IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, SECOND DISTRICT

DOUGLAS HANNAH,
A/K/A DOUGLAS J. HANNAH,

Appellant,

v.

MALK HOLDINGS, LLC

Appellee.
_____/

CASE NO. 2D21-2842

L.T. NO. 19-CA-007281

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE & FACTS

This appeal involves a business dispute grounded in honest mistakes that was successfully dressed up in bells and whistles. Appellant Douglas Hannah took custody of Appellee Malk Holdings, LLC's funds believing he had authority to do so under a collateral-pledge agreement. On indication that maybe he was mistaken or that the agreement was repudiated, Hannah repeatedly tried to return the funds.

In fact, after receiving a civil-theft demand, Hannah's attorney timely sent the funds via an attorney-trust check, which was indisputably received, but never cashed. Instead, Malk Holdings' owner pretended to have not receive it and demanded a second trust check over an offer to wire the funds. Malk Holdings' owner physically picked up that second check within the demand deadline, but waited 19 days to cash it—well after the deadline. Even though the attorney-trust account indisputably had the funds, the check bounced because the legal assistant for Hannah's attorney mistakenly inputted the check into the bank's fraud-protection program.

As a result, Malk Holdings sued, avoided Hannah's directed-verdict motions, and obtained a jury verdict against Hannah for civil

theft and conversion despite no evidence that he ever refused to return the funds; no evidence of felonious intent; and no evidence of actual damages since the funds were returned.

Hannah and Malkani were close friends with a long history of doing investment deals together.

Hannah works in the investments field, particularly real estate, private equity, stocks, and bonds. (T470). And for the last 20 years, his work has primarily been structured investments, which means he looks for opportunities in the marketplace and then pools other investors money alongside his own to make investments. (T620–21). He also owns and operates Silverleaf Advisors, which provides advisory services for these structured investments, including real-estate management and leasing. (T471, T684).

When someone participates in these structured investments they typically do so through investment vehicles, which are single-purpose entities created to make investments. (T633, 702). Appellee Malk Holdings, LLC is Sunil Malkani's investment vehicle, which Hannah created at Malkani's direction in 2010 and initially managed. (T214, T253, T628–29, T702–03). Although Malkani's father is a

passive owner, Malkani was the primary owner, manager, and voice of Malk Holdings at all relevant times. (T214, T252, T629–30, T703).

Hannah created this investment vehicle for Malkani, who is an eye doctor, because they were close friends and business partners. (T253–54, T214). In fact, before 2016, the two friends spent a lot of time together and with each other's families having lunch, dinner, and drinks. (*Id.*; T630). They regularly emailed and called—even as late as 11 at night—to discuss investments. (T630, T627). And they participated in over 75 investments together. (T630–31). Most of these were structured investments with were other investors, though several were just the two of them. (T630–33, T621, T254–57).

Two investments are particularly relevant to this case: The first is Distressed Capital II, LLC and the second is the Tamiami Square deal. Each is sequentially discussed in the next two sections.

One investment they were involved in was Distressed Capital II, LLC.

One structured investment that the two friends participated in was called Distressed Capital II, LLC (DC II). Operating between early 2010 and late 2018, this entity purchased distressed assets in South Florida, sold them for a profit, and then distributed those profits to

its investors. (T215, T473, T624, T703). It had 10 investors that initially raised $3.4 million in capital. (T474–75, T623). Malkani, through his investment vehicle, Malk Holdings, made a $250,000 capital contribution for a 4.68% interest. (*Id.*; T215–16, T626). Hannah did the same through his separate investment vehicle. (T474, T685).

DC II had two managers. The first was Mike Morgan, who is a longtime local real-estate attorney in South Florida. (T528–31, T573, T662–63). Morgan has served as the transactional attorney in several of Hannah's structured investments. (*Id.*). He was even, at one time, Malk Holdings' registered agent. (T253). Morgan was also DC II's registered agent and handled the transactional side of DC II's management, such as executing and processing documents. (T528–31, T551).

DC II's other manager was Hannah through his company, Silverleaf Advisors. (T216, T473–74, T622–23, T706). In this role, Hannah ran DC II's daily operations, including identifying and recommending investment opportunities, managing DC II's bank accounts, providing relevant corporate and tax information to the bookkeeper, and keeping the investors informed. (*Id.*; T638–40).

When Silverleaf Advisors had employees besides Hannah in DC II's early years, investors were kept informed through periodic emails containing detailed analytics about DC II's assets, costs, profits, and distributions. (T634, T219–20). At some point, however, Silverleaf stopped providing these courtesies due to staffing issues, but investors remained informed through regular calls with Hannah. (T634–37, T651).

Hannah, however, did not have authority to authorize distributions to DC II's investors. (T626–28, T685–86, T713). He could make recommendations and, if authorized, he typically carried out the authorizations by issuing and delivering the distribution checks. (*Id.*).

Major decisions—like whether and when to make profit distributions—were made by DC II's largest investor, Argentavis Investment Group, LLC. (T626–28, T704–07). Of the three individuals who comprised Argentavis, Matthew Middlethon was Argentavis's voice, lead investor, and ultimate decisionmaker, which, in turn, made him DC II's lead investor and primary decisionmaker. (*Id.*). In this leadership role, Middlethon was the final decisionmaker for DC

II over which assets to purchase, when to sell them, and whether to distribute profits. (*Id.*).

When Middlethon authorized distributions, they were made based on a pro rata formula tied to each investors' original capital contribution. (T217–18, T624–26). In the end, DC II was a very successful and profitable investment company for its investors over its eight-year life cycle. (T473–76).

Another investment involved a short-term loan from Hannah, which was to convert into an equity interest and was secured by a pledge agreement on future DC II distributions.

The second investment deal involved the two friends purchasing property together in October 2015 that was referred to at trial as Tamiami Square. (T640–45, T482–86, T552). Hannah's understanding of his and Malkani's agreement regarding this investment was that he would provide a short-term $465,000 loan to Malkani by way of written promissory notes to a subsidiary Malkani had created for the purchase called Aceplex, LLC. (*Id.*). Then at the end of January 2016, the loan would be forgiven when it was converted into Hannah's ownership interest in the holding company for Tamiami Square. (*Id.*).

To effectuate this deal, Hannah told Malkani that there needed to be some form of collateral to secure the loan. (*Id.*). According to Hannah, Malkani's response was, "You have all of my distributions from all of these entities. Shouldn't that be enough collateral?" (T640–43).

Hannah understood this to mean that he and Malkani were entering into an oral pledge agreement to secure this short-term loan using the future distributions that Malkani and his company, Malk Holdings, would receive from DC II. (T640–45, T482–86). After all, Hannah and Malkani were close, trusted friends with a long history of doing investments by oral agreement when it was just the two of them. (T254–57, T687). And the loan was only supposed to last about three months before converting into Hannah's ownership interest, thereby terminating the loan and any pledge agreement. (T640–45, T482–86).

But that loan never converted into an equity interest, their relationship soured, and Malkani sent a civil-theft demand for the DC II distributions.

Unfortunately, the loan never converted into an ownership interest at the end of January 2016 as anticipated. (T686, T484–85,

T645–46). Instead, Malkani, through Aceplex, began paying the loan (though even by trial, it had never been fully repaid). (T681–82, T686).

Because the loan was never converted, Hannah believed the oral pledge agreement continued. (T484–85, T645–46). This belief was only fortified by the fact that Malkani was paying the loan and had made no indication that the oral pledge agreement was no longer intact, such as when Hannah received no response from Malkani to an email sent in April 2016 asking where the future distributions for DC II should be sent. (R748, T485, T646, T274–75, T841).

As a result, when DC II issued two distribution checks totaling $91,347 to Malk Holdings in August 2017, Hannah exercised his rights under the pledge agreement to escrow those funds as collateral for the Tamiami Square deal. (T646, T482–83). Hannah confirmed that he was not intending to steal or use those funds, rather he believed his actions were authorized by their pledge agreement. (T479, T483, T661, T646).

In fact, Hannah was not surreptitious about taking and escrowing these funds. For example, he told his boss in DC II—Matthew Middelthon—about the pledge agreement when the distribution checks issued. (T649–50)). Middelthon's testimony

would have corroborated this fact, but the court excluded it as hearsay, even though it was being used for a nonhearsay purpose and qualified for a hearsay exception because it went to disprove felonious intent. (R491–92; T452–60 (depo desgn. pp. 22:2–16, 23:1, 23:20–22, 24:14–19, 24:21–25:3), T600–05 (depo desgn. 38:8–39:15, 56:5-13, 56:22, 57:1-11, 58:4–18, 85:15–86:2)); *see infra* pp. 56–61.

Hannah also had DC II issue the checks as "to the order of Douglas Hannah fbo Malk Holdings, LLC" so that it was clear that Hannah was only taking custody of these funds "for the benefit of" Malk Holdings. (R753–54, T477–83, T647–48). Middelthon confirmed that he reviewed these checks, authorized their issuance in this manner, and saw no problem with Hannah taking custody of the funds for Malk Holdings' benefit. (T707–10). Hannah also told the bookkeeper knowing that it would be recorded in the corporate books, which were then used to issue Malk Holdings' K-1 and report the distributions to the IRS. (R777–78, R769–71; T637–40). And Hannah knew the K-1 would be sent to Malk Holdings. (*Id.*).

Hannah then immediately deposited those distribution checks in a savings account at JPMorgan Chase, which he opened for the sole purpose of escrowing these funds as collateral for the Tamiami

deal. (R755; T478–82, T648–49, T664–65). Although Hannah admitted that only his name was on the account and that neither Malk Holdings nor Malkani had access to it, Hannah testified that he deposited these funds into this escrow account "[u]nder Dr. Malkani's instructions…." (*Id.* (quote at T479)). Hannah also confirmed and the account's bank statements show that these funds were never used by anyone for anything and Hannah never Hannah's personal funds in that account. (R755–66; T648–49, T664–65, T692). Rather, they remained in escrow untouched until they were eventually deposited in Mike Morgan's trust account for the purpose of disbursing to Malkani (discussed below). (*Id.*)

Finally, Hannah believes that he notified Malkani about taking custody of these funds per the pledge agreement by phone or email, but he admitted to being unable to find an email. (T482–83).

Malkani, however, testified that he knew nothing about this pledge agreement, disavowed ever entering it, and claimed to have never authorized Hannah to take custody of Malk Holdings' distributions. (T222, T235–41). Although he admitted to knowing that future distributions were coming because of Hannah's April 2016 email about where to send future distributions, Malkani claims

to have not heard anything from Hannah or DC II's leadership between that email and the end of 2017. (R748, T232–33, T274–75). On the other hand, Malkani admitted that he neither responded to that April 2016 email nor inquired during that time with Hannah, Middelthon, Morgan, or anyone else at DC II about the company or whether he was owed distributions. (T259–62, T274–75, T269–273).

Instead, in late 2017, he conducted his own investigation over the internet into whether DC II's assets had sold. (T232–34, T262, T629). When that did not bear fruit, he had his and Malk Holdings' attorney investigate the matter. (*Id.*; T270–71). This resulted in a lawsuit in late January 2018 against DC II for access to the corporate records, which DC II freely gave without objection—even stipulating to a judgment. (T270–71, T311, T551–52).

But after filing this lawsuit, Malkani refused to return calls or emails. For example, Middelthon testified that Malkani refused his calls and did not respond to his emails, which specifically referenced interactions that he and Malkani had previously had about Hannah escrowing Malk Holdings' distributions. (T712).

Hannah also emailed Malkani shortly after learning about the records lawsuit and offered to settle matters, including returning the

distributions that were being held as collateral in exchange for working out the loan:

From: Douglas Hannah <dhannah@silverleafad.com>
Date: February 2, 2018 at 3:32:35 PM MST
To: "Sunil M. Malkani" <malkanisunil@yahoo.com>

Sunil:

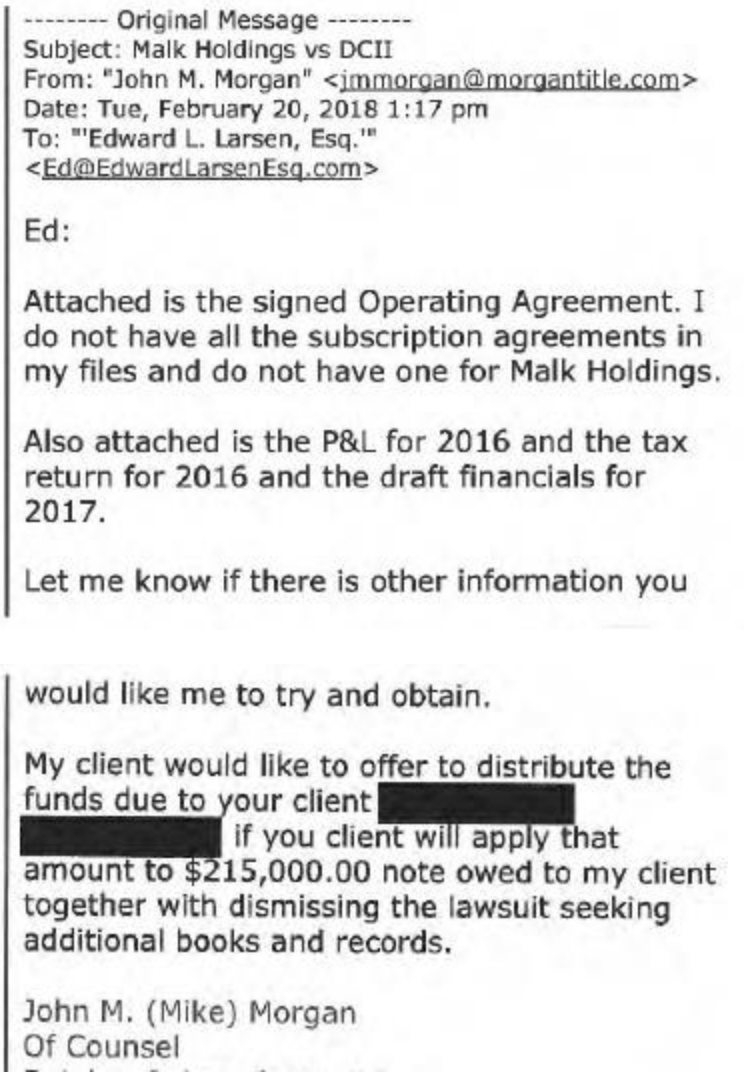
I would like to discuss working out a settlement.

Delighted to give you the distributions that we are holding as collateral based on our partnership agreement. This exchange can be done with some sort of work out or partial workout. Depositions are going to be uncomfortable for all parties.

(R767, T652–53). Again, Malkani did not respond. (*Id.*).

Yet, Malkani claims that this email shocked and angered him. (T235–41). Until then, Malkani said he knew nothing about a pledge agreement or that Hannah was holding Malk Holdings' distributions. (*Id.*). But Malkani readily admitted to not responding to this email despite his alleged shock and anger. (T276–77).

After receiving no response, Hannah had Morgan make a similar inquiry with Malkani's attorney to resolve the dispute when Morgan provided the documents requested in the records lawsuit. (R773–74; T534–35, T570). Like Hannah's email, Morgan offered to distribute the pledged funds in exchange for paying down the loan and dismissing the records lawsuit:



-------- Original Message --------
Subject: Malk Holdings vs DCII
From: "John M. Morgan" <jmmorgan@morgantitle.com>
Date: Tue, February 20, 2018 1:17 pm
To: "'Edward L. Larsen, Esq.'"
<Ed@EdwardLarsenEsq.com>

Ed:

Attached is the signed Operating Agreement. I do not have all the subscription agreements in my files and do not have one for Malk Holdings.

Also attached is the P&L for 2016 and the tax return for 2016 and the draft financials for 2017.

Let me know if there is other information you would like me to try and obtain.

My client would like to offer to distribute the funds due to your client [redacted] if you client will apply that amount to $215,000.00 note owed to my client together with dismissing the lawsuit seeking additional books and records.

John M. (Mike) Morgan
Of Counsel

(R773–74).

Indeed, at this point, the $91,347 was in Morgan's trust account. (R776, T532–35, T570–71). Because Hannah had previously had problems with Malkani not immediately cashing or depositing distribution checks in the past, Hannah believed it best to transfer those funds to his lawyer's trust account so that it could eventually be given to Malkani, whose office was only four miles from Morgan's

office. (T653–54). But since the funds were escrowed in a Chase savings account, he could not simply write a check. (T690–92). Rather, he had to temporarily transfer the funds from the savings account to his personal money-market account at Chase to be able to write the cashier's check for deposit in Morgan's trust, all of which happened simultaneously. (R776, T757–65; T690–92).

Malkani's attorney rejected Morgan's settlement email. (T319, T534). And even though Morgan and Malkani's attorney had several other conversations about the funds, the attorney never gave Morgan authority to wire him the funds. (T535, T537, T558–59, T571–72, T319–20, T328–29; *see also* T292).

Instead, four months after Morgan's settlement email, Malkani's attorney simply served civil-theft demands on Hannah under section 772.11, Florida Statutes (2019). (R779–87; T246–47, T279).

Within the 30-day demand deadline, Malkani lost the first satisfaction payment, refused a wire transfer, and received a second payment by attorney-trust check, but it bounced due to a legal assistant's clerical error.

The timing of these demands and Hannah's compliance with them is important to the argument below. The demands were sent to

Hannah on June 21, 2018 demanding a tender of payment totaling $91,347 in cash within 30 days:

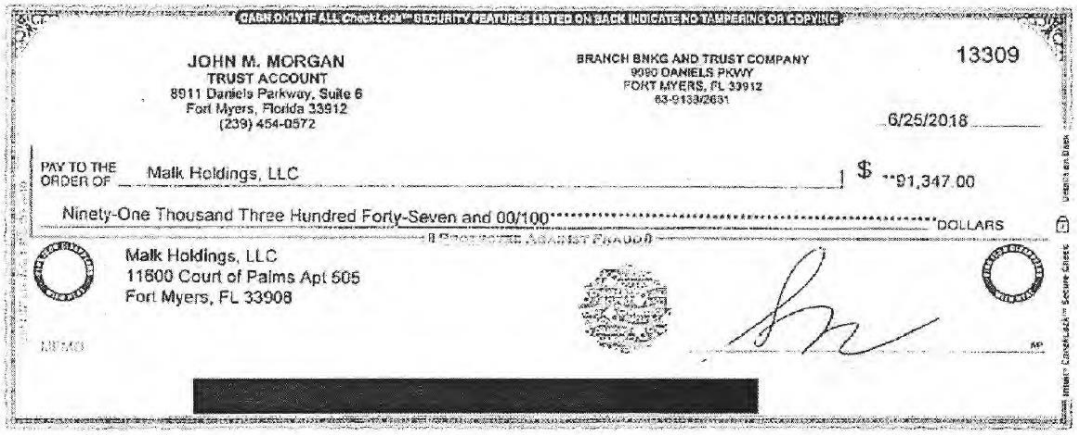
> 11. Pursuant to Florida Statute § 772.11, you (Hannah) have thirty days from the date of this letter to tender payment to Malk Holdings, LLC, in cash for the full amount of $32,703.00.

(R780).

> 11. Pursuant to Florida Statute § 772.11, you (Hannah) have thirty days from the date of this letter to tender payment to Malk Holdings, LLC, in cash for the full amount of $58,644.00.

(R784). So, the deadline for compliance was July 21, 2018. (T280).

Hannah immediately directed Morgan to release the funds since they were in Morgan's trust account, over which Hannah had no control. (T656–61, T586). Morgan's legal assistant issued an attorney-trust check for $91,347 to Malk Holdings on June 25, 2018:



(R792; T539, T575–76).

On July 2, 2016, Hannah's trial attorney then sent the trust check under cover letter via certified mail to Malk Holdings' attorney:

July 2, 2018

VIA CERTIFED MAIL/RRR AND AND E-MAIL (Ed@EdwardLarsonEsq.com)
7017 1450 0001 3902 8217

Edward Larsen, Esq
Larsen Trial Law
2390 North Tamiami Trail, Suite 202
Naples, Florida 34103

RE: *Response* [redacted]

Dear Mr. Larsen

I am in receipt of your letters dated June 21, 2018 to Douglas Hannah demanding $32,703.00 and $58,644.00, respectively, for a total of $91,347.00.

[redacted]

Accordingly, enclosed please find a check payable to Malk Holdings, LLC for the total amount of the distributions at issue.

(R791–92; T657). Hannah believed this satisfied the statutory demands, especially since the certified mail was received by someone in the office of Malkani's lawyer—Larsen:

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
Edward Larsen Esq.
Larsen Trial Law
2390 North Tamiami Trail
Suite 202
Naples Florida 34103

9590 9402 3556 7305 6596 91

2. Article Number (Transfer from service label)
7017 1450 0001 3902 8217

HANNAH-000193

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) Celeste Larsen
C. Date of Delivery 7/5

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Adult Signature
☐ Adult Signature Restricted Delivery
☑ Certified Mail®
☐ Certified Mail Restricted Delivery
☐ Collect on Delivery
☐ Collect on Delivery Restricted Delivery
Mail
Mail Restricted Delivery
☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restricted Delivery
☐ Return Receipt for Merchandise
☐ Signature Confirmation™
☐ Signature Confirmation Restricted Delivery

(R793; T660–61).

In fact, Malkani and his attorney both testified that the trust check was received on July 5th—well before the July 21st deadline. (T280–81, T329–32). Yet, Malkani never deposited it. (T539).

The only reason offered for why it was never deposited was because, according to Malkani's attorney, his letters demanded cash—i.e., "dollar bills[,] United States currency or its equivalent"—not a check. (T322). Hannah did not believe Malkani really intended a duffle bag of $91,347 in cash, which, as Hannah explained without contradiction, a bank would have never authorized. (T659).

When asked whether that was really the intent, Malkani's attorney said they wanted "payment in a form that would already have been cleared, that you didn't have to worry about it being dishonored. So…dollar bills, a certified bank check, or something that doesn't have to be further cleared by the…payor's bank." (T322). Yet, the attorney admitted that, at least in real-estate transactions, attorney-trust checks bear a significant similarity to cleared funds due to the Florida Bar's regulation of those accounts. (T329–31).

More importantly, Malkani's attorney admitted that despite timely receiving this trust check, he made no attempt to contact

Hannah or his attorney's to tell them this form of payment was insufficient. (T332).

Instead, unbeknownst to Hannah, Malkani complained to Morgan's legal assistant on July 11, 2018 that he had never received the check. (T281–82, T577–78, T660; *see* R794). He even admitted to suggesting that perhaps it wasn't received because the address physically on the check was his old office address, not his current office address—even though by all accounts it was physically mailed to and received by his lawyer. (*Compare* T282–83, *with* 791–93, *and* T280–81, T329–32).

Per Malkani's directions, Morgan's legal assistant put a stop payment on the check on July 11th. (T282, T578; R794). She then immediately offered to wire the funds to Malkani to avoid further issues since wires deliver instantaneously and are more like cash. (R794; T283–84, T578–79).

Malkani refused the wire transfer. (T283, T579). According to Malkani, he did not want to give out his banking information because he had been hacked before and was advised by his bank against giving out this kind of information. (T283–84, T299). Instead, Malkani expressly directed Morgan's legal assistant to issue him a

second trust check for $91,347. (T283–84, T578–81). Morgan's legal assistant issued that check on July 12th—so nine days before the July 21st deadline—which Malkani admitted to personally picking up and having in his possession on the same day. (*Id.*).

Malkani, however, did not immediately deposit the check. Even though he lives in Lee County, has at least one office in Lee County, and his bank is in Lee County, Malkani waited 19 days to deposit the $91,347 check on July 31st—i.e., then days after the July 21st deadline—because he "couldn't get to the bank before then…." (T284; R787–88).

Unfortunately, the second trust check bounced—not from insufficient funds—but because Morgan's legal assistant made a clerical error when inputting the check into the bank's positive-pay system. (R789–90; T248–50, T285, T541–43, T581–85).

In late June or early July 2018, Morgan's office and its bank implemented a positive-pay system because his trust account had been hacked. (T542, T581–85). This system required his assistant to input precise details about the check into a program tied to the bank when issuing trust checks so that the bank knew they were coming and not fraudulent. (*Id.*). If not inputted correctly, the bank would

automatically return the check. (*Id.*). According to Morgan's legal assistant, she was inputting multiple checks at once, and she failed to "push[ ] the final okay on each check…." (T584–85, T588).

Although Morgan could not remember exactly when the bank notified them about the check, he said it was sometime in August 2018. (T542–43, T565–66). He also believed that after receiving the notice, he or his legal assistant reached out to Malkani to rectify the situation by again offering to wire the funds. (T547–48, T550, T592).

Malkani doesn't remember that happening. (T290–93). He remembers Hannah making several attempts to pay the $91,347, but he didn't remember when or whether Morgan's office tried to rectify the mistake. (*Id.*).

On the other hand, Malkani admitted that he never contacted Morgan to find out what happened despite his bank specifically referring him to the check's maker, which he knew was Morgan. (R787–88, T285–87). Instead, he simply filed a bar grievance against Morgan—which was rejected because the funds were available—and he filed this lawsuit against Hannah. (T286–90).

Yet, as Hannah confirmed, he thought the money had been timely paid and was not aware of any of the problems after Malkani's attorney received the first check on July 5th. (T661; R793).

Despite having met Malkani's demand, a jury enters a verdict against Hannah for civil theft and conversion.

Malk Holdings' complaint against Hannah sounded in theories of civil theft, conversion, constructive fraud, and unjust enrichment. (R20–25). Besides denying the allegations underpinning these theories, Hannah pleaded several affirmative defenses, including:

- That Malk Holdings waived its claims or was estopped from presenting them because it, through Malkani, had orally pledged the relevant distributions from DC II as collateral for Hannah's loan concerning the Tamiami deal;
- That Malk Holdings waived its claims or was estopped from presenting them because Malkani had instructed Morgan to stop payment on the first timely trust check, then refused to accept a wire transfer, and failed to timely give notice of any payment defects on the second trust check;
- That Malk Holdings failed to comply with the condition's precedent to its claims since multiple checks were timely delivered and received, but Malk Holdings gave no notice of any payment issues until after the demand deadline;
- That Malk Holdings' claims have been paid;

- That Malk Holdings claims are barred by the doctrine of unclean hands because Malkani claimed to not receive the first payment when it was clearly delivered to counsel, failed to deposit the second payment within the demand deadline, and failed to give any notice of defects.

(R86–92). Malk Holdings filed a reply and amended reply to these defenses denying the pledge agreement's existence, compliance with the civil-theft demand, and payment. (R102–05, R171–72).

Unhappy with the results of court-ordered arbitration, Malk Holdings requested trial de novo in this action. (R140–42; R253).

Before trial, Malk Holdings filed two motions in limine. The first sought to exclude evidence that the $91,347 had been paid because ostensibly it would confuse the jury. (R238–39). Indeed, there was no dispute that Malk Holdings received payment in full of $91,347 in March 2020. (R699). This motion was initially denied pretrial, but then granted at trial over Hannah's contrary arguments. (R298; T10–23, T182–206). The second motion in limine sought to exclude Middelthon's video-deposition testimony after Hannah filed his notice of deposition designations. (R491–92, R497–505). Although the court refused to exclude those designations in their entirety, it granted the

motion insofar as Middelthon testified about the pledge agreement. (T452–60, T600–05).

After Malk Holdings rested, Hannah moved for a directed verdict, arguing that Malk Holdings had not proven a prima facie case for relief on its claims; had not proven any actual damages given that the $91,347 had, in fact, been returned to Malk Holdings shortly after this case began; and had failed to prove that it met the condition precedent to this lawsuit since Hannah had twice timely complied with Malk Holdings' demand letters, but never received releases as required by section 772.11. (T511–16). The trial court ultimately denied Hannah's motion and his renewed motion on the same grounds. (T526, T716–18, T723).

The jury ultimately rendered a verdict against Hannah as to the civil-theft and conversion counts, but in Hannah's favor as to the unjust-enrichment count. (R510–15). According to the jury, Malk Holdings' damages were $91,347. (*Id.*).

Hannah timely filed a motion and amended motion to set aside the verdict, for judgment in accordance with its directed-verdict motions, or, alternatively, for a new trial based on the same grounds raised at trial, including the contrary evidentiary rulings related to

payment and Middelthon's testimony. (R554–59; R593–99). Those motions were denied, and a final judgment was rendered consistent with the verdict. (R586–87, R623). The judgment was for $182,694, which is the treble amount of $274,041 less the $91,347 that Hannah paid on March 2020. (R586 & n.1).

SUMMARY OF THE ARGUMENT

Three primary grounds support reversal. First, Hannah was entitled to a release of all claims related to the alleged civil theft because he timely complied—twice—with Malk Holdings civil-theft demands. This Court and others have held that payment is tendered when it is mailed, not when it is received. Here, Hannah first complied when his attorney's trust check was mailed and received by Malk Holdings' attorney more than 16 days before the deadline. He then complied again when Malk Holdings owner demanded a second check and physically picked it up nine days before the deadline.

Insofar as Malk Holdings argues that these payments did not constitute compliance because they were in the form of checks, rather than cash, the Court should reject that argument. The caselaw is clear that objections to a payment's form must be made contemporaneously or they are waived. Not only did Malk Holdings indisputably never object to either checks, but its owner affirmatively rejected a wire transfer—which would have been the same as cash—and instead expressly asked for a second trust check.

Second, Hannah was entitled to a directed verdict because the evidence was legally insufficient to support each element of the civil-

theft and conversion count. For example, an essential element for both claims is an unequivocal demand and refusal to return the property. Hannah never refused to return the funds, and even Malk Holdings' owner admitted Hannah repeatedly tried to do so. Similarly, Malk Holdings failure to prove actual damages is also fatal to these claims. Indeed, sustaining "actual damages" is required to treble a civil-theft claim or else the plaintiff is limited to only $200. Here, the funds were indisputably returned and Malk Holdings presented no evidence of actual damages attributable to their temporary retention. Finally, the evidence may reflect that Hannah made a mistake in taking the funds or maybe acted recklessly or with gross negligence, but there was not clear and convincing evidence of felonious intent to steal the funds as is required to support civil theft.

Third, the trial court made two prejudicial evidentiary rulings. The first was improperly excluding Middelthon's testimony about the pledge agreement based on hearsay when it was being used for the nonhearsay purpose of proving that Hannah lacked a felonious intent when he took custody of Malk Holdings' funds. At a minimum, the testimony was admissible under the prior-consistent-statement exception since Hannah testified at trial and his prior consistent

statement to Middelthon was being used to rebut an improper motive and the alleged subsequent fabrication of the pledge agreement.

The second erroneous evidentiary ruling was excluding evidence of payment and attempted payment from the jury's consideration. This evidence was relevant because it tended to prove Hannah's defenses—particularly his payment defense—and tended to disprove the elements of Malk Holdings claims by showing no refusal to return the funds, no damages, and no felonious intent. In fact, excluding this evidence misled or confused the jury about whether the funds were ever returned to Malk Holdings—especially when Malk Holdings' attorney opened the door by suggesting it had never recovered its money in cross-examining Hannah's attorney.

Accordingly, this Court should reverse and remand for either judgment in Hannah's favor or, at a minimum, a new trial.

ARGUMENT & AUTHORITIES

I. The unrefuted evidence shows that Hannah timely complied twice with the civil-theft demand and was thus entitled to a release from further liability.

The trial court's first error was failing to grant Hannah's motions for directed verdict and judgment notwithstanding on his affirmative defenses of waiver, payment, and failure of conditions precedent. (R89–92; T512–16, T716–18, T556–57). Both motions are reviewed de novo. *See, e.g.*, *Merritt v. OLMHP, LLC*, 112 So. 3d 559, 562 (Fla. 2d DCA 2013). Both must be granted when no view of the evidence would allow a jury to find for Malk Holdings under the principles of substantive law applicable to section 772.11 and these defenses. *Id.*; *Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

The trial court should have granted Hannah's motions for two reasons. First, he complied with Malk Holdings' demands by mailing a trust check well before the deadline, which was received and for which no objection was made over the payment's form. Second, Malk Holdings, through Malkani, was timely given a second trust check at his express request when he refused a wire transfer, which would have been a cash equivalent.

Each reason is sequentially discussed below. Whether considered individually or collectively, each supports reversal and judgment in Hannah's favor on both civil theft and conversion because Hannah's compliance with the civil-theft demands entitled him to a release of liability for both counts, which were premised on the same underlying facts. (R21–24); § 772.11(1), Fla. Stat.

A. Hannah timely tendered payment via a trust check, which was received without objection.

Before filing an action seeking treble damages for civil theft, section 772.11(1) requires the plaintiff to make a written presuit demand. And "[i]f the person to whom a written demand is made complies with such a demand within 30 days after receipt of the demand, that person shall be given a written release from further civil liability…." § 772.11(1), Fla. Stat.

No case has interpreted this provision or explained what form compliance must take to entitle a defendant to a release. Florida courts have characterized this provision as a condition precedent to suit, which is consistent with the "[b]efore filing an action for damages…." language. *Id.*; *see Cummings v. Warren Henry Motors, Inc.*, 648 So. 2d 1230, 1233 (Fla. 4th DCA 1995). Federal courts have

also acknowledged the dearth of interpretative authority, but have suggested its purpose is to "forestall litigation and to prevent needless appeals to the courts when a matter may have been settled by negotiations between the parties." *See, e.g.*, *In re Tadlock*, No. 3:09-BK-712-PMG, 2010 WL 8320065, at *5 (Bankr. M.D. Fla. Sept. 1, 2010) (cites & quotes omitted). In any event, since section 772.11(1) derogates from the common law by allowing treble damages, which did not exist at common law, the entire statute must be strictly construed, limited in its application, and favor the defendant. *See, e.g.*, *Rosen v. Marlin*, 486 So. 2d 623, 625 (Fla. 3d DCA 1986) (recognizing this under section 772.11's precursor, which parrots section 772.11, albeit without presuit-demand language).

Here, the facts are undisputed. Malk Holdings' attorney sent two letters demanding Hannah tender a $91,347 payment within 30-days to Malk Holdings' attorney. (R779–80, R783–84). Because the letters were sent on June 21, 2018, the deadline to comply was July 21, 2018. (T280). On July 2, 2016—so eleven days after the demand—Hannah complied with it by mailing an attorney-trust check for the demanded amount to Malk Holdings' attorney. (R791–92; T658). There is no dispute that the funds were available in his

attorney's trust account at all relevant times. (T542, T532; R776). There is also no dispute that the attorney trust check was received on July 5th. (R793). In fact, Malkani and the attorney who sent the demand both admitted at trial to receiving it. (T280–81, T329–32).

Although no case discusses what constitutes compliance under section 772.11, multiple cases in a variety of similar contexts have ruled that "payment is considered 'tendered' on the date it is mailed, not the date that it was received." *Procacci v. Procacci*, 729 So. 2d 522, 523 (Fla. 4th DCA 1999); *cf. Wiers v. White*, 196 So. 206, 209 (Fla. 1940) ("It has been held in well-reasoned cases that by depositing a note in the mail with the intent that it should be transmitted to the payee or assignee in the usual way, the maker or assignor parts with his domination and control over it, and it and the delivery is in legal contemplation complete."). For example:

- In *Procacci*, the Fourth District found that an obligor could not accelerate a promissory note because the obligee tendered payment by mailing a check the day before obligor's default notice, even though the check was not received until later. 729 So. 2d at 523.
- In *Lee v. Chmielewski*, this Court recently held that an insurer satisfied a settlement demand to tender insured's policy limits by a specific date when insurer's agent attempted to personally deliver a

check on that date to opposing counsel's office after business hours, but no one was present to accept the check. 290 So. 3d 531, 535–36 (Fla. 2d DCA 2019).

- The First District reached a similar holding when it found tenant had cured a default per landlord's demand because the post service had attempted to deliver the check within the 10-day cure period, but landlord's office was closed. *Cullum v. Packo* 947 So. 2d 533, 536 (Fla. 1st DCA 2006).

- And a federal court applied this rule in the context of paying homeowner's association assessments. *Eisenberg v. Shendell & Associates, P.A.*, No. 10-CV-62149-JIC, 2011 WL 1233253, at *4 (S.D. Fla. Mar. 31, 2011).

These cases compel a finding that Hannah timely complied with Malk Holdings' presuit demand by tendering payment, which was not only mailed well before the 30-day deadline, but received. And like the defendants in *Lee* and *Cullum*, Hannah should not be penalized for Malk Holdings', Malkani's, and their attorney's failure to make any attempts to accept the payment by cashing the trust check. *Cf. Lee*, 290 So. 3d at 535–36 ("[Insured] should not be penalized because [plaintiff's] counsel was not available to accept the tender."); *Cullum* 947 So. 2d at 536 ("[N]o reason why [tenant] should be penalized for [landlord's] failure to be available to accept payment").

The only reason offered below for why Malk Holdings, Malkani, and their attorney did not accept Hannah's payment was because it was in the form of an attorney-trust check, instead of cash as demanded in the presuit letters. (R780, R784; T280–81; T329–32).

In responding to Hannah's directed-verdict motions, Malk Holdings argued that merely placing a check in the mail was not enough even if received. (R572–75 & T520–25). Rather, compliance required a legal tender, which ostensibly means delivering cash or its equivalent, such as certified or cleared funds. (*Id.*). An uncertified check, Malk Holdings argued, does not constitute a legal tender of payment because it is at best a conditional payment that is not completed until honored by the bank. (*Id.*).

To support its argument and these principles, Malk Holdings relied on five cases: *Hudgins v. Florida Fed. Sav. & Loan Ass'n*, 399 So. 2d 990, 991 (Fla. 5th DCA 1981); *Rissman on Behalf of Rissman Inv. Co. v. Kilbourne*, 643 So. 2d 1136, 1140 (Fla. 1st DCA 1994); *Enriquillo Exp. & Imp., Inc. v. M.B.R. Indus., Inc.*, 733 So. 2d 1124, 1126 (Fla. 4th DCA 1999); *Nanci S. Landy, P.A. v. Empire Marble & Granite, Inc.*, 762 So. 2d 954, 955 (Fla. 3d DCA 2000); *Twitty v.*

Prudential Ins. Co. of Am., No. 2:05-CV-67-FTM-34SPC, 2007 WL 9718650, at *4–*5 (M.D. Fla. Nov. 14, 2007). (R572–75 & T520–25).

As a preliminary matter, the five cases underpinning Malk Holdings' argument do not represent Florida law generally, much less in the context of complying with presuit civil-theft demands. In fact, none of them really rely on Florida law as their source material for the principle that mailing a check does not constitute a tender of payment. A careful study of their precedential lineage shows that they are either citing secondary sources or are citing *Hudgins*, 399 So. 2d at 990, or *Enriquillo*, 733 So. 2d at 1126, which themselves rely on secondary sources. The limited exception is that *Enriquillo* cites *Cowen v. Indianapolis Life Ins. Co.*, 157 So. 180, 182 (Fla. 1934), which recognized this principle in other jurisdiction, but declined to apply it under *Cowen*'s facts.

What's more, Malk Holdings' cases and arguments contradict the cases above, which held payment is tendered when the check is mailed. *See supra* 31–32. This includes contradicting this Court's recent decision in *Lee*, 290 So. 3d at 556, where a presuit settlement was deemed accepted when a check was tendered, which is akin to complying with a presuit civil-theft demand by tendering a check. *See*

Tadlock, 2010 WL 8320065, at *5 (recognizing demand's statutory purpose to settle civil-theft claims).

To be sure, an effective tender requires "actually attempt[ing] to pay the sums due; mere offers to pay, or declarations that the debtor is willing to pay, are not enough." *Southfork Investments Group, Inc. v. Williams*, 706 So. 2d 75, 79 (Fla. 2d DCA 1998); *see Aetna Cas. & Sur. Co. v. Protective Nat. Ins. Co. of Omaha*, 631 So. 2d 305, 309 (Fla. 3d DCA 1993) (finding no tender where check was not actually delivered or attempted to be delivered). But that's precisely what happened here. To find otherwise puts form over substance, especially in today's times where payment by checks are ubiquitous and especially in this case where the payment was an attorney-trust check delivered to another attorney. *See* R. Regulating Fla. Bar 5-1.1(j)(4).

But even if Malk Holdings' cases and their principle that a check does not constitute a legal tender reflect Florida law, that principle has several exceptions. The exception relevant here is waiver. As one of Malk Holdings' cases explained, " 'Although a creditor may object to and refuse a tendered personal check, if the creditor fails to object, or objects on grounds other than inadequacy of the consideration,

the circumstances may give rise to a waiver as to the form of the tender.' " *Rissman*, 643 So. 2d at, 1140 (cites omitted).

Current versions of the same treatises that Malk Holdings' cases cite also recognize that objections to defective tenders must be made at the time of the tender. *See, e.g.*, 28 *Williston on Contracts* § 72:34 (4th ed. 2021) ("[A] a creditor may waive its right to object to the form of the tender, as where the creditor fails to object when a debtor tenders a personal check, or objects on a ground other than the impropriety of the tender."); 28 *Williston on Contracts* § 72:43 (4th ed. 2021) ("As a general principle, an objection to a faulty tender must be made promptly and specifically or it is waived."); 74 Am. Jur. 2d *Tender* § 9 (2021) ("An objection to a tender must be made at or near the time of tender, and the grounds for objection must be specified. Otherwise, the objection is deemed waived…. An objection to the medium of tender is waived if not promptly made."); 86 C.J.S. *Tender* § 20 (2021) (same).

Courts outside Florida have similarly ruled that failure to object contemporaneous with a check's tender constitutes waiver, especially when the defendant's account contains sufficient funds and the defendant could have cured the deficiency if told. *See, e.g.*, *In re*

Printree, Ltd., 40 B.R. 131, 133 (Bankr. S.D.N.Y. 1984) (citing other New York cases and involving attorney-trust check); *Sieverts v. White*, 273 P.2d 974, 975 (Utah 1954); *Shuster v. Brantley*, 606 N.E.2d 612, 614 (Ill. App. Ct. 1992); *Larsen v. Sjogren*, 67 Wyo. 447, 463, 226 P.2d 177, 182 (1951); *Texaco, Inc. v. Creel*, 292 S.E.2d 130, 134 (N.C. Ct. App. 1982) (involving attorney-trust check), *aff'd*, 310 N.C. 695, 314 S.E.2d 506 (1984)).

The only case in Florida to apply this waiver principle in the context of tendering a check is the analogous case of *Keanie v. Goldy*, 698 So. 2d 1264, 1267 (Fla. 5th DCA 1997). In that case, an insurance company tendered an attorney-trust check for the judgment amount to satisfy the obligation and prevent the accrual of postjudgment interest. *Id.* at 1267. The Fifth District recognized the rule it announced in *Hudgins* that a "a personal check is not the equivalent of cash or a certified check," but held that failure to timely object to a personal check so that cash or certified funds can be obtained results in waiver:

> In the present case, the check was tendered and accepted without condition or reservation and immediately deposited into the account of the accepting attorneys. Had an objection to the insurer's attorneys' trust account

> check been made, then cash or certified funds could have been substituted.

Keanie, 698 So. 2d at 1267 (citing *Rissman*'s quote above for support).

Similarly, there is no dispute that Malk Holdings' attorney received the trust check on July 5th and that neither he nor anyone at Malk Holdings contemporaneously objected to the payment by check, rather than cash. (R793, T329–32, T280–81). Malk Holdings' attorney admitted these two facts:

> Q Okay. You never responded after you received that attorney trust check and said, Ms. Kerlek, where's the cash; the attorney trust check is not good enough, right?
>
> A I did not, no. I received the check from your office. I did -- and I did not tell you that it was not good enough.

(T332). Under its own caselaw, Malk Holdings had an obligation to object to avoid waiver. *Rissman*, 643 So. 2d at 1141; *cf. Arbogast v. Bryan*, 393 So. 2d 606, 608–09 (Fla. 4th DCA 1981) (recognizing waiver can occur by failing to "speak out in vindication of a claim when there is a duty to do so"). Having failed to do so, it waived any

objection to Hannah's mode of compliance with the civil-theft demand. *Keanie*, 698 So. 2d at 1267. Therefore, the Court should find that Hannah was entitled to a release and that the trial court erred in denying his directed-verdict motions.

B. At a minimum, Hannah complied when Malkani refused a wire transfer and expressly asked for a second trust-check.

Even if the first trust check was somehow insufficient compliance, Hannah, through counsel, provided a second trust check at Malkani's insistence, which he personally picked up nine days before the deadline on July 11, 2018. (T282–84, T578–81). Standing alone, this satisfied a second tender as a matter of law since the second check was physically picked up by Malkani, not just mailed. *See supra* pp. 31–32 (*Procacci*, *Wiers, Lee*, *Cullum*, *Eisenburg*).

But even under Malk Holdings' cases and the principle they espouse, this second check also constitutes compliance for two interrelated reasons. First, Malkani's request and receipt of the trust check without any contemporaneous objection would independently constitute waiver of any right to demand cash. *Rissman*, 643 So. 2d at 1141; *Keanie*, 698 So. 2d at 1267; *cf. SourceTrack, LLC v. Ariba, Inc.*, 958 So. 2d 523, 526 (Fla. 2d DCA 2007) (ruling generally that

waiver can occur expressly or implicitly through conduct inconsistent with one's right).

Second, even Malkani's cases recognize that express agreements or consent for payment by check, rather than cash, can constitute a legal tender. *See, e.g.*, *Enriquillo*, 733 So. 2d at 1127–28 (distinguishing cases where "creditor has allowed the debtor to comply with its obligation of payment by merely mailing the check"); *Nanci*, 762 So. 2d at 955 (same); *Twitty*, 2007 WL 9718650, at *4 (same); *see also Neuman v. Ferris*, 432 So. 2d 641, 642 (Fla. 4th DCA 1983) (finding creditor agreed to tender by check when it expressly instructed debtor to mail check to a specific address).

Here, Malkani was offered a wire transfer on July 11 that, by all accounts, would have been the equivalent of cash. (T282–84, T578–81). But he admits to rejecting that offer due to past, unrelated bank-fraud experiences. (T283–84, T299). Instead, he admitted to accepting the offer of a second check drawn on the trust account of Hannah's attorney, which he then personally picked up the day it issued. (*Id.*; R788). Thus, under his own legal authorities, Malkani expressly agreed to compliance by trust check, rather than cash. *Id.*

The fact that this agreement was not in writing—as Malk Holdings' argued below—is irrelevant because "where an agreement is arrived at by words, oral or written, the contract is said to be 'express.'" *Sarasota County Pub. Hosp. Dist. v. Venice HMA, LLC*, 325 So. 3d 334, 345 (Fla. 2d DCA 2021) (cleaned up).

Nor is it relevant that the check ultimately didn't clear when Malkani waited to deposit it 19 days later, well after the civil-theft deadline. (T284–87; R787–90). Malkani accepted the burdens of a potential banking issue by refusing a wire transfer—which would have instantaneously transferred the funds to Malkani without issues—and asking for a check instead. (R794; T536, T556, T578–79); *see Neuman*, 432 So. 2d at 642.

The analysis may be different if the check was dishonored due to insufficient funds. *See, e.g.*, *Scarfo v. Peever*, 405 So. 2d 1064, 1066 (Fla. 5th DCA 1981) (finding when one elects to pay by check, they have the burden to ensure sufficient funds are available when the check is presented within a reasonable time). But that's not what happened. Morgan's trust account always had sufficient funds to honor the check. (T542). Morgan's legal assistant simply made a scrivener's error when inputting the check's information into the

bank's positive-pay program, which—like Malkani's concerns—had been implemented in late June or early July due to bank-fraud concerns. (R789–90; T248–50, T285, T541–43, T581–85).

Thus, Hannah should not be penalized for Malkani refusing to accept payment by wire due to unrelated bank-fraud concerns and then Malkani waiting 19 days to deposit the $91,347 check because he was just too busy. *Cf. Lee*, 290 So. 3d at 535–36 (holding that even if it was reasonable for opposing counsel to close his office at 5:00 on the due date, the insured "should not be penalized because [opposing] counsel was not available to accept the tender," which was by check); *Cullum*, 947 So. 2d at 536 ("[T]he unrebutted evidence shows that [tenant] delivered the check to [landlord] on April 16—well within the ten-day cure period. We see no reason why [tenant] should be penalized for [landlord's] failure to be available to accept payment."). This is especially true since Hannah had no control over Morgan's trust account and had no idea of any issues with the first check, much less Malkani's refusal of a wire and issues with the second check. (T657–61, T587).

Accordingly, this Court should find that, at a minimum, Hannah's tender and Malkani's acceptance of the second trust check

nine days before the civil-theft deadline constituted compliance and entitled Hannah to a release from further liability. As a result, the Court should reverse the denials of his directed-verdict motions and remand for judgment in Hannah's favor.

II. The evidence was legally insufficient to support the elements of civil theft or conversion.

Both during and after trial, Hannah argued for a directed verdict because there was not a preponderance of evidence—much less the higher civil-theft burden of clear and convincing evidence—to support each element of Malk Holdings' civil-theft and conversion counts. (T511–16, T716–18; R555–57); *Merritt*, 112 So. 3d at 562. Again, the legal sufficiency of the evidence is a question of law, reviewed de novo. *Id.*

Under this standard, the Court must reverse for three independent reasons. First, neither count was established because the undisputed evidence showed that Hannah never refused to return Malk Holdings $91,347, but rather repeatedly endeavored to return those funds. Second, neither count could be established because there was no evidence of damages or, at best, the damages

were nominal. Finally, civil theft was not established because there was no proof of felonious intent.

A. Because Hannah never refused Malk Holdings' demand for return of its distributions, he could not be found liable for civil theft or conversion.

Civil theft is merely the statutory form of conversion. *Gokalp v. Unsal*, 284 So. 3d 1097, 1098–99 (Fla. 4th DCA 2019). So, to establish civil theft, the plaintiff must prove a conversion plus criminal intent. *Id.*; *Bailey v. Covington*, 317 So. 3d 1223, 1227 (Fla. 3d DCA 2021). And if the facts fail to prove "conversion, there can be no cause of action for civil theft." *Heldenmuth v. Groll*, 128 So. 3d 895, 896 (Fla. 4th DCA 2013).

Conversion is "an act of dominion wrongfully asserted over, and inconsistent with, another's possessory rights in personal property." *Joseph v. Chanin*, 940 So. 2d 483, 486 (Fla. 4th DCA 2006) (cites & quotes omitted). Importantly, however, "[t]he essence of an action for conversion is not the acquisition of property by the wrongdoer, but rather the refusal to surrender the possession of the subject personalty after demand for possession by one entitled thereto." *Murrell v. Trio Towing Serv., Inc.*, 294 So. 2d 331, 332 (Fla. 3d DCA 1974).

So, an unequivocal demand and refusal to return property are "essential elements" to any conversion claim. *See, e.g.*, *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So. 2d 490, 500 (Fla. 3d DCA 1994). Indeed, a conversion claim does not arise until there has been both a demand for return and refusal. *Ernie Passeos, Inc. v. O'Halloran*, 855 So. 2d 106, 108 (Fla. 2d DCA 2003) ("[O]rdinarily a cause of action for conversion will arise only after the person entitled to possession demands possession...."); *Beach Cmty. Bank v. Disposal Servs., LLC*, 199 So. 3d 1132, 1135 (Fla. 1st DCA 2016) ("By refusing to comply with Beach's lawful demand, Disposal took an overt action inconsistent with Beach's possessory rights, thereby completing the necessary elements for a claim of conversion.").

As a preliminary matter, there was no clear and convincing evidence that Malkani or his company made an unequivocal demand for the distributions on anyone until the June 2018 civil-theft demand. (T262, T269–73, T276–77); *cf. Fort Caroline Orchids, Inc. v. Guest*, 378 So. 2d 305, 307 (Fla. 1st DCA 1979) ("The demand should have been stated in absolute and unequivocal terms.").

But even if there was a technical glitch in complying with that June demand, there was no proof that Hannah ever refused to return

the funds, much less clear and convincing proof of refusal. For example, this is not a case where Malk Holdings' demands went ignored or was rejected. *Compare Senfeld v. Bank of Nova Scotia Tr. Co. (Cayman) Ltd.*, 450 So. 2d 1157, 1161 (Fla. 3d DCA 1984).

In fact, even before the demand, Hannah made at least two attempts to return the funds. (R767, R773–74; T652–53, T534–35). And as discussed in section I, he made at least two more attempts after the demand in July 2018. *See supra* pp. 29–43. Insofar as those July attempts were defective—through no fault of Hannah, mind—they certainly do not constitute a refusal. *Refusal*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The denial or rejection of something offered or demanded"). He didn't even know the attempts had failed. (T660–61). Even after those glitches, there were multiple additional attempts to return the funds, though the court would not allow evidence of attempted payments past August 2018. (T539, T543–50, T592); *see infra* 61–66. Malkani himself admitted that Hannah made multiple attempts to return the funds. (T292).

Therefore, the evidence is legally insufficient to prove an essential element of conversion, namely, refusal to return the funds. And since conversion is an essential element of civil theft, that claim

must fail too irrespective of the technical defects in complying with the civil-theft demand. Accordingly, this Court should reverse the denial of Hannah's directed-verdict motions.

B. Malk Holdings never proved any actual damages, especially given that the funds were returned.

The purpose of damages in tort actions is to "restore the injured party to the position it would have been in had the wrong not been committed." *DFG Group, LLC v. Heritage Manor of Mem'l Park, Inc.*, 237 So. 3d 419, 421–22 (Fla. 4th DCA 2018) (cites & quotes omitted). Absent proof of damages, there can be no remedy or recovery for an alleged wrongful act. *Broxmeyer v. Elie*, 647 So. 2d 893, 895 (Fla. 4th DCA 1994).

For example, a party cannot recover for an alleged wrong if the plaintiff incurred no expense, obligation, or liability or has been fully reimbursed for its injuries. *See, e.g.*, *Coop. Leasing, Inc. v. Johnson*, 872 So. 2d 956, 958 (Fla. 2d DCA 2004) (finding plaintiff could not recover medical expenses beyond those paid by Medicare because she never had any liability for those expenses); *Delant Const. Co. v. Doral Enter. Jt. Vent.*, 13 So. 3d 1097, 1098 (Fla. 3d DCA 2009) ("[T]he law does not permit a windfall by virtue of receiving 'a recovery…for

damages which…had subsequently been reimbursed.' ") (quoting *Sharff, Wittmer & Kurtz, P.A. v. Messana*, 581 So. 2d 906, 907 (Fla. 3d DCA 1991)).

Failure to prove damages is equally fatal to civil theft and conversion. *See, e.g.*, *Kent v. Sullivan*, 793 So. 2d 1027, 1028 (Fla. 5th DCA 2001). In fact, to treble damages, section 722.11's plain language requires proof of "actual damages sustained…" *See also Spiwak v. Gen. Real Estate Ltd.*, 546 So. 2d 81, 82 (Fla. 3d DCA 1989) (agreeing plaintiff generally entitled to treble damages, but reversing for failure to prove those damages with sufficient evidence). Otherwise, the statute entitles the plaintiff to only "minimum damages in the amount of $200…." § 722.11, Fla. Similarly, claims for conversion fail without evidence of damages, such as when the evidence reflects that plaintiff ultimately was paid for a bank's mishandling of a check and no other damages were presented attributable to that misconduct. *Regions Bank v. Maroone Chevrolet, L.L.C.*, 118 So. 3d 251, 257 (Fla. 3d DCA 2013).

Here, Malk Holdings failed to prove any "actual damages sustained" by clear and convincing evidence. *See Haddad v. Cura*, 674 So. 2d 168, 169 (Fla. 3d DCA 1996) ("[P]roof of both liability and

damages by clear and convincing evidence as a prerequisite for treble damages."). This is not a case where Hannah disputed ownership and so never returned the funds. There was also no dispute that Hannah made multiple attempts to return the funds, which were returned by at least March 2020. (T292, T495). Malk Holdings presented no evidence of other actual damages attributable to their temporary retention, such as causing missed investment opportunities or causing expenses, obligations, or other liabilities that Malk Holdings would not have incurred but for Hannah's action. *Cf. Regions Bank*, 118 So. 3d at 257; *Coop. Leasing*, 872 So. 2d at 958.

So, while the court improperly excluded this fact of payment from the jury—which is a separate issue discussed below—directed verdict should have been granted against Malk Holdings for lack of any "actual damages sustained" by Hannah's action. At a minimum, the court should have denied treble damages and limited Malk Holdings to only nominal damages of $200. § 772.11(1), Fla. Stat. Accordingly, this Court should reverse and remand for either judgment in Hannah's favor or a judgment limited to only $200.

C. Even if Malk Holdings proved conversion, civil theft must fail for lack of clear-and-convincing evidence of felonious intent.

The critical difference between conversion and civil theft is that the latter requires clear-and-convincing evidence of felonious intent. *Westinghouse*, 590 So. 2d at 988. Standing alone, proof that property was converted is not enough because taking possession under a mistaken, good-faith belief will support conversion, but not civil theft. *Compare Seymour v. Adams*, 638 So. 2d 1044, 1047 (Fla. 5th DCA 1994) (taking property on mistaken belief about right supports conversion), *with Transcapital Bank v. Shadowbrook at Vero, LLC*, 226 So. 3d 856, 864 (Fla. 4th DCA 2017) (reversing for directed verdict because evidence showed mistake, not intent to steal).

Felonious intent is a "high threshold to meet." *Irwin v. Miami-Dade Cty. Pub. Sch.*, 06-23029CIV, 2009 WL 497648, at *8 (S.D. Fla. Feb. 25, 2009), *aff'd*, 398 Fed. App'x 503 (11th Cir. 2010). It's more than merely acting reckless or with gross negligence. *City of Cars, Inc. v. Simms*, 526 So. 2d 119, 120 (Fla. 5th DCA 1988).

Rather, it's the specific, conscious intent to steal, i.e., deprive someone of their property. *See, e.g.*, *Daniels v. State*, 587 So. 2d 460, 462 (Fla. 1991); *Canada v. State*, 139 So. 2d 753, 755 (Fla. 2d DCA

1962). This intent must exist at or before the taking. *Adams v. State*, 443 So. 2d 1003, 1006 (Fla. 2d DCA 1983); *Leggett v. State*, 237 So. 3d 1144, 1146 (Fla. 3d DCA 2018). And while it may be proven through circumstantial evidence, that evidence must strongly suggest guilt and be "inconsistent with any reasonable hypothesis of innocence." *Green v. State*, 90 So. 3d 835, 837 (Fla. 2d DCA 2012); *Leggett v. State*, 237 So. 3d 1144, 1146 (Fla. 3d DCA 2018); *see Westinghouse*, 590 So. 2d at 988 (reversing for directed verdict in defendant's favor where evidence ambiguous as to felonious intent).

In fact, multiple cases have held that "where a 'taking was in the open, with no subsequent attempt to conceal it, and there was no concealment nor denial of such taking, but on the other hand, an express avowal thereof,' a strong presumption of no felonious intent is raised." *Adams*, 443 So. 2d at 1007 (quoting *Maddox v. State*, 38 So. 2d 58, 59 (Fla. 1948)); *Johnson v. State*, 228 So. 3d 1164, 1167 (Fla. 1st DCA 2017).

This is precisely what the evidence showed here. *See supra* pp. 7–10. As in *Adams*, *Maddox*, and *Johnson,* Hannah unequivocally avowed that he had no intent to steal or use Malk Holdings' funds. (T479, T483, T661, T646). Rather, Hannah believed he had authority

to take custody of them because he believed that Malk Holdings and Malkani had pledged them as collateral for another deal between Hannah and Malkani. (T640–46, T478–86, T552). Property taken pursuant to agreements—even oral ones—does not support civil theft. *See, e.g.*, *Kay v. Katzen*, 568 So. 2d 960, 961 (Fla. 3d DCA 1990); *Segal v. State*, 98 So. 3d 739, 744–45 (Fla. 4th DCA 2012).

Although Malkani repudiated the agreement at trial, his testimony, standing alone, is not enough to prove that Hannah acted with felonious intent. *Cf. State v. Stenza*, 453 So. 2d 169, 171 (Fla. 2d DCA 1984) (finding sworn averment that no agreement existed and that defendant lacked authority does not, standing alone, support inference of a felonious intent to steal). After all, it does not refute Hannah's unequivocal testimony that he did not intend to steal Malk Holdings' money or the inference from the evidence below that, at a minimum, Hannah acted under a mistaken belief. *Cf. id.* at 172 (reaching the same conclusion).

In fact, Malkani's own admissions rebut his trial repudiation, at least circumstantially. For example, Malkani admitted that he and Hannah historically invested together based on oral agreements. (T254–57). He admitted that they did have another substantial

investment deal at the time. (T164–65; R741–46). And despite claiming to have not learned about this pledge agreement until Hannah's February 2018 email—which ostensibly shocked and angered him—Malkani admitted to never writing Hannah back to disavow the agreement or ask Hannah what he was talking about. (R767; T235–41, T276–77).

But even if Hannah was mistaken about the pledge agreement's existence, the evidence at the time of the taking does not show clear and convincing felonious intent. In fact, like *Adams*, *Maddox*, and *Johnson*, Hannah took custody of the funds in broad daylight and never attempted to conceal it. For example, he expressly told his boss at DC II (Middelthon) what he was doing and why when the distributions issued. (T649–50). He had DC II issue the distribution checks as "to the order of Douglas Hannah fbo Malk Holdings, LLC," which was also reviewed and authorized by Middelthon. (R753–54; T477–83, T647–48; 707–10). And he told the bookkeeper knowing it would be recorded in the corporate books, reported to the IRS, and reflected on the K-1 sent to Malk Holdings. (R777–78, R769–71; T637–40). These actions not only show a lack of concealment, but also directly show that Hannah's mental state was not to specifically

steal Malk Holdings' funds, but rather to take custody of them for its benefit.

Even after taking the funds, Hannah never used them for his own purposes or commingled them with his personal funds. (R755–66; T478–83, T648–49, T664–65, T692). Rather, he deposited them in a savings account opened for the sole purpose of serving as an escrow account, which Hannah believed was communicated to and authorized by Malkani. (*Id.*). The funds remained there untouched until he moved them to his attorney's trust account for the purpose of disbursing them to Malk Holdings to resolve their differences. (*Id.*).

Finally, the fact that Hannah made repeated attempts to return the funds—both before and after Malk Holdings' demands—further indicate a lack of felonious intent to steal. (R767, R773–74, T652–53, T534–35, T570; *see supra* pp. 14–21; *Green*, 90 So. 3d at 837 ("[W]hile the misrepresentations could provide circumstantial evidence of Green's intent to steal, i.e., to deprive Argent of its money, that inference was contradicted by the fact that Green made every payment on the loan when it came due, and in fact repaid the mortgage in full."); *Isenhour v. State*, 952 So. 2d 1216, 1222 (Fla. 5th DCA 2007) (finding no felonious intent proven because, among other

facts, "Isenhour contacted Pulte to arrange paying back the money and Pulte refused to discuss it with him").

At worse, the evidence shows that Hannah may have been mistaken. Or he may have been reckless. Or maybe he was grossly negligent for trusting his friend. But there is no clear and convincing evidence that he acted with felonious intent to temporarily or permanently deprive Malk Holdings of its funds. Therefore, not granting directed verdict in his favor was reversible error. *Cf. Westinghouse*, 590 So. 2d at 988 (reaching similar conclusion); *Merritt*, 112 So. 3d at 562 (affirming directed verdict for lack of felonious intent).

III. The trial court also improperly excluded several key pieces of evidence, which prejudiced Hannah.

At a minimum, this Court must reverse the verdict and judgment because the trial court improperly excluded key portions of Middelthon's testimony and evidence about Hannah's payment and payment attempts. Although the admission of evidence is generally reviewed for an abuse of discretion, that discretion is curtailed by the evidence code and relevant caselaw. *Pantoja v. State*, 59 So. 3d 1092, 1095 (Fla. 2011). Thus, whether the code was properly interpreted

and applied—such as whether hearsay applies—is reviewed de novo. *See, e.g.*, *Alvarado-Contreras v. State*, 305 So. 3d 842, 844 (Fla. 2d DCA 2020); *North v. State*, 221 So. 3d 1235, 1236–37 (Fla. 2d DCA 2017).

A. The hearsay rule did not preclude Middelthon's testimony about the pledge agreement.

At trial, Hannah sought to play portions of his boss's video deposition about the pledge agreement. (R491–92; T452–60, T600–05). In these portions, Middelthon testified that Hannah had explained why he was having Malk Holdings' distributions issued as "Douglas Hannah fbo Malk Holdings," that it concerned a separate pledge agreement related to Hannah and Malkani's Tamiami deal, and that the explanation came contemporaneous with the distributions' issuance. (*Id.*). The trial court ruled that these portions of Middelthon's testimony were hearsay and excluded them. (*Id.*; *see also* R557–58, R596–98, R623).

This evidentiary ruling was erroneous for two reasons. First, Middelthon's testimony was being used for a nonhearsay purpose: to collaborate Hannah's testimony that he lacked felonious intent when he took Malk Holdings' funds. Hearsay is an out-of-court statement

offered to prove the truth of the matter asserted. § 90.801(1)(c), Fla. Stat. (2019). But a hearsay objection must fail when the statement is being used for a nonhearsay purpose, such as to prove something other than the truth of the matter asserted—like a person's motive or knowledge. *See, e.g.*, *North*, 221 So. 3d at 1237; *Duncan v. State*, 616 So. 2d 140, 141–42 (Fla. 1st DCA 1993).

Several analogous cases illustrate the use of statements for the nonhearsay purpose of disproving a defendant's specific intent to steal. For example, in *Buchanan v. State*, 743 So. 2d 59, 60 (Fla. 2d DCA 1999), this Court found it error to exclude a witness's testimony that before the burglary, the witness had heard a third person tell the defendant that she owned the personal property in the home and asked defendant to retrieve it for her. The Court held that the statement was not being offered to prove that the third person actually owned the property, but that the defendant lacked a felonious intent to steal because he believed the owner had authorized him to take custody of the property. *Id.* at 61.

In *Alfaro v. State*, 837 So. 2d 429, 431 (Fla. 4th DCA 2002), defendant charged with grand theft auto called his neighbor, who testified that he saw defendant in the stolen car's passenger seat the

day before and was told by the driver that the driver owned the van. The court ruled the testimony admissible "because it was not offered for the truth of the matter asserted but to show that, having heard the statement, [defendant] had a good faith belief that [driver] owned the van and that he had lawful permission to drive it.… [which] disprove[s] the element of intent required to prove theft." *Id.* at 432.

And the Fifth District reached a similar conclusion in *Sibley v. State*, 636 So. 2d 893, 893 (Fla. 5th DCA 1994), when defendant sought to testify that the person giving him the property had indicated that he owned it. The court held the statement was not hearsay because it went to the defendant's knowledge, which was a critical element to the charge of dealing in stolen property. *Id.* at 894.

Here, Middelthon's testimony about Hannah's explanation for why he wanted the funds distributed to him for the benefit of Malk Holdings was not being offered for the truth of its assertion—i.e., that there really was a pledge agreement—but to show that Hannah believed one existed when he took custody of the funds, that he believed he had authority to do so, and that he lacked the specific intent to steal them. This testimony also showed that the pledge agreement was not simply a "cover story" Hannah made up after the

fact in February 2018—as Malk Holdings argued to the jury (T812–14, T819–20)—but rather was a belief Hannah held and told others about when the checks issued in August 2017.

Perhaps that belief was mistaken. Perhaps it was reckless or grossly negligent. But this evidence shows a lack of felonious intent necessary to support civil theft. *See supra* 50–55.

Second, Middelthon's testimony was admissible under the prior-consistent-statement exception. Although a prior consistent statement is generally not admissible to bolster a witness's testimony, it is admissible if the statement's declarant testifies at trial subject to cross-examination, if the prior statement is consistent with the declarant's trial testimony, and if the statement "is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication." § 90.801(2)(b), Fla. Stat. (2019); *Tundidor v. State*, 221 So. 3d 587, 599 (Fla. 2017).

Here, while Hannah's prior consistent statements—i.e., that the checks were being issued to Hannah for the benefit of Malk Holdings per a pledge agreement—were introduced through Middelthon's testimony, Hannah was the declarant of those statements and did, in fact, testify at trial subject to cross-examination. *See, e.g.*, *Harris*

v. State, 843 So. 2d 856, 862 (Fla. 2003) (applying exception even when witness's prior statement was introduced through a friend's testimony); *Fleitas v. State*, 3 So. 3d 351, 356–57 (Fla. 3d DCA 2008) (same). And throughout these proceedings, Malk Holdings expressly accused Hannah of intending to steal its funds and having made up the pledge agreement in his February 2018 email to Malkani after purportedly getting caught. (T479–87, T671–74, T683–84, T812–14, T819–20). Thus, Middelthon's testimony about Hannah's statements when the checks were issued refutes both Malk Holdings' charge of an improper motive and subsequent fabrication.

Therefore, the court erred in excluding these parts of Middelthon's testimony based on hearsay, which was prejudicial to Hannah. Indeed, the statements went directly to a key element of the claims: Hannah's intent. *Cf. Buchanan*, 743 So. 2d at 61. They also rebutted Malk Holdings' theory that Hannah made up the whole pledge agreement after taking the funds. The Court should thus reverse and remand for a new trial.

B. Evidence of payment and attempted payment was directly relevant to the claims and defenses.

Finally, the court erred in excluding evidence of payment and attempted payments after August 2018. Although the stipulated fact of payment supports directed verdict, *see supra* pp. 46–50, the erroneous exclusion of this evidence from the jury also supports, at a minimum, a motion for new trial. In fact, Malk Holdings' motion to exclude this evidence based on relevance was initially denied, but then granted the morning of trial. (R238–39, R298, T10–23, T182–206, T543–50, T494–97; *see also* R558–59, R577–78, R623).

The threshold requirement for relevance is whether the evidence tends to prove or disprove a fact material to a claim or defense. § 90.401, Fla. Stat. (2019); *Duncan*, 616 So. 2d at 142 (ruling evidence tending to support a defense theory is relevant).

Here, the evidence was certainly relevant to proving Hannah's defenses, including his compliance with Malk Holdings' demands (i.e., defenses of waiver, estoppel, and failure of conditions precedent) and his payment defense. (R90–91). It is even probative of Hannah's unclean-hands defense—on which directed verdict was entered due to insufficient evidence—because it shows that Hannah repeatedly

tried to correct the scrivener's error that caused the second check to fail by attempting to pay the funds, but Malk Holdings did not respond to those efforts. (R91; T185–86, T543–50, T726, T726–30). And as illustrated above, this evidence tends to disprove Malk Holdings' civil-theft and conversion claims by showing that Hannah never refused to return the funds, never had felonious intent to steal them, and never caused Malk Holdings any actual damages attributable to their temporary retention. *See supra* pp. 43–55.

Malk Holdings argued, however, that the evidence of payment and attempted payment after August 2018 would prejudice it and confuse the jury. (T10–11, T195–204, R577–78). Yet, whether evidence is prejudicial is not the issue because most evidence is prejudicial to one party when it is admitted. *Amoros v. State*, 531 So. 2d 1256, 1260 (Fla. 1988). The issue is whether "unfair prejudice" substantially outweighs the evidence's probative value. *Id.*; § 90.403, Fla. Stat. (2019). "Unfair prejudice" is aimed at excluding evidence that "inflames the jury or appeals improperly to the jury's emotions." *McDuffie v. State*, 970 So. 2d 312, 327 (Fla. 2007) (cites & quotes omitted).

The fact that Hannah repeatedly attempted to return the funds and ultimately did return them does not invoke any emotional response whatsoever. It simply disproves the civil-theft and conversion claims (i.e., lack of refusal to return the funds, felonious intent, and damages) and proves Hannah's defenses of payment and failure of conditions precedent. *See supra* pp. 43–55.

Nor would this evidence confuse the jury, particularly since both civil theft and conversion require proof of actual damages. *See, supra* pp. 47–50. In fact, *not* admitting this evidence clearly confused the jury because it apparently believed that Malk Holdings had never been paid given that its verdict was limited to the $91,347 that Hannah initially retained, rather than any actual damages attributable to the fund's temporary retention. (R511–13). Had the evidence of payment and attempted payments been presented, then the jury would have had to award zero damages because Malk Holdings presented no "actual damages" attributable to the funds' temporary retention. *See supra* pp. 47–50; § 772.11, Fla. Stat.; *cf. Regions Bank*, 118 So. 3d at 257 (reversing most conversion claims for lack of damages since funds had been returned and no evidence existed of other attributable damages).

At a minimum, the court erred in continuing to exclude this evidence when Malk Holdings counsel opened the door despite the court's admonishments by implying that Malk Holdings had never been paid during the following cross-examination of Hannah's attorney (Morgan):

> Q. Now this check that's dated [6/25/18]…you did not deliver this check to Malk Holdings, did you?
>
> A. No, but it was issued to Malk Holdings.
>
> Q. The check was sent to somebody else?
>
> A. Correct.
>
> Q. And the money that represents—that is—or at least the amount that's reflected in this check, that amount remained in your trust account throughout the month of June 2018?
>
> A. Yes.
>
> Q. Remained in your trust account throughout the month of July 2018?
>
> A. Yes.
>
> Q. Remained in your trust account throughout the month of July (sic) 2018?
>
> A. Yes.
>
> Q. *Malk Holdings never got that money, right*?
>
> I'm talking about in the month of—we're talking about July 2018, Malk Holdings didn't get that money, despite the check you gave them, right?

A. Correct….

[Hannah's counsel objects that he's opened the door, which is overruled.]

(T563–65 (emphasis supplied); *see also* T203–04 (admonishment)).

Since Hannah was prohibited from presenting evidence of payment or attempted payment after August 2018, the jury was no doubt already under the misapprehension that Hannah had never returned the funds. But the emphasized question expressed exactly that and undoubtedly solidified in the jury's mind that Malk Holdings had never been paid, which not only falsely suggests that it had been damaged, but undercuts the credibility of Hannah's evidence showing that he never had a felonious intent to steal and had repeatedly tried to return the funds. And while Malk Holdings' counsel scrambled to narrow his question to just July 2018, the damage had already been done by misleading or confusing the jury.

Accordingly, this Court should find that it was error to exclude Hannah's evidence of payment and attempted payment, which go to the heart of this case's claims and defenses and which undoubtedly confused or misled the jury into returning a verdict in the exact amount that Hannah had already returned. At a minimum, Malk

Holdings forced this error by suggesting that "Malk Holdings never got that money…." (T565). Therefore, this Court should reverse and remand for a new trial.

CONCLUSION

This Court should find that the trial court erred in failing to grant Hannah's directed-verdict motions as to compliance with Malk Holdings' civil-theft demands and the insufficiency of the evidence to support its civil-theft and conversion counts. Either ground supports reversing and remanding for judgment in Hannah's favor or, at a minimum, a new trial.

Alternatively, the Court should find that the trial court improperly excluded key parts of Middelthon's testimony and the evidence of payment and its attempts. Either evidentiary ruling supports reversing and remanding for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 25, 2022, this initial brief was electronically transmitted to the Clerk of Court via the Florida Courts E-Filing Portal ("FCEP") for filing and transmittal of electronic mailing to the following FCEP registrant(s) or pro se parties in the manner specified:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this initial brief was submitted in Bookman Old Style 14-point font as required by Florida Rule of Appellate Procedure 9.045(b) and satisfies Rule 9.210(a)'s word limitation by being less than 13,000 words.

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