SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 6D24-____

L.T. NO. 23-CA-001742-O

KNIGHT HEALTH HOLDINGS LLC, *a foreign limited liability company*,

Petitioner,

v.

UPSHOT NORTH MILLS, LLC, *a Florida limited liability company*,

Respondent.

Appeal from the Circuit Court for Orange County.

John E. Jordan, Judge.

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF JURISDICTION

This petition seeks review of a non-final discovery order compelling the production of documents reflecting the Petitioner's financial condition. This Court has jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(2)(A) & 9.100(a).

STATEMENT OF THE CASE AND FACTS

Knight Health Holdings, LLC ("Knight Health" or the "Guarantor") petitions this Court for a writ of certiorari to review the trial court's discovery order, R. at 381–83[1] (the "Discovery Order"), which in relevant part broadly compels the production of financial documents irrelevant to the claims raised by Respondent Upshot North Mills, LLC ("Upshot" or "Landlord").

This is a breach-of-contract case predicated exclusively on an alleged anticipatory repudiation of a lease agreement. The lease obligates the landlord, Upshot, to construct the core and shell of a hospital on property in Orlando, and then lease the property back to the tenant, Defendant Kindred Orlando Hospital LLC ("Tenant" or "Kindred"), for a term of twenty years. *See id.* at 104–21 (the "First Amended Complaint" or "FAC"). Knight Health is neither the landlord nor the tenant; it is guarantor of the Tenant's obligations.

The Tenant has expressed to the Landlord, Upshot, in writing, that it intends to fulfill its obligations under the lease. Yet Upshot has sued *both* the Tenant and the Petitioner/Guarantor, claiming to be concerned that the Tenant will breach the Lease *in the future*, and claiming to believe that the Guarantor will breach its guaranty

[1] Record citations are to Petitioner Knight Health Holdings LLC's Appendix filed concurrently with this Petition.

obligation *in the future* (an obligation which, naturally, is not triggered unless the Tenant actually breaches).

The trial court has allowed this claim to proceed and, in the Discovery Order under review, ordered disclosure of vast private and commercially sensitive financial information "reflecting or relating to" the Guarantor's financial *capacity*, from January 2022 to February 27, 2024, to fulfill its obligations under the Guaranty. Upshot, the Landlord, had demanded adequate assurances from the Tenant (Kindred) not the Guarantor (Knight Health). The challenged discovery, therefore, has no relevance to the Landlord's claims. By imposing intrusive and legally irrelevant discovery on a party, the Discovery Order is a textbook case for certiorari review.

A. The Lease and Guaranty

In July 2022, Kindred contracted with Upshot to build, and then lease, a long-term acute care and rehabilitation hospital. *See* R. at 104; *see also id.* at 122–204 (the "Lease"). Per the Lease, Upshot "agreed to build [Kindred] the core and shell of a 6-story medical facility, at a cost of approximately $30 million, and to deliver [it] in 'shell condition[.]'" *Id.* at 107. After delivery of the building, Kindred agreed to complete the build-out of the hospital, and 270 days after Upshot turned the hospital over to Kindred, Kindred would lease the building for a twenty-year term, "with annual rent starting at more than $4 million and increasing to over $7 million,

with two (2) options to renew and extend the Lease for an additional ten (10) years." *Id.*

Petitioner Knight Health was the Guarantor of Kindred's performance under the Lease. *See id.* at 108; *id.* at 205–08 (the "Guaranty"). Under the terms of the Guaranty, Upshot agreed to "provide [the Guarantor] with notice of a default by [Kindred] under the Lease and permit [the Guarantor] to cure said default within the same time periods offered to [Kindred] under the Lease." *Id.* at 206.

B. Upshot Demands "Adequate Assurances" of Tenant's Ability to Perform Under the Lease

In October of 2023, Kindred, the Tenant, cancelled a groundbreaking ceremony it had planned for October 2023, and informed Upshot, the Landlord, that Kindred was experiencing financial difficulties. *Id.* at 109. According to the Landlord, the Tenant repeated statements regarding its financial difficulties for several months thereafter, and "senior representatives" of the Tenant allegedly raised concerns as to the costs and capitalization of the construction project. *See id.* at 109–10.

Significantly, the Landlord does not allege that any of these statements were made by the Petitioner, the Guarantor. The only allegation made about the Guarantor is that its credit rating with the risk assessment firm "Moody's" was downgraded from B2 to B3 on or about December 19, 2022; and from B3 to Caa2 on or about December 14, 2023." *Id.* at 111.

"Faced" with "uncertainty" and "the urgent need for clarity," the Landlord sent the Tenant a letter dated January 24, 2024, demanding that it provide "written adequate assurances of performance under the Lease" within 30 days. *Id.* at 114. Specifically, the Landlord demanded an "unequivocal statement" that: i) the Tenant "was prepared to timely perform all of its obligations under the Lease"; and ii) the Tenant "had the present financial means necessary to perform" under the Lease, accompanied by "reasonable proof of [the Tenant]'s financial capacity to perform its obligations under the Lease"—proof that was not required under the Lease's terms. *Id*. The Landlord pointed to no provision in the Lease requiring such proof. And none exists.

The Landlord declared that "[f]ailure to provide the written and unequivocal assurances demanded above within 30 days of receipt of this letter shall be deemed a repudiation of the Lease . . . entitling [the Landlord] to immediately declare a total breach of the Lease." *Id.* at 115.

C. Tenant Assures Upshot of Its Intention and Ability to Perform Its Obligations Under the Lease

Notwithstanding the fact that the Landlord had no right to demand "adequate assurances," the Tenant, to keep the deal on track, responded to the Landlord's demand in writing, within the 30-day period requested, and unequivocally stated that it would and could comply with its obligations under the agreement. *See id.* at 239–40 (responding to the Landlord's demand for adequate assurance by stating that "at

no point has" the Tenant "ever intentionally represented that it would not, or could not, abide by the terms of the Lease—terms which [the Tenant] intends to comply with" and that the Tenant "does have the financial means to comply with the Lease" (emphasis in original)). The Tenant further noted, however, that the Lease includes no obligation for it to provide "proof of liquidity" or other sensitive financial information; indeed, the Lease imposes no financial reporting obligations on the Tenant at all, other than a requirement to annually disclose its and its Guarantor's audited financial statements. *Id.* at 149. Therefore, the Tenant stated the following:

> [G]iven that the Lease itself does not contain any specific financial covenants or requirement that proof of liquidity be provided, we are disinclined to voluntarily provide such sensitive financial information, especially given the fact that the Tenant has not defaulted in any way on its financial obligation under the Lease. However, Tenant does have the financial means to comply with the Lease, and remains open to further discussion on this point, to the extent the Landlord has any specific concerns that the Tenant can reasonably address.

Id. at 239.

D. Upshot Sues Tenant and Respondent/Guarantor Anyway

Rather than respond to the Tenant's offer of further discussions, five days after receiving the Tenant's written assurances of its intention and ability to perform under the Lease, the Landlord filed this lawsuit. The Landlord sued not only the Tenant alleging breach of the Lease, but also the Guarantor, alleging breach of the Guaranty—even though the Tenant never defaulted under the Lease to trigger the

Guarantor's obligations and even though the Guarantor never received a written notice of default as required by the Guaranty.

Upshot's two-count Amended Complaint alleges the following:

Count I is styled "Breach of Lease (Failure to Provide Adequate Assurances Resulting in Repudiation)," *id.* at 116, and is asserted against the Tenant only. The Landlord complains that the Tenant "failed to timely provide, upon demand by Landlord, adequate assurances of performance including evidence of Tenant's present financial capacity to perform," and that "such failure constitutes a repudiation of the Lease." *Id.* at 117. The Landlord does not and cannot point to any "unequivocal, distinct, and absolute statements or actions" by the Tenant evincing a refusal to perform its Lease obligations. *Mori v. Matsushita Elec. Corp. of Am.*, 380 So. 2d 461, 463 (Fla. 3d DCA 1980) (requiring such statements to establish repudiation of a contract). Rather, the Landlord claims that because it grew "uncertain" as to the Tenant's ability to perform under the Lease, it somehow has a right to deem the Lease repudiated unless the Tenant provides the "assurances" of future performance—a right the Landlord never negotiated when the Lease was signed. *See id.* at 117 (alleging that the Tenant's "failure to timely provide *adequate assurances* constitutes a repudiation of the Lease and entitles [the Landlord] to bring a claim for breach of contract" (emphasis added)).

Based on its unilateral rewriting of the Lease to require the disclosure of sensitive financial information (including "access to bank records" or "loan commitments," *id.* at 115) as "assurance" of the Tenant's ability to satisfy its contractual obligations in the future, Upshot seeks payment of twenty years of rent worth $50 million. *See id.* at 118.

Count II is the breach of Guaranty claim against the Guarantor. The Landlord does not, and cannot, allege any default by the Guarantor of the terms of the Guaranty, because no such default occurred. In fact, the ***only*** basis for the Landlord's breach of Guaranty claim is that the Guarantor "failed to provide said assurances," *id*. at 119, demanded of the Tenant in Upshot's January 24, 2024 letter. Based on that "failure," and that alone, the Landlord claims that Guarantor "failed to timely cure Tenant's breach," and thereby breached the Guaranty. *Id*.

E. Upshot's Discovery Requests and Motion to Compel

On May 29, 2024, while the parties were still briefing the Defendants' Motion to Dismiss (which the trial court ultimately denied without an explanation or accompanying opinion), the Landlord served Requests for Production on both the Tenant and the Guarantor. At the heart of this appeal is Request No. 13 directed to the Guarantor. *See* R. at 278.

Request No. 13 calls for the Guarantor to produce "*[a]ny* and *all* documents reflecting or relating to [the Guarantor]'s financial *capacity* to fulfill its obligations

under the Guaranty." *Id.* (emphases added). Such open-ended language comes with no limits on its face. The Guarantor is a large, privately-held health care company that owns and operates 75 specialty hospitals and 17 community hospitals in 21 states. So all manner of documents must be reviewed and considered for responsiveness, including Board presentations, business-development plans involving dozens of hospitals unrelated to the Mills Park project, consolidated statements of operations, system-wide capital spending plans, private commercial terms offered to the Landlord's competitors, company-wide spending forecasts, division budgets, bank account information, cash flow reports and similar financial information. Basically any document that could arguably be related to the Guarantor's finances, and therefore, "reflect[ ] or relate[ ] to" the Guarantor's "capacity to fulfill its obligation," *id.*, to guaranty the Tenant's obligations under the Lease—obligations which have never been breached—must be considered.

The Guarantor objected to this request: (1) because it seeks privileged information and work product; (2) because it seeks confidential and/or proprietary information regarding the Guarantor's business; and (3) because it is overbroad, burdensome, and, more importantly, seeks information not relevant to the claims or defenses in the case. With respect to the relevancy objection, the Guarantor argued that any confidential and proprietary information regarding the Guarantor's business, "reflecting or relating to [the Guarantor]'s financial capacity to fulfill its

obligations under the Guaranty," "have no relevance to whether the Lease or Guaranty were breached." *Id.* at 287.

On July 31, 2024, Upshot moved to compel. With respect to Request No. 13, Upshot offered a few scattershot arguments:

First, it claimed that Guarantor's financial capacity is relevant because Landlord has alleged that the Tenant sought additional funding partners (which is specifically permitted under the Lease). Nonetheless, Upshot claims that the Tenant's actions called "into question whether Guarantor actually did have the capacity to perform[.]" *Id.* at 310.

Second, the Landlord further argues that the Guarantor "has asserted that it had the financial means to fulfill its obligations, and [the Landlord] should not be forced to rely solely on Defendant's word." *Id.* The Landlord negotiated for more than the Defendants' word, but limited that "more" to the Defendants' audited financial statements. *See id.* at 149 (requiring an annual exchange *only* of audited financial statements).

Third, the Landlord argues that the Guarantor's financial capacity to perform is relevant "because it provides context and motive for Defendants' actions and statements of repudiation." *Id.* at 295. But the Landlord has never alleged that the Guarantor repudiated; only the Tenant is alleged to have repudiated the Lease. *See id.* at 116–121.

Finally, the Landlord suggests that the Guarantor's financial capacity is somehow relevant because the Guarantor's present financial condition would make reasonable the demand for assurance that Landlord issued exclusively to Tenant. *See id.* at 297. This assertion, however, does not remedy the Landlord's failure to allege that the Guarantor repudiated either the Lease or the Guaranty, whether through a similar theory of anticipatory repudiation or otherwise.

F. The Trial Court's Discovery Order

On October 2, 2024, the trial court ordered the Guarantor to produce documents in response to Request No. 13 over a two-year period, without addressing the Guarantor's relevance and overbreadth objections. Specifically, the Discovery Order stated in relevant part:

> Within fourteen (14) days of the parties having entered into a mutually agreeable Confidentiality Agreement or alternatively within fourteen (14) days of this Order, whichever comes first, [the Guarantor] shall produce non-privileged/non-confidential/non-proprietary documents from January 1, 2022 through February 27, 2024, that are responsive to Plaintiff's Requests to Produce Nos. 4, 5, 6, 7, 8, 9, 10, 11, and 13.

Id. at 382. The trial court specifies no substantive limits on the broad and irrelevant demand for "*[a]ny* and *all* documents reflecting or relating to" the Guarantor's "financial capacity to fulfill its obligations under the Guaranty." *Id.* at 278.

Given the fourteen-day window to produce not just documents responsive to Request No. 13 but *all* of the requests for production directed at both the Tenant and the Guarantor (13 requests served on the Guarantor and 24 on the Tenant), and given

the potential for irreparable harm resulting from the Guarantor being forced to produce extensive, commercially-sensitive, and irrelevant financial capacity documents to an adversarial party involved in an overlapping industry (*i.e.*, health care real estate), on October 8, 2024, the Guarantor filed in the trial court an Emergency Motion to Stay operation of the Discovery Order compelling production of the Guarantor's financial capacity discovery responsive to Request No. 13 pending this Court's review of this Petition. *See id.* at 384–396. But, as of the time of this writing, the trial court has not resolved that motion.

SUMMARY OF THE ARGUMENT

A writ of certiorari to review and quash the Discovery Order compelling compliance with Request No. 13 is warranted because by ordering the production of the Guarantor's financial discovery, the trial court departed from the essential requirements of the law, resulting in material injury that cannot be remedied in a post-judgment appeal. This is a classic case warranting this Court's certiorari review and correction. *See, e.g., ESJ JI Leasehold, LLC v. PJGWI, Inc.*, 337 So. 3d 115, 116–17 (Fla. 3d DCA 2021) ("Allowing discovery of irrelevant, private financial information clearly departs from the essential requirements of law and constitutes 'cat out of the bag' discovery that can cause material injury that cannot be adequately redressed on appeal."); *see also Mana v. Cho*, 147 So. 3d 1098, 1100 (Fla. 3d DCA 2014) (same)

A likelihood of material injury that cannot be remedied in a post-judgment appeal, *i.e.*, "irreparable harm," is jurisdictional and must be considered first. "The disclosure of a party's financial or confidential business information may cause irreparable harm where the information is irrelevant to any pending matter." *JILCO, Inc. v. MRG of S. Florida, Inc.*, 162 So. 3d 108, 110 (Fla. 4th DCA 2014). Here, the Guarantor's financial capacity information is clearly not relevant to the two breach of contract claims, and the irreparable harm to the Guarantor that would result from its compliance with the Discovery Order is evident. The Guarantor operates in a

highly competitive industry, and exposing its financial information to the public or even a competitor risks putting it at serious competitive disadvantage in both ongoing and future transactions and projects. Further, others in the industry may be more hesitant to deal with the Guarantor were it known that its sensitive financial information has been made public or disclosed to others in the industry. The Guarantor's relationship with the potential joint venture partners with whom it is in *ongoing* negotiations would be most immediately impacted. And access to the Guarantor's financial information would give Upshot, the Landlord, a commercial advantage with respect to further negotiations or future projects.

The Guarantor's irreparable harm is guaranteed by the trial court's Discovery Order, which departs from the essential requirements of the law. "Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence." *Bd. of Trustees of Internal Improvement Tr. Fund v. Am. Educ. Enterprises, LLC*, 99 So. 3d 450, 457 (Fla. 2012). "Ordinarily the financial records of a party are not discoverable unless the documents themselves or the status which they evidence is somehow at issue in the case." *Aspex Eyewear, Inc. v. Ross*, 778 So. 2d 481, 481–82 (Fla. 4th DCA 2001) (citing *Graphic Assocs., Inc. v. Riviana Rest. Corp.*, 461 So.2d 1011 (Fla. 4th DCA 1984)).

Here, the trial court ordered production of corporate financial information that has no connection to the breach of contract claims at issue in the Amended Complaint. In compelling the production of "[a]ny and all documents reflecting or relating to [the Guarantor]'s financial capacity to fulfill its obligations under the Guaranty," R. at 278, a request clearly not reasonably calculated to lead to the discovery of admissible evidence, the trial court has not constrained Upshot's ability to demand the type of "*carte blanche* irrelevant discovery" that the Florida Supreme Court has held is impermissible. *See Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 95 (Fla. 1995).

In summary, compelling the Guarantor to produce confidential and commercially sensitive financial information is paradigmatic "cat-out-of-the-bag" discovery that causes irreparable harm that cannot be cured in a post-judgment appeal. Once the financial records are disclosed to Upshot, the damage has been done.

Accordingly, a writ of certiorari to review and quash the Discovery Order is warranted here.

STATEMENT OF PRESERVATION

The issue raised in this petition was raised first in the Petitioner's Responses and Objections to Respondent's First Requests for Production, *see* R. at 286–87 and then again in the Petitioner's Response in Opposition to Respondent's Motion to Compel, *see id.* at 356–58.

ARGUMENT

"To be entitled to certiorari relief, Petitioners must establish '1) a departure from the essential requirements of the law; 2) resulting in material injury for the rest of the trial; 3) that cannot be remedied on post-judgment appeal.'" *Regala v. McDonald*, 374 So. 3d 855, 858 (Fla. 6th DCA 2023) (quoting *Walt Disney Parks & Resorts U.S., Inc. v. Alesi*, 351 So. 3d 642, 644 (Fla. 5th DCA 2022)). "Because the second and third elements, which are jointly referenced as 'irreparable harm,' are jurisdictional, they must be established before the first element, *i.e.*, the merits, may be addressed." *Id.* (first citing *DecisionHR USA, Inc. v. Mills*, 341 So. 3d 448, 452 (Fla. 2d DCA 2022); and then citing *Miami Dade Coll. v. Allen*, 271 So. 3d 1194, 1196 (Fla. 3d DCA 2019)).

A. The Discovery Order Will Result in Irreparable Harm

"Discovery of private and confidential financial information often triggers certiorari" review. *Bath & Kitchen Boutique, LLC v.* Little, 390 So.3d 44, 45 (Fla. 3d DCA 2023). A party may obtain the other party's financial information in only limited circumstances, and any order granting discovery outside those limitations has long been considered impermissible discovery for which certiorari relief lies. *See, e.g.*, *ESJ JI Leasehold, LLC v. PJGWI, Inc.*, 337 So. 3d 115, 116 (Fla. 3d DCA 2021) (holding that even if produced "under a confidentiality order" the "production of [the petitioner's] financial documents . . . with no relevance to the litigation"

"constitutes 'cat out of the bag' discovery meriting certiorari relief"); *see also Aspex Eyewear*, 778 So.2d at 481–82 ("Ordinarily the financial records of a party are not discoverable unless the documents themselves or the status which they evidence is somehow at issue in the case."); *Universal Eng'g Testing Co. v. Israel*, 707 So. 2d 900, 901 (Fla. 5th DCA 1998) (specifying that a corporation's tax records and financial statements constitute confidential and proprietary information).

The Discovery Order concerns exactly the kind of confidential and private information that, once disclosed, causes irreparable harm. The Order implicates far more than information regarding the specific hospital project at issue in this case. Financial capacity discovery implicates the entirety of Guarantor's operations.

The intrusion into Guarantor's business operations is massive. The Discovery Order will require the review of a wide variety of Guarantor's private financial documents, including, non-exhaustively, such confidential proprietary materials as Board presentations, business development plans involving dozens of hospitals unrelated to the Mills Park project, consolidated statements of operations, system-wide capital spending plans, private commercial terms offered to the Landlord's competitors, company-wide spending forecasts, division budgets, and similar financial information. All of this could fall within the scope of "any" and "all" documents that "relat[e] to" or bear on any serious analysis as to the Guarantor's "capacity to fulfill its obligations under the Guaranty." R. at 278. How much would

be required to be disclosed pursuant to the order (given the absence of any accompanying guidance) cannot be known with certainty. But, in any event, *any of this information*, once disclosed, can never be undone. And that is where the harm lies. *See, e.g.*, *Bath & Kitchen Boutique, LLC v. Little*, 390 So. 3d 44, 44–45 (Fla. 3d DCA 2023) ("Bath & Kitchen Boutique argues that the financial discovery sought doesn't relate to an issue in the case, doesn't constitute permissible postjudgment financial discovery, and *instead constitutes impermissible cat-out-of-the-bag financial discovery causing irreparable damage*, for which there is no remedy on appeal. Based on the facts before us, *we agree*." (emphases added)); *see also Capco Properties, LLC. v. Monterey Gardens of Pinecrest Condo.*, 982 So. 2d 1211, 1213 (Fla. 3d DCA 2008) (quashing a discovery order that required the production of, among other things, Capco Properties, LLC's "financial statements, balance sheets, profit and loss statements, [ ] tax returns" and "[s]tatements of all bank accounts").

Any disclosure is likely to cause serious and irreparable harm to the Guarantor's operations having nothing to do with the Lease and Guaranty at issue. For example, should its private financial information become available to even a small number of individuals in the health care industry, such disclosures threaten to undermine Guarantor's commercial relationships and bargaining position with its business partners and the hospital systems it operates, as well as its relationships with competitors. Upshot itself could use the information to obtain an unfair

commercial advantage for itself, both with respect to Orlando hospital projects in which Guarantor is involved in, and in other health care real estate projects in the future. It is difficult to imagine all the possible ways that the release of enterprise-wide financial discovery relating to Guarantor could harm its operations and its standing in the health care community.

This is precisely the kind of information that "once . . . disclosed, there is no adequate way to repair the damage to the legally-recognized privilege or privacy interests of the party injured by the disclosure." *Gomillion v. State*, 267 So. 3d 502, 506 (Fla. 2d DCA 2019). Such discovery should not be permitted.

B. The Discovery Order Reflects a Departure from the Essential Requirements of the Law

The trial court departed from the essential requirements of the law because the discovery at issue is demonstrably *irrelevant* to the claims and defenses in this case. Though "the scope and limitation of discovery is within the broad discretion of the trial court," *SCI Funeral Servs. of Fla., Inc. v. Light*, 811 So.2d 796, 798 (Fla. 4th DCA 2002), that discretion is "guided by the principles of relevancy and practicality" to "prevent injury through abuse of the action or the discovery process within the action." *Friedman v. Heart Inst. of Port St. Lucie, Inc.*, 863 So. 2d 189, 194 (Fla. 2003).

"Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence." *Am.*

Educ. Enterprises, LLC, 99 So. 3d at 457. "Allowing discovery of irrelevant, private financial information clearly departs from the essential requirements of law and constitutes 'cat out of the bag' discovery that can cause material injury that cannot be adequately redressed on appeal." *ESJ JI Leasehold*, 337 So. 3d at 116–17; *see also Publix Supermarkets, Inc. v. Santos*, 118 So. 3d 317, 319 (Fla. 3d DCA 2013) ("Although overbreadth by itself is not a sufficient basis for certiorari jurisdiction, *the Florida Supreme Court has held that certiorari review is appropriate where the discovery order effectively grants 'carte blanche' to irrelevant discovery*." (quoting *Am. Educ. Enterprises*, 99 So. 3d at 457 (emphasis added))); *see also Publix Super Markets, Inc. v. Roth*, 355 So. 3d 1056, 1060 (Fla. 2d DCA 2023) (quashing the trial court's order compelling "corporate-wide" discovery because the trial court's departure from the appropriate relevancy standard "result[ed] in carte blanche to discovery of irrelevant information"). This important principle applies as fully to business entities as it does to individuals. *See, e.g.*, *Am. Educ. Enterprises*, 99 So. 3d at 457–58; *JILCO*, 162 So. 3d at 110; *Capco Properties*, 982 So. 2d at 1211.

Upshot claims that Guarantor's financial discovery will demonstrate that the Guarantor "was experiencing a financial crisis and had no plan – and no intention – and no ability to perform." R. at 374. Upshot claims that the Guarantor's capacity to perform "provides context and motive for Defendants' actions and statements of

repudiation." *Id.* at 295.[2] Upshot points to the fact that the Tenant sought additional funding partners (which is specifically permitted under the Lease), calling "into question whether [the Guarantor] actually did have the capacity to perform[.]" *Id.* at 310.

In other words, the Landlord believes that the Guarantor's financial condition will somehow reveal whether the Tenant had a "plan," "intention," "ability," or "motive" to breach its obligations under the Lease, and that evidence of such intent justifies the Landlord's demand for adequate assurances from the Tenant (not the Guarantor). That convoluted theory not only entails illogical leaps (the Guarantor is not the Tenant) but, more importantly, Florida law is indifferent to a party's "intent" to breach a contract, which is why a party's financial information is not relevant in a breach-of-contract action. *See, e.g.*, *Chetu, Inc. v. KO Gaming, Inc.*, 261 So. 3d 605, 606–07 (Fla. 4th DCA 2019) ("The trier of fact will decide whether either party breached the contract" and that the "financial information of" the parties "*is not* relevant to that determination." (emphasis added)); *Zarrella v. Pac. Life Ins. Co.*, No. 10-60754-CIV, 2011 WL 13096629, at *3 (S.D. Fla. Sept. 16, 2011) (rejecting "Plaintiffs' only relevancy argument" that the documents sought "would likely lead to admissible evidence as to 'motive, opportunity, intent, preparation, knowledge,

[2] Upshot's Amended Complaint only alleges "actions and statements of repudiation" by Kindred, the Tenant, not Knight Health, the Guarantor.

identity or absence of mistake or accident'" because this was "*not relevant to the remaining breach of contract claim*" (emphasis added)); *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 9:11-80601-CIV, 2014 WL 12557835, at *2 (S.D. Fla. Dec. 24, 2014) ("Consideration of extrinsic evidence, such as the *intent* of the contracting parties" was not relevant in a breach-of-lease action (emphasis added)).

With respect to the Landlord's claim for breach of contract by the Tenant, all that matters is whether the Tenant refused to perform its contractual obligations with statements or actions that were "'distinct, unequivocal, and absolute . . . and without qualification.'" *Publix Super Markets, Inc. v. Fireman's Fund Ins. Co.*, No. 8:22-2569-CIV, 2023 WL 6049680, at *9 (M.D. Fla. Sept. 15, 2023) (quoting *Amnay v. Select Portfolio Servicing, Inc.*, 2022 WL 3577358 (M.D. Fla. Aug. 19, 2022), at *5, *aff'd*, 2023 WL 3944869 (11th Cir. June 12, 2023).[3] The financial capacity of Tenant's Guarantor has no bearing on that issue.

As to the Landlord's claim against the Guarantor for breach of the Guaranty, the relevance of the requested discovery is even further afield. *First*, there could be no breach of the Guaranty until the Tenant breached its obligations under the Lease;

[3] *See also Mori*, 380 So. 2d at 463 ("Such a repudiation may be evidenced by words or voluntary acts but the refusal must be distinct, unequivocal, and absolute."); *see* Florida Standard Jury Instruction 416.23 for Anticipatory Breach ("To establish this claim, claimant must prove . . . the defendant demonstrated or communicated distinctly, unequivocally, and absolutely that defendant would not or could not perform the contract.").

as discussed above, that never happened. But even if Upshot could allege that the Tenant breached the Lease by failing to adequately respond to the Landlord's demand for further assurances, that demand was for further assurances as to Tenant's intention and capacity to fulfill its obligations under the Lease. The Landlord never demanded further assurances of the Guarantor's intention or capacity to fulfill its obligations under the Guaranty. Thus, the Guarantor's financial capacity never even comes into play.

And the harms produced by this compelled disclosure are not remedied merely by use of a confidentiality agreement or order. In *ESJ JI Leasehold*, the Third District Court of Appeal quashed the trial court's order "requiring production of" ESJ JI Leasehold LLC's "financial records and other communications." 337 So. 3d at 115. The Court held that "[d]espite requiring the production of ESJ's financial documents under a confidentiality order, we conclude that compelling production of financial documents sought, with no relevance to the litigation as framed by the pleadings, constitutes 'cat out of the bag' discovery meriting certiorari relief." *Id.* There the Court reiterated the problem the Landlord faces here: Relevancy is shaped by the claims raised in the pleadings. And, in its First Amended Complaint, the Landlord directs its adequate-assurances theory of repudiation to Tenant only, not Guarantor. The claim against the Guarantor is a separate claim turning on whether Tenant breached or not, irrespective of *how* it breached. *See* R. at 116–18. In *ESJ JI*

Leasehold, the Court held that ESJ's financial records were irrelevant because the "Respondents ha[d] made no showing of a causal connection between the claims, as framed by the parties' pleadings, and the financial records sought[.]" *Id.* at 116. The same is true with respect to the Landlord's claims and its incongruent demand for Guarantor's financial records.

Therefore, by entering the Discovery Order compelling production of irrelevant and irreparably harmful financial capacity discovery, the trial court has departed from the essential requirements of the law. Therefore, this Court should grant certiorari review and quash the Discovery Order.

CONCLUSION

For the reasons stated above, Guarantor respectfully requests that the Court grant its Petition for a Writ of Certiorari and quash the portion of the trial Court's Discovery order compelling the production of documents responsive to Request No. 13.

Date: October 14, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2024, I filed and served a true and correct copy of the foregoing through the Florida e-filing system and email on all counsel of all record:

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210

The undersigned certifies that this brief complies with the font and size requirements specified in Rule 9.100(l) in that this petition was prepared in Times New Roman, 14-point font.

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