then-existing law to those material facts. *Koch v. Koch*, 47 So. 3d 320, 324 (Fla. 2d DCA 2010).

Moreover, "[u]nder [§ 57.105, Fla. Stat.] the legislature has expressed its unequivocal intent that where a party files a meritless claim, suit or appeal, the party who is wrongfully required to expend funds for attorneys' fees is entitled to recoup those fees." *Martin County Conservation Alliance v. Martin County*, 73 So. 3d 856, 857 (Fla. 1st DCA 2011) (finding that "[c]ourts are not at liberty to disregard the legislative mandate that courts *shall impose sanctions* in cases without foundation in material fact or law. The word 'shall' in § 57.105, Fla. Stat., evidences the legislative intent to impose a *mandatory penalty* to discourage baseless claims, by placing a price tag on losing parties who engage in these activities." (Quoting *Albritton v. Ferrera,* 913 So. 2d 5, 8-9 (Fla. 1st DCA 2005). Indeed, "section 57.105 expressly states courts 'shall' assess attorney's fees for bringing, or failing to dismiss, baseless claims or defenses.") *Id.*

Finally, in determining an award of sanctions under § 57.105, *the trial court's findings "must be based on substantial competent evidence" and the trial court "must make an inquiry into what the losing party knew or should have known during the fact-establishment process, both before and after the suit was filed.*" *See Trust Mortg., LLC c. Ferlanti*, 193 So. 3d 997, 1001 (Fla. 4th DCA 2016). *(Emphasis added).*

B. Sanctions against Plaintiff and its attorneys are appropriate under § 57.105(1)(a) as they knew or should have known that the declaratory relief claim was not supported by the material facts necessary to establish it.

First and foremost, the record testimony, exhibits, and authorities show that sanctions under § 57.105(1)(a) are justified against Plaintiff and its attorneys as there is no arguable basis in fact to establish that the State Attorney provide the grand jury records he was sued to produce.

Here, Plaintiff and its attorneys had a due diligence obligation to determine the operative facts and law prior to this lawsuit being filed, and therefore *knew or should have known* from the outset that Mr. Aronberg was not a proper party to this action. Despite their due diligence obligation, throughout the litigation Plaintiff was informed numerous times that Mr. Aronberg was an improper party to the lawsuit

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because not only is it impossible for him to produce the requested records as he has no possession, custody, or control over them, but also because the statutes that govern the disclosure of grand jury records clearly and unambiguously do not grant such authority or power to the State Attorney.

The material facts showing that Plaintiff's claim has no reasonable expectation of success against the State Attorney have been open, obvious, and apparent to everyone involved in this matter from the start. Specifically, Mr. Aronberg's position has been consistent: neither he nor his office has possession, custody, or control of the Requested Materials and therefore the declaratory relief sought by Plaintiff seeks materials that are impossible for the State Attorney or his office to produce, and he is not a proper party to this action. Again, these material facts negating Plaintiff's claim against the State Attorney were not only set forth in the June 8, 2020, § 57.105 Demand Letter, but have been the basis for the State Attorney's defense in every pleading, filing, and/or correspondence in this matter. Mr. Aronberg specifically made these assertions in his first Motion to Dismiss and the Motion to Dismiss Count 2, as well as in a press release from his office,[3] and a Twitter post pinned to the top of his account that mirrored the press release, and his § 57.105 Demand Letter. Notably, Plaintiff even admitted in its October 2, 2020 Memorandum of Law that the Clerk is in possession of the requested records. [Ex. J20, CA/Aronberg-000262].

Plaintiff and its attorneys, through their initial research, *knew or should have known* prior to suing Mr. Aronberg that he is not a proper party. Likewise, Plaintiff and its attorneys *knew or should have known* this ultimate fact and that their remaining claim for declaratory relief was unsupported by the material facts necessary to establish it following the June 3, 2020 Motion to Dismiss hearing before Judge Marx. And at the very least, Plaintiff and its attorney's certainly *knew or should have known* that their claim lacked any basis in fact or law once they were served with the § 57.105 Demand Letter on June 8, 2020.

During the June 3, 2020 hearing, Judge Marx drew a bright line as to when Plaintiff and its attorneys *knew or should have known* that Plaintiff's entire lawsuit against Mr. Aronberg had no basis in fact or law

[3] Plaintiff to this day has *never* informed its readers that the State Attorney issued a press release that announced the creation a web portal with all the public records related to the case. Plaintiff also ignored Mr. Aronberg's statement in the press release that "I have never seen or had access to the Epstein Grand Jury transcripts, as the State Attorney's office has never possessed them."

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since the relief sought by Plaintiff is impossible for the State Attorney to perform. Specifically, Chief Judge Marx made the following statements putting Plaintiff on notice if they weren't already:

> "... not for nothing, I think we all know that they don't have control and custody of the records." [June 3, 2020 Hearing Transcript, p. 3:18 – 4:1].
>
> "I think we can all agree ... that the state attorney doesn't have these records." [June 3, 2020 Hearing Transcript, p. 5:17-19].
>
> "I'm asking you, how are the clerk and the state attorney the proper defendants?" [June 3, 2020 Hearing Transcript, p. 8:4-6].
>
> "I'm puzzled by the procedural posturing of this case naming the state attorney. And, you know, I'm further stymied by the fact that you allege in your complaint that they have – particularly David Aronberg the State Attorney – that he has these records." [June 3, 2020 Hearing Transcript, p. 8:8-14].
>
> "[O]kay, let's run this all the way out. Let's say you win and you get a judgment against the State Attorney Dave Aronberg. What's he supposed to do with it? He can't release the grand jury testimony. He has no authority whatsoever to do that." [June 3, 2020 Hearing Transcript, p. 8:18-22].
>
> "And the only thing we're here today about is why should the clerk and the state attorney have to defend a civil action when it's a [im]possibility of performance? They – even if you were to win and get a judgment against them, they cannot give you what they don't have." [June 3, 2020 Hearing Transcript, p. 10:21 – 11:1].
>
> "I'm simply saying why should these two entities have to defend this lawsuit when even down the road if [you] win they can't give you what they don't have?" [June 3, 2020 Hearing Transcript, p. 11:12-15].
>
> "And, you know, really, I want you to boil it down for me as to this – let's take it all the way down the road. You win. You get a judgment against the clerk and the state attorney. I know there's other reasons why you might have filed it this way. But I'm just simply puzzled because I do hear what the clerk and the state attorney are saying, and that is, performance is impossible. They don't have the records and cannot – absolutely. There's not even an inch of wiggle room – that they could release the records even if you got a judgment. It is solely a determination for the court. I, frankly, think, you know, there's ways to get to your records. There's ways to get confidential records. But it isn't by suing the state attorney and the clerk." [June 3, 2020 Hearing Transcript, p. 16:12 – 17:3].
>
> "Even assuming arguendo that they have the records – we know they don't – you were to get a judgment against them, how would you expect them to perform?" [June 3, 2020 Hearing Transcript, p. 17:6-9].
>
> "What do you mean? What do you mean? They're not trying to block it. They're saying that despite the fact – let's just talk about the clerk, because we all know the state attorney doesn't have it." [June 3, 2020 Hearing Transcript, p. 17:23 – 18:2].

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Ex.J13, pgs. 227-231.

Notably, despite the clear, unambiguous message sent by Judge Marx to Plaintiff and its counsel, Plaintiff's witness, when questioned about Judge Marx's statements regarding Mr. Aronberg's impossibility of performance, attempted to pass off her comments as non-authoritative:

> Mr. Mendelsohn: I took her statements as complete dicta since they were not before her as a question on the motion to dismiss. I did not know what personal knowledge she had of what the state attorney's possession or non-possession was. So I did not credit it as being anything but a dicta statement from her.

[2022-09-06 Transcript, 164:8-13].

Mr. Mendelsohn's response is unpersuasive. Black's Law Dictionary defines "Dictum," (Pl. Dicta), as: "(1) A statement of opinion or belief considered authoritative because of the dignity of the person making it. (2) A familiar rule; a maxim." It was improper for Mr. Mendelsohn and Plaintiff to disregard Judge Marx's statements and not give them any credit as she was the Chief Judge at the time and her comments should have been held in high esteem and as instructive to Plaintiff and its attorneys. It is also significant that Judge Marx went out her way to make the statements notifying Plaintiff and its attorneys of Mr. Aronberg's impossibility of performance. Judge Marx's notification should have carried more weight with Plaintiff and its attorneys because at this point they were clearly informed by the Court that no matter what, even if they were to somehow win the lawsuit, the State Attorney would not be able to access and turn over the requested materials.

Accordingly, even though Plaintiff and its attorneys were informed of Mr. Aronberg's impossibility of performance prior to Judge Marx's statements, they were undoubtedly on notice of this material fact following the June 3, 2020 hearing. Thus, upon being served with Mr. Aronberg's § 57.105 Demand Letter on June 8, 2020, Plaintiff and its attorneys *knew or should have known* that Mr. Aronberg was improper party to the action and that their remaining claim for declaratory relief was unsupported by the material facts necessary to establish it.

Notably, Mr. Mendelsohn admitted in his testimony that he and Plaintiff were unsure of who to sue, when he said: "I wanted to see, you know, who to sue, to be honest with you, in this case." [2022-09-

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06 Transcript, 110: 4-5].[4] Even after detailing at length the hundreds of hours Plaintiff's attorneys' apparently researched who to sue and how to bring this case, Plaintiff and its attorneys *knew or should have known*, based on the relevant authorities and information available to them, that Mr. Aronberg was never a proper party to this lawsuit. Plaintiff and its attorneys *knew or should have known* this if not prior to the lawsuit being filed, then definitely when they were served with the 57.105 Demand Letter. [2022-09-08 Transcript, 149:6-10].

Of additional importance regarding Plaintiff and its attorneys' decision to sue Mr. Aronberg to release the 2006 Jeffrey Epstein grand jury records, is Mr. Mendelsohn's reliance on *In re Grand Jury Proceedings*, 832 F.2d 554 (11th Cir. 1987). Mr. Mendelsohn testified that he specifically relied on this case with regard to the state attorney necessarily being a party. [2022-09-08 Transcript, 111:18-23]. Importantly, however, the state attorney *was never sued* to produce confidential records in *In re Grand Jury Proceedings*. Rather, the state attorney was *subpoenaed*, which is markedly different from suing an elected official to produce what they do not have and have no power to produce. Consequently, Plaintiff and its attorneys' research was flawed. They *knew or should have known* through their research that suing the State Attorney was not the proper avenue for accomplishing what they sought. If Plaintiff had just followed the lead of the party in the case upon which they rely, there would be no lawsuit and no § 57.105 Demand. There is no factual scenario wherein Mr. Aronberg could comply with what he was sued for and despite being notified of this fact numerous times, Plaintiff and its attorneys persisted with their action against Mr. Aronberg beyond 21-days after being served with the § 57.105 Demand.

Also of significance here is Plaintiff and Mr. Mendelsohn's attempt to pivot their argument and move the goalposts from what they demanded in the First Amended Complaint, which alleged that Mr. Aronberg "is in possession and/or control of documents that are subject of this action" [CA/Aronberg-

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[4] The Palm Beach Post wrote an article dated September 8, 2022, which notably included the above quote and further corroborates Mr. Aronberg's allegations of Plaintiff's bad faith since Plaintiff and its attorneys *should have known who to sue before improperly suing Mr. Aronberg.*.

000117], and sought disclosure and public access from him as to the requested records for the purpose of informing the public. [CA/Aronberg-000136].

Despite suing Mr. Aronberg to provide access and disclose the requested records, Mr. Mendelsohn disingenuously asserted that once Mr. Aronberg said he had no objection to the Clerk releasing the records pursuant to a court order, "the Post accomplished everything that it needed from the State Attorney in the amended complaint." [2022-09-08 Transcript, 6-13]. For all intents and purposes, Plaintiff and its lawyers attempted to amend their complaint on the stand and reframe it as though it sought something entirely different from Mr. Aronberg: a voiced non-objection vs. access to and disclosure of confidential court records of which the state attorney has no possession, custody, or control.

There is nothing in the First Amended Complaint that Plaintiff or its attorneys can point to and show the Court that all they sued Mr. Aronberg for was to "not object." This is nowhere close to a proper basis for filing the present lawsuit against the State Attorney. For Plaintiff to now assert that it sued the State Attorney merely to force him to announce he would not object to a decision of a separate Constitutional officer is a bewildering claim, especially considering Plaintiff was repeatedly informed that Mr. Aronberg has never had control over the documents. As such, Mr. Aronberg's lack of "objection" to the release of the documents has no impact upon its possible disclosure by the Clerk. This is why Plaintiff has never demanded such a thing from the State Attorney in any of its pleadings.

Further, Mr. Mendelsohn stated that Mr. Aronberg "originally voiced objection, then he changed it to neutrality." [2022-09-08 Transcript, 200:10-11]. Again, Mr. Mendelsohn is disingenuous, as he is basing this "voiced objection" on the legal position asserted in the State Attorney's Motion to Dismiss, but fully ignored Mr. Aronberg's consistent position that he has never had possession, custody or control of the grand jury records. Nonetheless, Mr. Aronberg's ostensible "change to neutrality" was not a change of position because it has always been impossible for Mr. Aronberg to perform as to Plaintiff's declaratory relief claim.[5]

[5] Notably, Black's Law Dictionary defines "Declaratory Judgment" as "a binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement." Accordingly, Plaintiff's

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Based on the foregoing, it is apparent that the record testimony, exhibits, and authorities show that sanctions under § 57.105(1)(a) are justified against Plaintiff and its attorneys as there is no arguable basis in fact to establish that the State Attorney provide the grand jury records he was sued to produce. Thus, sanctions against Plaintiff and its attorneys are appropriate under § 57.105(1)(a), as they knew or should have known that Count I was not supported by the material facts necessary to establish their claim for declaratory relief.

C. Sanctions against Plaintiff and its attorneys are appropriate under § 57.105(1)(b) as they knew or should have known that the declaratory relief claim was not supported by the application of the law to the material facts.

Not only is it factually impossible for Mr. Aronberg to produce the requested grand jury records, because he has no possession, custody, or control over them; it is likewise legally impossible for Mr. Aronberg to produce the requested grand jury records because the statutes and rules that govern the disclosure of grand jury records clearly and unambiguously do not grant such authority or power to the state attorney. Accordingly, the record testimony, exhibits, and authorities show that sanctions under § 57.105(1)(b) are also justified against Plaintiff and its attorneys since there is no arguable basis in law to establish that the State Attorney was empowered to provide the grand jury records he was sued to produce. Here, as before, Plaintiff and its attorneys *knew or should have known* through their initial research that their declaratory relief claim was unsupported by the application of the law to the material facts.

Text, context, and purpose are the ordinary tools used for discerning statutory meaning, with the overarching principle being "that judges lack the power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *Horowitz v. Plantation Gen. Hosp. Ltd. P'ship*, 959 So. 2d 176, 182 (Fla. 2007). Here, the plain language of sections 905.17 and 905.27(2) is clear and unambiguous and, therefore, controls. Tellingly, when Mr. Mendelsohn was asked whether clear, unambiguous statutory language is controlling, he dodged the question. [2022-09-08 Transcript, 155:23 – 156:8].

declaratory relief claim also has no basis in fact or law as a declaratory judgment in its favor would only establish its rights, not enforcement of releasing the requested records.

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Specifically, Florida Statutes, § 905.27(2), which governs the exceptions to disclosure of grand jury records, states:

> *When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil case, it may be disclosed to all parties to the case and to their attorneys and by the latter to their legal associates and employees. However, the grand jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever. (Emphasis added).*

Mr. Aronberg asserted his position of impossibility of performance under the law as applied to the material facts based on the plain language of § 905.27. In fact, Mr. Aronberg made arguments under the statute to Plaintiff and Plaintiff's counsel in his original Motion to Dismiss, the Motion to Dismiss Count 2, the § 57.105 Demand Letter, and the Motion for Summary Judgment.

Mr. Mendelsohn even confirmed that he and his firm researched § 905.17 and 905.27, but sued Mr. Aronberg anyway. [2022-09-08 Transcript, 155:11-13; 160:15-16]. Mr. Mendelsohn also admitted that the requested materials were not being sought in connection with a pending criminal or civil case. [2022-09-08 Transcript, 15-18].

Further, this same argument was ultimately utilized in Judge Hafele's Final Judgment in favor of the Clerk since the Plaintiff admittedly did not seek to use the requested materials in the defense or prosecution of a civil or criminal case. Specifically, the Final Judgment in favor of the Clerk states:

> In interpreting a statute, the court must respect the role of the legislature, the legislative process, and the language of the statute. "'A court's function is to interpret statutes as they are written and give effect to each word in the statute.'" *State v. Sampaia*, 291 So. 3d 120, 125 (Fla. 4th DCA 2020) (quoting *Fla. Dept. of Revenue v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001). "[W]hen legislation is clear 'our task is to apply the text, not improve upon it.'" *Kaplan v. Epstein*, 219 So. 3d 932, 933 (Fla. 4th DCA 2017) (quoting *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). "It is our [courts'] duty to interpret the law as given us by the people in the Constitution or by the Legislature. We are not permitted to substitute judicial cerebration for law or that which we think the law should be and command that it be enforced." *In re Investigation of Circuit Judge of Eleventh Judicial Circuit of Florida*, 93 So. 2d 601, 608 (Fla. 1957). "As courts, we should never forget that in construing acts of the legislature, we are concerned only with the power of the legislature to enact the law. Our peculiar social and economic views have no place in such a consideration." *Tyson v. Lanier*, 156 So. 2d 833, 838 (Fla. 1963).

Ex.J30.

Again, Plaintiff admittedly was attempting to gain access to the requested records for public disclosure purposes that had no connection to a pending criminal or civil case. Section 905.27(2) clearly

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and unambiguously states that disclosure of records like those requested here *"can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever."* Accordingly, based on Plaintiff's attorneys' research and experience they *knew or should have known* that the declaratory relief claim was unsupported by the application of the law to the material facts.

Moreover, Florida Statutes § 905.17 states the following:

> *The notes, records, and transcriptions are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution and shall be released by the clerk only on request by a grand jury for use by the grand jury or on order of the court pursuant to s. 905.27. (Emphasis added).*

Mr. Mendelsohn admits to being aware of this statutory provision in his research, but sued Mr. Aronberg, the State Attorney anyway. [2022-09-08 Transcript, 155:11-13; 160:15-16]. Nonetheless, here, the plain language of sections 905.17 and 905.27(2) is clear and unambiguous and, therefore, controls. Accordingly, Plaintiff and its attorneys *knew or should have known* through their initial research that their declaratory relief claim was not supported by the application of the law to the material facts.

In addition to the foregoing, prior to filing the lawsuit Plaintiff and its attorneys *knew or should have known* the proper legal mechanism for requesting the grand jury records they seek: Rule 2.420(j), Florida Rules of General Practice and Judicial Administration, which only requires the filing of a "motion" seeking disclosure. Here, the evidence shows Plaintiff and its lawyers failed to follow the proper procedure in requesting the records sought in this case as detailed at length in Judge Hafele's Final Judgment in favor of the Clerk. Notably, all Plaintiff had to do was file a Motion Seeking Disclosure in the underlying case and serve the parties thereto. That underlying case is *State of Florida v. Jeffrey Epstein*, Case No. 2006-CF-9454, and neither Mr. Aronberg nor his office is a party thereto. Furthermore, when asked whether he was familiar with the foregoing rule prior to filing this lawsuit, Mr. Mendelsohn responded "absolutely." [2022-09-08 Transcript 183:22 – 184:1]. Consequently, prior to filing the instant lawsuit Plaintiff and its attorneys *knew or should have known* that their declaratory relief claim against the State Attorney was unsupported by the application of the law to the material facts.

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Finally, the above legal arguments, which have been presented to Plaintiff and its lawyers several times, including Mr. Aronberg's 57.105 demand letter, show that it is legally impossible for Mr. Aronberg to produce the requested grand jury records because the statutes and rules that govern the disclosure of grand jury records clearly and unambiguously do not grant such authority or power to the State Attorney. Accordingly, the record testimony, exhibits, and authorities demonstrate that sanctions under § 57.105(1)(b) are justified against Plaintiff and its attorneys, as there is no arguable basis in law to establish that the State Attorney provide the grand jury records he was sued to produce. Here, as before, Plaintiff and its attorneys *knew or should have known* through their initial research that their declaratory relief claim was unsupported by the application of the law to the material facts.

D. Mr. Aronberg's Amended Motion for Attorneys' Fees does not violate the 21-day safe harbor provision because Plaintiff dropped the State Attorney from the action prior to the filing of the Amended Motion.

"Section 57.105(4), Florida Statutes creates an opportunity to avoid the sanction of attorney's fees by creating a safe period for withdrawal or amendment of meritless allegations and claims." *Davis v. Bailynson*, 268 So. 3d 762, 769 (Fla. 4th DCA 2019). Specifically, the relevant portion of the Statute states:

> A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Fla. Stat. § 57.105(4).

Likewise, "[t]he primary purpose of the safe harbor provision of § 57.105(4), Fla. Stat., is to provide the recipient of a motion for an award of costs and attorney's fees with *notice and the opportunity to withdraw or abandon* a frivolous claim before sanctions are sought." *MC Liberty Express, Inc. v. All Points Servs.*, 252 So. 3d 397, 404 (Fla. 3d DCA 2018). *(Emphasis added).*

Here, Plaintiff contends that the State Attorney failed to serve his Amended Motion at any time before filing it, and therefore failed to comply with the 21-day notice provision. Plaintiff claims that for this reason alone the Amended Motion should be denied and cites in support of its argument *Lago v. Kame By Design, LLC*, 120 So. 3d 73, 75 (Fla. 4th DCA 2013) (holding that "if a party files a subsequent or

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amended motion for sanctions under section 57.105 and raises an argument that was not raised in the original motion for section 57.105 sanctions, the subsequent motion must independently comply with the 21-day 'safe harbor' provision of Section 57.105(4).").

The instant case, however, is distinguishable from *Lago*. In *Lago*, the moving party (Kame) had not been dismissed or dropped from the case at the time his amended motion for attorneys' fees was filed, so the Lagos still had an opportunity to change their position and Kame was thus required to give a second safe-harbor notice. In *Lago*, the case was still active when the plaintiff filed its amended motion for attorneys' fees, which meant that the defendant was entitled to notice and an opportunity to change its position and withdraw its offending motion before being sanctioned.

The timeline of events in the instant action stands in stark contrast to that of *Lago* and necessitates a different result. Here, Plaintiff was served with the State Attorney's § 57.105 Demand and its accompanying First Motion for Attorneys' Fees on June 8, 2020. On June 23, 2020, Plaintiff's counsel sent a letter in response indicating Plaintiff's refusal to drop Count I of the First Amended Complaint against the State Attorney. After waiting for the requisite 21-day safe harbor period to pass, the State Attorney properly filed its First Motion for Attorneys' Fees. Over four months later, after settlement negotiations failed and after the State Attorney's Motion for Summary Judgment was filed, Plaintiff dropped the State Attorney as a party on October 21, 2020. Significantly, *only after Plaintiff dropped the State Attorney as a party, and thus had no ability to change its position*, was the Amended Motion filed. Thus, the *Lago* rule does not apply here and Plaintiff is unable to provide any case law or authority that fits the fact pattern of the instant case.

Again, because Mr. Aronberg had already been dropped as a party when his Amended Motion for Attorneys' Fees was filed, the safe harbor provision became meaningless and irrelevant as Plaintiff and its attorneys no longer needed notice and an opportunity to withdraw their claim for declaratory relief, as they had already done so. In this instance, the safe harbor provision was moot upon Plaintiff's dropping of Mr. Aronberg as a party and no additional 21-day safe harbor period was necessary.

The Florida Rules of Civil Procedure and the courts of Florida are clear. Because Rule 1.250

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specifies that a party is dropped "in the manner provided for voluntary dismissal in Rule 1.420(a)(1)," dropping a party therefore *"operates as an adjudication on the merits." See, Siboni v. Allen*, 52 So. 3d 779, 781 (Fla. 5th DCA 2010); Rule 1.420(a)(1) Fla. R. Civ. P. Notably, Plaintiff admits that "the entire action, which necessarily included Count I [of the First Amended Complaint], was dismissed as to [the State Attorney] on October 21, 2020. [Def.Ex.10, p.7]. As a result of dropping the State Attorney from the case, Plaintiff not only effectively made an admission that its allegations against the State Attorney have no basis in fact or law, but also concluded the case as to the State Attorney and thereby became the losing party in this action.

Consequently, unlike the fact scenario and timeline in *Lago*, because Plaintiff concluded the instant litigation by dropping the State Attorney from the action before the filing of the Amended Motion, it was impossible to give Plaintiff an opportunity to respond and withdraw its declaratory relief claim since Plaintiff had already done so, and therefore there can be no violation of the 21-day safe harbor provision set forth in Fla. Stat. § 57.105(4). As stated earlier, the purpose of the 21-day safe harbor provision of § 57.105(4) is to give the recipient a chance to change course and drop the movant from the lawsuit, *IMC Liberty Express*, 252 So. 3d at 404, but this purpose is moot when the recipient has already dismissed its claim. After waiting four months to finally drop the State Attorney from its lawsuit, Plaintiff is trying to avoid sanctions by somehow claiming that it should have been given an extra 21 days to dismiss the State Attorney *after the lawsuit was over*. Plaintiff's argument turns *Lago*'s on its head and makes no legal sense.

Based on the foregoing, the State Attorney's Amended Motion does not violate the 21-day safe harbor provision because Plaintiff dropped him from the action prior to the filing of the Amended Motion, and therefore Plaintiff was not prejudiced by the filing of the Amended Motion. Accordingly, as further set forth below, Plaintiff has exposed itself to § 57.105 attorneys' fees as sanctions for failing to drop the State Attorney as a party within the 21-day safe harbor period.

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E. Mr. Aronberg's Amended Motion for Attorneys' Fees did not raise additional or new legal arguments pertaining to the entitlement of fees.

In any event, unlike the movant in *Lago*, Mr. Aronberg's Amended Motion for Attorneys' Fees did not raise new or additional legal arguments pertaining to the entitlement to fees. Specifically, although the original Motion for Attorneys' Fees was more condensed in its form than the Amended Motion, it nonetheless stated Mr. Aronberg's intention to seek attorneys' fees under § 57.105, and it discussed the 21-day safe harbor provision that commenced on June 8, 2020 with the service of the motion together with the §57.105 Demand Letter to dismiss the First Amended Complaint and its remaining claim for declaratory relief.

Notably, the original Motion for Attorneys' Fees expressly referenced, and thereby incorporated, the June 8, 2020 § 57.105 Demand Letter in which the undersigned counsel advised Plaintiff and its attorneys of the facts that establish that the declaratory relief claim is without support of the facts or the law. The Demand Letter was introduced into evidence at the evidentiary hearing by stipulation and laid out in detail the specific reasons Mr. Aronberg is entitled to attorneys' fees as a sanction under § 57.105, which are the same reasons argued at the evidentiary hearing and in the Amended Motion.

Plaintiff's counsel indisputably received this correspondence, and in fact filed a letter dated June 23, 2020, disputing the assertions made, refusing to withdraw the declaratory relief claim against Mr. Aronberg, and insisting instead that Mr. Aronberg withdraw his § 57.105 demand. The Amended Motion for Attorneys' Fees simply includes the procedural events in this case which had not yet occurred at the time the original motion had been filed, and discusses the reasonableness of attorneys' fees incurred from the date of the service of the § 57.105 demand to the filing of the Amended Motion. To be clear, the Amended Motion does not include any new or additional grounds for an award of attorneys' fees and based on the foregoing was not improperly filed.

Also, in thoroughly researching the relevant authorities, there does not appear to be any case law requiring a motion for attorneys' fees under § 57.105 to be pled with specificity in such a manner to preclude relief if pleading requirements are not met. Likewise, Mr. Aronberg's fee motions comply with Rule 1.525,

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Florida Rules of Civil Procedure, which states: "Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment." Mr. Aronberg clearly complied with the Statutes and Rules as he filed his original Motion for Attorney's fees on July 1, 2020, more than 21 days after serving his §57.105 Demand Letter, and he filed his Amended Motion for Attorneys' Fees on November 9, 2020, which was within 30 days of being dropped as a party on October 21, 2020. Thus, even if the Court were to find the Amended Motion to be improper, it can still proceed on the original Motion for Attorneys' Fees. In fact, despite finding that the plaintiff's amended motion for attorneys' fees was improper in *Lago*, the appellate court instructed the trial court to rule on the plaintiff's original motion for attorneys' fees, since it was properly served and filed pursuant to § 57.105, Fla. Stat. *Lago*, 120 So. 3d at 75.

Accordingly, the foregoing shows that notice intent of the safe harbor provision was satisfied based on the timing of Mr. Aronberg's § 57.105 Demand Letter and his fee motions. Thus, the only remaining requirement pertains to the sufficiency of the evidence presented at the evidentiary hearing.

F. 57.105(3)(a) Defense is Inapplicable

Plaintiff's reliance on § 57.105(3)(a) as a defense to Mr. Aronberg's attorney fee claim is inapplicable. Specifically, § 57.105(3)(a) states:

> 3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:
> (a) Under paragraph (1)(b) if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

Plaintiff attempts to twist the language of the statute in two different ways to suit its argument. First, Plaintiff fails entirely to recognize that the 57.105(3)(a) defense applies only to claims made under 57.105(1)(b). Here, Mr. Aronberg asserted his claim for 57.105 sanctions under both sections (1)(a) and (1)(b), so none of Plaintiff's attempts at trying to establish good faith have any effect on Mr. Aronberg's assertion under § 57.105(1)(a) – that Plaintiff's declaratory relief claim fails because it is unsupported by the material facts necessary to establish it.

Moreover, Plaintiff attempts to add a word that is nowhere found in the statute: "interpretation."

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Plaintiff argues that its declaratory relief claim was presented to the Court as "a good faith argument for the *interpretation* of existing law or at least, the establishment of a new law." Nonetheless, the 57.105(3)(a) defense only applies to claims arguing for the "extension, modification, or reversal of existing law or the establishment of a new law...." Here, Plaintiff's claim for declaratory relief only sought interpretation of § 905.27, not an extension, modification, or reversal of the Statute. Plaintiff's only claim that sought to create a "new law" was its Count 2, which was dismissed with prejudice and is not part of Mr. Aronberg's claim for sanctions.

Plaintiff's argument that sanctions pursuant to § 57.105(1)(b) are unjustified based on § 57.105(3)(a) also fails because there is no arguable basis in law that the State Attorney could provide the Requested Materials. [See, I.C., *supra.*]. In determining an award of sanctions under § 57.105, the trial court "*must make an inquiry into what the losing party knew or should have known during the fact-establishment process, both before and after the suit was filed*." *See Trust Mortg., LLC c. Ferlanti*, 193 So. 3d 997, 1001 (Fla. 4th DCA 2016); *See also Chue v. Lehman*, 21 So. 3d 890, 891-92 (Fla. 4th DCA 2009). Here, Plaintiff's fact-establishment process began before either of its original Complaint or First Amended Complaint were filed. Both of Plaintiff's pleadings revolved around its arguments for a private right of action under Fla. Stat. § 905.27 and whether it had constitutional and statutory standing to overcome grand jury secrecy provisions "in furtherance of justice."[7]

Nonetheless, Florida law regarding the disclosure of grand jury materials, § 905.17(1), states:

> *The notes, records, and transcriptions are confidential* and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution *and shall be released by the clerk only* on request by a grand jury for use by the grand jury or *on order of the court* pursuant to s. 905.27. (Emphasis added.)

Accordingly, based on the clear, unambiguous statutory language set forth in § 57.105.17(1), only the Clerk, not the State Attorney, may release grand jury materials pursuant to an order of the court. Thus,

[7] Significantly, any and all arguments offered by Plaintiff regarding the "furtherance of justice" exception set forth in § 905.27, Florida Statutes is moot since Count 2 was dismissed with prejudice and is not the subject of Plaintiff's remaining claim for declaratory relief, Mr. Aronberg's § 57.105 Demand Letter or the Amended Motion for Attorneys' Fees.

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it was easily apparent that the State Attorney and his office lack the legal authority to obtain and deliver the Requested Materials demanded by Plaintiff in Count I of the First Amended Complaint.

As set forth at length above, the clear, unambiguous statutory language in §§ 905.17 and 905.27(2), Fla. Stat., and Plaintiff's admissions that it had researched these provisions prior to suing Mr. Aronberg indicate that Plaintiff and its attorneys *knew or should have known* through their initial research that their declaratory relief claim was unsupported by the application of the law to the material facts. Regardless of whether Plaintiff actually knew of the controlling provision set forth in § 905.17(1) during its fact-establishment process, Plaintiff was not only on constructive notice of said statutory provision, but was specifically informed of this provision in several instances prior to the State Attorney being dropped as a party. Based on Plaintiff's own research, statutory constructive notice, the State Attorney's affidavit, all of the pleadings and correspondence in this matter as well as through the State Attorney's office press release and social media accounts, and Chief Judge Marx's statements during the June 3, 2020 hearing, Plaintiff *knew or should have known* that Count I of the Amended Complaint "would not be supported by the application of then-existing law to [the] material facts" in this action. *See § 57.105(1)(b)*.

Furthermore, as set forth in detail above and despite Plaintiff's contentions, there is no arguable "good faith" basis in law and/or fact, under § 57.105(1)(a) or (b), or any reasonable expectation of success as to Plaintiff's Count I; and therefore, sanctions against Plaintiff are appropriate under § 57.105. *See Minto PBLH, LLC v. 1000 Friends of Florida, Inc.*, 228 So. 3d 147, 149 (Fla. 4th DCA 2017). Moreover, under no set of facts did Plaintiff have a reasonable expectation of success against the State Attorney in obtaining the sought after documents because at no time did the State Attorney have possession, custody, or control over said documents. In fact, Plaintiff acknowledged, admitted, and acquiesced to the impossibility of the State Attorney providing the Requested Materials when Plaintiff dropped the State Attorney from the action on October 21, 2020.

G. Finding of Frivolousness Not a Factor

"Section 57.105 does not require a finding of frivolousness to justify sanctions, but only a finding that the claim lacked a basis in fact or law" and "does not require a party to show complete absence of a

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justiciable issue of fact or law." *Martin County Conservation Alliance v. Martin County*, 73 So. 3d 856, 865 (Fla. 1st DCA 2011). As set forth above, it is clear that Plaintiff's declaratory relief claim fails under § 57.105(1)(a) because it is unsupported by the material facts necessary to establish it, and under § 57.105(1)(b) because it is unsupported by the application of the law to the material facts. In fact, although neither the word "frivolous" nor any of its derivatives are found in the Statute, Plaintiff's claim for declaratory relief is nothing more than a frivolous claim.

In determining an award of sanctions under § 57.105, the trial court's findings "must be based on substantial competent evidence" and the trial court "must make an inquiry into what the losing party *knew or should have known* during the fact-establishment process, both before and after the suit was filed." See *Trust Mortg., LLC v. Ferlanti*, 193 So. 3d 997, 1001 (Fla. 4th DCA 2016). In this vein, although frivolousness is not required but is nonetheless present here, the case of *Weatherby Assocs. v. Ballack*, 783 So. 2d 1138 (Fla. 4th DCA 2001) can be helpful to the Court in determining the timing of when the sanctions against Plaintiff and its attorneys began to accrue and whether sanctions are appropriate against Plaintiff's attorneys.

As to the first issue, although the *Weatherby* court's analysis revolves around frivolousness, defined as lacking any justiciable issues of law or fact, it applied the following 2-prong analysis: "First, the court must determine whether the suit was frivolous when initially filed. If it was not, then the court must determine whether the suit became frivolous after the suit was filed."

Here, following the guidance of *Weatherby*, substantial competent evidence was introduced to the Court showing that Plaintiff and its counsel *knew or should have known* prior to filing the instant lawsuit that there were no justiciable issues of law or fact. As previously discussed, under § 57.105(1)(a) Plaintiff and its attorneys through their initial research *should have known* prior to suing Mr. Aronberg that he is not a proper party and should never have been sued by Plaintiff because he has no access, custody or control of the requested records and his performance is impossible.

Likewise, Plaintiff and its attorneys *knew or should have known* this ultimate fact and that their remaining claim for declaratory relief was unsupported by the material facts necessary to establish it

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following the June 3, 2020 Motion to Dismiss hearing before Judge Marx. During that hearing, Judge Marx drew a bright line as to when Plaintiff and its attorneys *knew or should have known* that Plaintiff's entire lawsuit against Mr. Aronberg had no basis in fact or law since the relief sought by Plaintiff is impossible for the State Attorney to perform. At the very least, however, Plaintiff and its attorneys definitely *knew or should have known* that there were no justiciable issue of law or fact regarding their declaratory relief claim when they were served with the § 57.105 Demand Letter on June 8, 2020. In fact, at no time has Plaintiff produced any evidence whatsoever to support its claim, since it is patently impossible, both factually and legally, for Mr. Aronberg to produce the records he was sued to produce.

Likewise, under § 57.105(1)(b) Plaintiff and its attorneys *knew or should have known* through their initial research that their declaratory relief claim was unsupported by the application of the law to the material facts. As set forth above, the record testimony, exhibits, and authorities show that sanctions under § 57.105(1)(b) are also justified against Plaintiff and its attorneys because there is no arguable basis in law to establish that the State Attorney provide the grand jury records he was sued to produce, pursuant to §§ 905.27(2) and 905.17, Florida Statutes, as well as Rule 2.420 of the Rules of Judicial Administration.

As to the second issue of whether sanctions are appropriate against Plaintiff's attorneys as well as Plaintiff, the *Weatherby* court stated:

> When assessing attorney's fees against a losing party's attorney, the trial court must find that there were no justiciable issues of law or fact and that the losing party's attorney did not act in good faith based on the representations of his or her client.

§ 57.501(1), Fla. Stat. (1999). Here, based on the testimony of Mr. Mendelsohn, it is apparent that Plaintiff was relying on its attorneys to determine any justiciable issues of law or fact and that Plaintiff's attorneys were not relying on representations of their client in determining Mr. Aronberg's capacity for access, custody, and control of the requested documents. Plaintiff argued that it wanted access to the grand jury records for purposes of public disclosure and relied on its attorneys to accomplish that goal. Accordingly, there is no good faith defense to apply on the part of Plaintiff's attorneys as there is no record evidence that their actions were made in good faith based on representations of their client; therefore, sanctions are appropriate against both Plaintiff and their attorneys.

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H. Conclusion as to Entitlement

Despite Plaintiff's arguments to the contrary, the record evidence shows that Plaintiff and its lawyers *knew or should have known* prior to filing this lawsuit that the declaratory relief claim fails under 57.105(1)(a), because it is unsupported by the material facts necessary to establish it; and under 57.105(1)(b) because it is unsupported by the application of the law to the material facts. Alternatively, Mr. Aronberg contends that Plaintiff and its attorneys' *knew or should have known* the declaratory relief claim lacks any basis in law or fact following Judge Marx's comments during the June 3, 2020 hearing. Moreover, Plaintiff and its attorneys certainly *knew or should have known* that there were no justiciable issue of law or fact regarding their declaratory relief claim when they were served with the § 57.105 Demand Letter on June 8, 2020.

Moreover, as set forth above, Mr. Aronberg's § 57.105 Demand Letter follows the proper procedures and does not violate the 21-day safe harbor provisions because Plaintiff dropped Mr. Aronberg as a party prior to the filing of the Amended Motion for Attorneys' Fees. Further, Plaintiff's §57.105(3)(a) defense is wholly inapplicable to Mr. Aronberg's claim under § 57.105(1)(a) and likewise does not apply to Mr. Aronberg's § 57.105(1)(b) claim since Plaintiff's claim for declaratory relief is not a claim for the extension, modification, or reversal of existing law or the establishment of new law with a reasonable expectation of success.

Rather, the record evidence shows that Mr. Aronberg properly complied with § 57.105 in serving his demand letter and filing the requisite fee motions. There was nothing improper or violative as to Mr. Aronberg's pursuit of attorneys' fees for defending against a claim with no basis in fact or law. Consequently, Plaintiff and its attorneys have exposed themselves to sanctions under § 57.105 and Mr. Aronberg prays the Court find that he is entitled to such relief.

IV. REASONABLENESS OF REQUESTED FEES & COSTS

As discussed at length above, Mr. Aronberg is entitled to attorneys' fees and costs as sanctions against Plaintiff under § 57.105, Florida Statutes because Plaintiff's claim for declaratory relief fails for having no basis in fact or law.

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At the direction of Judge Hafele, the parties agreed that should the Court find Mr. Aronberg entitled to attorneys' fees as sanctions, expert witnesses would be waived as to the reasonableness phase of the hearing. Likewise, Plaintiff has stipulated to the undersigned counsel's hourly rate of $425.00/hour.

Here, the record evidence as to reasonableness of the sanctions sought by Mr. Aronberg consists of: (1) the invoice of the undersigned counsel's law firm regarding this matter [Ex.J32]; (2) the undersigned's Amended & Supplemental Affidavit of Attorneys' Fees & Costs [Ex.J33]; and (3) the Amended and Supplemental Affidavit of Reasonable Attorneys' Fees and Costs by Mr. Robert Winess, Esq.

Significantly, although the above-referenced invoice totals $69,417.50 in fees, it is important to note that the above-referenced affidavits certify fees sought only as of June 8, 2020, the date Plaintiff was served with Mr. Aronberg's § 57.105 Demand Letter, forward. Thus, the total amount of attorneys' fees sought by Mr. Aronberg total $61,840.00.

Plaintiff's Bench Memo Regarding Attorney Fee Objections takes issue with several of the line-item attorneys' fees sought by Mr. Aronberg as § 57.105 sanctions. Specifically, Plaintiff contends that the fees for Travel Time in the amount of $10,412.50 are not compensable. Despite their contention, the courts of Florida disagree when sanctions are sought, as here:

> Although travel time is generally not compensable, travel time may be awarded as part of a sanction under certain circumstances, such as where a party was aware that his actions could result in unnecessary litigation." *Palm Beach Polo Holdings, Inc. v. Stewart Title Guar. Co*., 132 So. 3d 858, 862 (Fla. 4th DCA 2014); *See Eve's Garden, Inc. v. Upshaw & Upshaw, Inc*., 801 So. 2d 976, 979 (Fla. 2d DCA 2001) (affirming award of attorney's fees for travel time and concluding that "travel time may be awarded when fees are awarded as a sanction"); *See also Graham v. R.J. Reynolds Tobacco Co.,* 2017 U.S. Dist. LEXIS 201838 (11th Cir. Fla., Nov. 17, 2017) (finding that attorney travel time is awardable where attorney's fees are sought as sanctions).

Additionally, Plaintiff contests several of the fees sought as "Administrative Entries"; however, a review of the contested entries clearly shows that while some may be classified as "clerical" or "ministerial," several cannot. Accordingly, proper and compensable time entries were made on 07/01/2020, 08/18/2020, 10/14/2020, 11/09/2020, 07/23/2021, 07/29/2021, and 08/21/2021, which total $4,462.50, and should be included in any fee award to Mr. Aronberg.

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Plaintiff also contests "Relation Back" time entries in the amount of $27,540.00. Here, Plaintiff attempts to recalculate the fees sought by Mr. Aronberg to begin on October 14, 2020, the date of Mr. Aronberg's Response to Plaintiff's Memorandum of Law in Opposition to First Motion for Attorneys' Fees. As stated above, Plaintiff and its attorneys *knew or should have known* that their declaratory relief claim had no basis in fact or law from the initiation of this lawsuit or at the very least as of service of Mr. Aronberg's § 57.105 Demand Letter on June 8, 2020. Similarly, Plaintiff's argument in the alternative starts the attorney fee clock on July 1, 2020, which also fails for the aforementioned reasons. As to the remainder of the fees contested by Plaintiff, Mr. Aronberg and the undersigned counsel leave their determination to the learned hands of the Court.

V. CONCLUSION

Based on the foregoing, Defendant, DAVE ARONBERG, as State Attorney of Palm Beach County, Florida, respectfully requests the Court enter an order granting his Amended Motion for Attorneys' Fees as well as such other and further relief as the Court deems just or proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 2022, a copy of the foregoing was been electronically filed with the Florida E-File Portal for e-service on all parties of record herein.

JACOBS SCHOLZ & WYLER, LLC

/s/ Douglas A. Wyler

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