

**IN THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT OF FLORIDA**

KB HOME FORT MYERS LLC,

Appellant,

Appeal No. 2D21-384

v.

L.T. Case No. 11-3267-CA

TAISHAN GYPSUM CO., LTD.,  
f/k/a SHANDONG TAIHE DONGXIN CO.,  
LTD. and TAI'AN TAISHAN  
PLASTERBOARD CO., LTD.,

Appellees.

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## **NATURE OF THE CASE**

In 2011, appellant KB Home Fort Myers LLC (“KB”) sued appellees Taishan Gypsum Co. Ltd. (“Taishan Gypsum”) and Tai’an Taishan Plasterboard Co., Ltd. (“Taishan Plasterboard”) (collectively, “Taishan”) in the Circuit Court of Charlotte County. KB’s lawsuit asserted claims that were related to the subject of federal multidistrict litigation in which KB and Taishan were codefendants and both represented by counsel. KB, however, did not tell Taishan’s U.S. counsel about this lawsuit, and when Taishan did not appear and answer, KB obtained entry of defaults from the clerk, again without telling Taishan’s U.S. counsel. KB then obtained a nonfinal default damages order. Years later, after Taishan’s U.S. counsel learned of the defaults, Taishan filed a motion to set them aside on several grounds, including that settled Florida law required KB to inform Taishan’s known U.S. counsel of the lawsuit and defaults. Circuit Judge Geoffrey H. Gentile granted the motion on that basis, and KB now appeals from the nonfinal order setting aside the clerk’s defaults and the resulting nonfinal default order.

## **STATEMENT OF THE CASE AND FACTS**

Although incomplete in several respects and peppered with argumentative commentary, KB’s Statement of the Case and Facts is for the most part an accurate statement of the procedural history of this case and

the underlying facts. (Appellant’s Initial Brief [“App. Br.”] at 4-18). Taishan here, however, corrects a few facts that KB misstates, and Taishan sets forth some additional facts that KB neglects, including substantial evidence that KB had actual knowledge of U.S. counsel who were actively defending Taishan in drywall litigation, the proceedings that led up to the October 2013 amended order on default damages (A.345) (“Amended Default Order”), its subsequent treatment as a nonfinal order by the circuit court, and a thorough description of the nonfinal December 2020 order that is the subject of this appeal. (A.1013) (“Order Vacating Defaults”). References to KB’s Amended Appendix are denoted as “A.\_\_\_\_,” and references to Taishan’s Supplemental Appendix are denoted as “SA.\_\_\_\_.”

**A. KB Knew About Taishan’s U.S. Drywall Counsel as Active Co-Defendants in Related Litigation**

KB’s statement of the facts begins with the filing of this lawsuit on November 2, 2011. (App. Br. at 4). But several of the important facts on which the circuit court relied below occurred earlier.

By 2011, KB and its counsel Carlton Fields were already knee-deep in the Chinese drywall litigation. The previous year, KB and several affiliated homebuilders had been named as defendants in federal drywall multidistrict litigation in New Orleans, *In re: Chinese Manufactured Drywall Products*

*Liability Litigation* (MDL-2047). In the MDL, Carlton Fields had appeared for KB on June 14, 2010. (A.395-398). Only four days earlier, the law firm Hogan Lovells had filed a notice of appearance for TG and then on July 6, 2010, Hogan Lovells appeared for TTP. (A.399-405). Taishan and KB (or KB's affiliates, also represented by Carlton Fields) were co-defendants in at least five cases in the MDL. (A.415-29). As KB's counsel of record, Carlton Fields would have received notice that Hogan Lovells represented Taishan and was actively defending Taishan in drywall litigation—the MDL court specifically ordered that all filings in the MDL (including notices of appearances) be uploaded to an electronic service platform as the sole means of service for all filings in the MDL. (A.406-14).

In its briefing below, KB wrote eleven pages about the national drywall litigation, the MDL, and the parties' active participation in both. (A.939-50). And KB submitted hundreds of pages of exhibits reflecting Hogan Lovells' prominent role for Taishan in the MDL over years of litigation. KB, however, did not include those exhibits in the Appendix. (A.11) (noting "omitted" material). They can be found in Taishan's Supplemental Appendix. (SA.5, 61, 175, 295, 330, 439). KB's statement of facts largely ignores the MDL, although KB briefly lists the exhibits that Taishan submitted below, which show that Carlton Fields for KB and Hogan Lovells for Taishan appeared in

the MDL in 2010, including in the same case (*Gross*). (App. Br. at 11). KB also concedes that the record shows that Hogan Lovells was actively defending Taishan in the MDL, including by “filing motions,” “extensive jurisdictional discovery,” and in a subsequent Fifth Circuit appeal. *Id.* at 14. Most of that active MDL litigation predated the clerk’s entry of defaults here.

**B. KB’s Lawyers Communicated With Taishan’s U.S. Drywall Litigation Counsel By Communicating About The Subject Of *This* Lawsuit**

KB does not mention the most compelling record evidence that its Carlton Fields’ lawyers *actually* knew of Hogan Lovells and the specific Hogan Lovells attorneys representing Taishan in U.S. drywall litigation. Carlton Fields attorney Lannie Hough stated in his affidavit below that, sometime before June 15, 2011, he “learned that Frank Spano and Joseph Cyr, Hogan Lovells US LLP, were counsel to Taishan Gypsum Co., Ltd. in the Chinese Drywall Omnibus Class Action.” (A.589).

With that knowledge, Carlton Fields corresponded with Hogan Lovells about the subject of *this* lawsuit. KB “sent information about the defective drywall to Hogan Lovells prior to the filing of the lawsuit.” (A.967). Attorney Hough averred that, on behalf of KB, he sent multiple “notices to Mr. Spano and Mr. Cyr, providing Taishan opportunities to inspect the implicated properties prior to commencement or [*sic*] remediation activities.” (A.589).

He submitted to the court below one such letter, dated June 15, 2011—five months before commencing this action and fifteen months before repeatedly seeking defaults against Hogan Lovells’ clients. (A.596-97). Those letters were about the “implicated properties” in this case, but the exemplar letter provided did not threaten Taishan with a lawsuit or demand money damages; it notified Mr. Spano and Mr. Cyr that KB “will commence work to remove, dispose of, and replace” drywall at a homeowner’s property on a certain date, and invited Hogan Lovells to “advise immediately if Taishan wishes to inspect the Property or obtain samples of any drywall or other materials in advance of KB’s work.” *Id.*

But when KB’s lawyers subsequently filed this action and then repeatedly pursued clerk’s defaults, they stopped sending communications to Mr. Spano and Mr. Cyr of Hogan Lovells. Without notifying anyone at Hogan Lovells, KB initiated this lawsuit in November 2011. (A.15). KB later sought a clerk’s default against Appellees on three separate occasions over six months: (1) against Taishan Gypsum in September 2012 (A.139); (2) against Taian Plasterboard in December 2012 (A.157); and (3) against both in March 2013 (A.226, 230). All three times, KB’s drywall lawyers at Carlton Fields said nothing to Taishan’s drywall lawyers at Hogan Lovells, even as those same sets of lawyers actively litigated related drywall claims

on behalf of their respective clients in the MDL. As Judge Gentile put it in granting Taishan's motion to vacate the clerk's defaults, "I think frankly plaintiff's counsel at the time did everything but just pick up the phone or just tell them, hey, there's this case, 11-CA-3267, down in Charlotte County." (A.1099).

**C. The Proceedings That Led To and Followed The Circuit Court's Amended Default Order Show that it Was Not a Final Judgment**

Having secured entry of defaults without notice to Taishan's known U.S. counsel, KB sought default damages in January 2013 and again in April 2013, based solely on two affidavits attaching lists of the claimed costs of remediating houses—the same remediation activities that KB had given Taishan's U.S. counsel pre-suit notice of by direct letter. (A.310-18 (Taian Plasterboard), and 327-33 (Taishan Gypsum)). KB told the Court, "[t]o the extent that this Court requires further evidence to establish KB's requested damages, KB requests an evidentiary hearing on the same." (A.306). At a June 12, 2013 hearing before Magistrate Judge Koch, KB's counsel represented that the damages were "liquid[at]ed." (A.334). Judge Koch ruled that the damages were "unliquidated." (A.335). KB does not contest that ruling. (App. Br. at 49).

Judge Koch also expressed a “concern” about notice. (A.334-35). That concern was certainly not about “whether the matter could be resolved by affidavit,” (App. Br. at 7), because the hearing notes state explicitly that the “Mag[istrate] issue is not by affidavit or in person testimony.” (A.335). Instead, the notes show that “it’s the notice requirement that is the issue. Making a future order not valid.” *Id.* KB’s counsel responded merely that “this is how it’s been handled in the past.” *Id.* A few weeks later, the magistrate entered two reports and recommendations, recommending damages against Taian Plasterboard for \$11,361,325.23 (A.337-39) and against Taishan Gypsum for \$7,315,628.18 (A.340-42).

The circuit court’s initial July 2013 “Order on Report and Recommendations of the Magistrate” (A.343) was not “a single order approving both reports.” (App. Br. at 8). The July 2013 Order did not identify two reports and referred to a singular “Report.” (A.343). More than three months later, the circuit court entered its Amended Default Order, which explicitly identified both reports. The Amended Default Order was not captioned as a “final judgment.” (A.345). The Amended Default Order does not contain any finality language; it states that the reports are “ratified and approved,” and that “[t]he Court adopts each and every finding and recommendation contained in both reports.” (A.345).

After the Amended Default Order, KB took no action on the docket for over two years. (A.11). On December 4, 2015, the circuit court issued an order requiring all parties to appear on January 4, 2016, for a mandatory case management conference. (A.347). The certificate of service showed that the circuit court administrator attempted to mail service to Taishan in China. (A.348). The envelope containing papers to Taian Plasterboard was later returned to the court. (A.355-57).

On December 14, 2015, KB filed a “Final Disposition Form” that is “for the use of the Clerk of the Court for the purpose of reporting judicial workload data pursuant to Florida Statutes section 25.075.” (A.349). KB checked a box next to the statement, “Disposed by Default – Final Judgment.” *Id.* The circuit court held the hearing anyway.

The court’s hearing minutes reflect that it ordered a “Motion for SJ filed w/i 60 days.” (A.350). The subsequent written order states “60 days to file MSJ.” (A.351). The certificate of service shows that the circuit court’s civil case manager attempted to mail service to Taishan in China. (A.352). The envelope containing papers to Taian Plasterboard was later returned to the court. (A.358-60).

On March 4, 2016, the day its summary judgment motion was due, KB filed a “Notice of Dropping Party,” which claimed to “drop[] Defendant

Ocean Construction, Inc., as a party to this case.” (A.353). KB listed Taishan in its certificate of service. (A.354). But dropping Ocean Construction did not cause the circuit court to close the case.

On April 29, 2016, the circuit court set another case management conference and reported the following status: “Plaintiff was ordered to file a Motion for Summary Judgment in 60 days pursuant to the order on JCMC entered 1/4/16; defendant’s mail returned unserved.” (A.361). Consistent with KB’s notice of dropping Ocean Construction, the certificate of service did not include Ocean Construction but still included Taishan. (A.362). The circuit court docket then went silent for more than four years. (A.11).

#### **D. The Order Vacating Defaults**

In September 2019, “counsel for KB contacted Taishan’s American lawyers to inquire about settlement possibilities.” (A.955-56). Taishan subsequently filed its Motion to Vacate Default Orders. (A.364). Although Taishan’s motion raised the dispositive counsel-notice problem as the first ground for vacatur, KB addressed it only briefly in a late footnote. (A.976). KB’s footnote mentioned only two specific arguments: (1) “KB had no reason to believe Hogan Lovells represented Defendants in this case”; and (2) KB “served Defendants themselves with suit papers in this case.” At oral argument, KB presented only those two specific arguments on the counsel-

notice issue. (A.1074-1080, 1083-84) (no reason to know about Hogan Lovells), and (A.10:80-83) (service on defendants).

On December 29, 2020, Judge Gentile entered his Order Vacating Defaults, in which he found:

KB knew that the law firm of Hogan Lovells represented [Taishan] in drywall litigation because KB and [Taishan] were co-defendants in related drywall litigation in the federal multidistrict proceedings in the Eastern District of Louisiana in which Hogan Lovells was counsel of record for and actively defending [Taishan]. KB demonstrated that actual knowledge by sending Hogan Lovells pre-suit correspondence regarding the claims later included in this Charlotte County lawsuit.

(A.1014).

Judge Gentile also found that “KB did not provide notice of its complaints and default applications to Defendants’ known counsel” in violation of “Florida law [that] requires that defendants’ known counsel be served with notice of application for default.” *Id.* (citation omitted). Judge Gentile supported his analysis with “the general Florida policy favoring resolution on the merits” and with Florida law directing a “trial court to exercise its discretion in the direction of vacating the default.” (A.1014) (citation omitted). He also relied on “a broader duty of civility and professionalism” from this Court’s case law “that required KB to alert

Defendants' known counsel in similar cases before obtaining defaults against Hogan Lovells' clients." *Id.*

Having vacated the clerk's defaults, Judge Gentile then vacated the magistrate's reports and recommendations and the Amended Default Order on three grounds. First, he ruled that "the invalid entry of the clerk's default renders the subsequent default proceedings and order invalid." (A.1015). Although the court found that the record was ambiguous as to whether the Amended Default Order was a final judgment, the court did not need to decide the issue because "whether the default damages order is a final judgment or not, the invalid entry of default renders it 'void.'" *Id.* (citation omitted).

Second, the court ruled that the Amended Default Order was "invalid and void because KB did not provide notice of the default damages proceeding to Defendants' known counsel. *Id.* (citation omitted). Judge Gentile validated the magistrate's previously expressed concern that "the lack of proper notice under Rule 1.440 . . . could make 'a future order not valid.'" *Id.*

Third, the court ruled that, "even if the entry of default had been valid, the amounts entered as damages would still be invalid" due to two separate procedural problems: (1) the magistrate fixed the damages without a jury trial

after KB had requested a jury trial in its complaint; and (2) KB's "plaintiff-generated list of damages . . . was not a sufficient basis for fixing unliquidated property damages in this case." (A.1015-16).

The court denied Taishan's request to quash service (A.1013), and Taishan does not appeal that ruling.

### **SUMMARY OF THE ARGUMENT**

The Court lacks jurisdiction in this admittedly "nonfinal appeal." (Appellant's Brief ("App. Br.") at 1). Florida Rule of Appellate Procedure 9.130(a)(5) does not confer jurisdiction because the vacated Amended Default Order was not a final judgment: it did not purport to be a "final judgment"; it did not contain the language of finality necessary to make it a final judgment; and the circuit court did not treat it as a final judgment, instead continuing to expend judicial labor on the claims against Taishan well after the order was entered. KB cannot turn the Amended Default Order into a final judgment by relying on the disfavored practice of a circuit judge "adopting" a magistrate's recommendation, which is reluctantly acknowledged to confer finality only in the limited context of family law, where special considerations demand finality. This Court should not be the first to extend that disfavored practice beyond family law, and it certainly should not do so in this case to reinstate a disfavored default. Instead, the Court should

resolve all doubts in favor of a resolution on the merits, which in this instance means finding no appellate jurisdiction.

Even if the Court were to exercise jurisdiction, it should affirm the nonfinal Order Vacating Defaults below because the undisputed law and facts require that result. Although the Court reviews the vacatur of a void final judgment de novo, where that decision is based on a decision to set aside an ex parte entry of default by a clerk, binding precedent requires review of the underlying predicate decision only for a gross abuse of discretion. *U.S. Bank Nat. Ass'n v. Lloyd*, 981 So. 2d 633, 640 (Fla. 2d DCA 2008) (citation omitted); *accord Makes & Models Magazine, Inc. v. Web Offset Printing Co.*, 13 So. 3d 178 (Fla. 2d DCA 2009); *Marshall Davis, Inc. v. Incapco, Inc.*, 558 So. 2d 206, 207-08 (Fla. 2d DCA 1990).

KB does not and cannot establish that Judge Gentile grossly abused his wide discretion. Judge Gentile applied this Court's binding precedent, which directs that "[a] trial court should vacate an ex parte default when the plaintiff seeking default had actual knowledge that the defendant was represented by counsel and intended to defend the lawsuit, but failed to contact the defendant's counsel prior to seeking default." *Lloyd*, 981 So. 2d at 640 (citations omitted). Judge Gentile permissibly relied on all the evidence, including compelling evidence of pre-suit correspondence from

KB's counsel Carlton Fields to Taishan's counsel Hogan Lovells regarding the very claims that later formed the basis for this lawsuit. Judge Gentile reasonably found that the letter, which KB submitted below, demonstrated actual knowledge of the attorneys who were to defend these claims for Taishan, just as they were doing in other cases involving KB.

Even if the Court were to apply a de novo standard, it should affirm the Order below for all the same reasons. KB "recognizes that the case law promotes setting aside of clerk's defaults in order to allow the parties to resolve a case on the merits." (App. Br. at 51). KB does not dispute the governing legal principles requiring a court to vacate a clerk's default when the plaintiff knew of defendant's counsel and an intent to defend but nonetheless obtained an ex parte default without notifying counsel. KB also does not dispute that it had that knowledge. Indeed, it submitted the devastating pre-suit correspondence evidence that proved it. The Court should reject KB's claim that it "had no reason to know" about Hogan Lovells on the same basis that it rejected the identical argument in *Lloyd*. KB's justification that it served Taishan fares no better because "notice to the client is not an acceptable substitute for the required notice to opposing counsel." *Muhtar v. Wilmington Sav. Fund Soc'y, FSB*, 239 So. 3d 775, 776 (Fla. 3d DCA 2018) (citation omitted).

After the Court upholds Judge Gentile's vacatur of the clerk's defaults, it should affirm the vacatur of the magistrate's reports and recommendations and the circuit judge's Amended Default Order on several grounds, including the automatic voiding effect of the invalid clerk's defaults, the failure to provide notice of the damages proceedings to known counsel, and the failure to assess unliquidated damages in an evidentiary hearing.

None of KB's arguments come close to even denting the clear case for affirmance here. KB failed to preserve most of its appellate arguments by limiting its discussion of the counsel-notice issue below to a footnote containing only two arguments and a brief discussion of those two arguments at the hearing. Even if preserved, KB's other arguments all fail. The evidence below was sufficient, and Judge Gentile cannot be reversed simply because Taishan did not submit an affidavit. KB does not meaningfully distinguish this Court's binding precedents and the "sustained tradition of cases" in Florida vacating *ex parte* clerk's defaults without notice to known counsel. *M.W. v. SPCP Group V, LLC*, 163 So. 3d 518, 521 (Fla. 3d DCA 2015). And binding precedent makes a judgment based on an invalid clerk's default "void," not just voidable. *Lloyd*, 981 So. 2d at 640.

Instead of filing this nonfinal appeal of a nonfinal order without proper jurisdiction, KB and Carlton Fields should have conceded their error in not

notifying Taishan's known U.S. counsel for drywall claims and moved on. That is what appellate counsel did in *Muhtar*, 239 So. 3d at 776, in which the court specially commended counsel's "candor and professionalism" for filing a "concession of error" regarding the failure to serve opposing counsel with the required notice of default. Instead, KB doubles down on its violation of binding precedent and its duty of civility and professionalism by inventing new arguments on appeal that are equally fanciful and meritless. The Court should roundly reject KB's improper appeal and either decline jurisdiction or affirm the nonfinal Order below.

## **ARGUMENT <sup>1</sup>**

### **I. THE COURT LACKS JURISDICTION TO CONSIDER THE TRIAL COURT'S VACATUR OF NONFINAL ORDERS**

#### **A. The Default Orders Vacated By the Trial Court Were Not Final Judgments**

The Court should dismiss this appeal because it lacks jurisdiction over the circuit court's nonfinal 2020 order vacating its nonfinal 2013 "Amended

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<sup>1</sup> Because of the unusual structure of KB's Initial Brief, Taishan is unable to follow the sequencing and categorization of the issues, as suggested in the Court's practice preferences. For example, KB waits to address the Court's lack of jurisdiction until page 38 and does not address the standard of review until page 41. Appellate jurisdiction, however, is a threshold issue, and a proper understanding of the standard of review necessarily must inform any meaningful discussion of the merits.

Default Order on Reports and Recommendations of the Magistrate.” See *Stubbs v. Fannie Mae*, 250 So. 3d 151, 152 (Fla. 2d DCA 2018) (dismissing appeal because “an order entered on a motion to vacate a non-final order is not reviewable”) (citation omitted).

KB admits “[t]his is a nonfinal appeal.” (App. Br. at 1). For a nonfinal order “to be appealable,” KB “must” show that the nonfinal order “fall[s] under the category of exceptions listed in Rule 9.130.” *Crawford v. Dwoskin*, 729 So. 2d 520, 521 (Fla. 3d DCA 1999). Although KB’s Initial Brief does not cite or discuss Florida Rule of Appellate Procedure 9.130, KB’s Notice of Appeal (A.1018) relies on Rule 9.130(a)(5), which permits appellate review of nonfinal “orders entered on an authorized and timely motion for relief from judgment.” But Rule 9.130(a)(5) has no application here because the Amended Default Order was not a “judgment.”

As Judge Gentile himself observed at the oral argument below, “I don’t even see a judgment.” (A.1066). Judge Gentile found that the Amended Default Order “did not appear on the docket as a ‘final judgment.’” (A.1015).<sup>2</sup> KB does not dispute that the Amended Default Order was “not entitled ‘final judgment.’” (App. Br. at 39). It is also undisputed that the Amended Default

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<sup>2</sup> No final judgment appears on the case docket. (A.10-12).

Order did not itself expressly contain words of finality. (App. Br. at 39) (claiming that Amended Default Order contains finality language “by adoption”); see also *Monticello Ins. Co. v. Thompson*, 743 So. 2d 1215, 1216 (Fla. 1st DCA 1999) (an order is not a judgment “without language in the order which ‘hereby enters’ a judgment, or similar unequivocal language of finality”).<sup>3</sup>

Moreover, after entry of the 2013 Amended Default Order, the “judicial labor” continued into 2016 and beyond. See *Rollins Fruit Co. v. Wilson*, 923 So. 2d 516, 519 (Fla 2d DCA 2005) (“A judgment is not final where further judicial labor is required or contemplated to end the litigation between the parties.”). KB is wrong that the Amended Default Order concluded “the judicial work . . . as to Taishan.” (App. Br. 9). As Judge Gentile highlighted, “other matters remained to be resolved in the lawsuit.” (A.1015).

The circuit court certainly did not act as if it had entered final judgment against Taishan in October 2013. More than two years later, in December 2015, the court set a case management conference, commanding the presence of **all** named parties and attempting to serve

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<sup>3</sup> Judge Gentile found that the Amended Default Order used words merely “suggesting finality.” (A.1015).

Taishan in China (A.347). The court held the conference even after KB filed an administrative form claiming that the case was “Disposed by Default – Final Judgment.” (A.349). The circuit court ordered KB to file a motion for summary judgment. (A.350, 351).

KB argues that this summary judgment directive related only to its claims against co-defendant Ocean Construction, but that argument is belied by the record. First, KB misrepresents that record by claiming that “[t]he minutes of the case management hearing indicate that Judge Porter, who was now assigned to the case, contemplated the filing of a motion for summary judgment on the claim **against Ocean Construction** within 60 days.” (App. Br. at 9) (emphasis added). The court’s hearing minutes state only, “Motion for SJ filed w/i 60 days.” (A.350). The subsequent order on judicial case management conference, which KB does not cite, likewise states, without elaboration, “60 days to file MSJ.” (A.351).

Subsequent developments, however, strongly suggest that the circuit court intended the proposed summary judgment motion to litigate the claims against Taishan, not Ocean Construction. Instead of filing a summary judgment motion on March 4, 2016, as ordered by the circuit court, KB filed a notice dropping Ocean Construction as a party (and listed Taishan in the certificate of service). (A.353-54). The circuit court still attempted to get KB

to comply with the order to file a summary judgment motion—despite KB’s notice dropping Ocean Construction. (A.361). Indeed, the court’s certificate of service shows attempted service on Taishan only, omitting the dropped defendant Ocean Construction and thus defying KB’s strident assertion here that the order related to Ocean Construction. Thus, “the title of the order, the lack of language demonstrating finality,” and the “ambiguous” behavior of the court which suggests that some future order shall be entered render the Amended Default Order here “nonfinal for appellate purposes.” *Hoffman v. Hall*, 817 So. 2d 1057, 1058 (Fla. 1st DCA 2002).

Moreover, KB itself did not act as if it had obtained a final judgment. After the entry of the Amended Default Order in 2013, KB filed no document on the docket for more than two years. (A.11). KB did not try to enforce its alleged judgment until 2019. (A.378).

Thus, the appealed from nonfinal order granted relief from a 2013 nonfinal Amended Default Order, which it had “inherent authority to do.” *Hunter v. Dennies Contracting Co.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997) (trial court “has inherent authority to reconsider any of its nonfinal rulings, and, if it deems appropriate, to alter or retract them”). Without the vacatur of a final “judgment,” this Court lacks jurisdiction under Rule 9.130(a)(5) or any other rule and should dismiss the appeal.

## **B. No Other Ground Permits A Nonfinal Appeal Here**

### **1. This Court Should Refuse to Extend Adoption of Magistrate's Finality Language To Default Orders**

The Court should reject KB's post hoc attempt to fabricate a judgment from a nonfinal order with a disapproved practice that is only reluctantly permitted in the unique context of family law. Although the Amended Order itself contains no words of finality, KB argues that it incorporates language of finality "by adoption," inasmuch as it "adopted" the magistrate's default reports and recommendations. (App. Br. at 39-40). In support of this proposition, KB relies on a single family law decision, *Norris v. Norris*, 28 So. 3d 953 (Fla. 2d DCA 2010).

*Norris* is distinguishable and should not be extended here. It was not an appellate-jurisdiction decision, but instead addressed the very different concern of whether an order was sufficient "to dissolve a marriage." *Norris*, 28 So. 3d at 955. Because of the unique finality concerns for the parties to a formal divorce and relying on family law procedural rules, this Court recognized a circuit judge's adoption of a magistrate judge's marriage-dissolution recommendation as "minimally sufficient" to dissolve the marriage. *Id.* But the Court was highly critical of using orders that adopted a magistrate's dissolution language and "urge[d] the circuit to discontinue its use immediately." *Id.*; see also *Glevis v. Glevis*, 310 So. 3d 525, 526 n.1

(Fla. 2d DCA 2021) (recognizing “with some reservation” final marriage dissolution based on adoption of magistrate recommendation). The Court highlighted the unique benefits of “a final judgment expressly stating that the marriage between the parties is dissolved.” *Id.* at 955-56.

*Norris* has been cited in the reported case law only four times and only in the family law context. See *Glevis*, 310 So. 3d at 526 n.3; *J.R.B. v. Dep’t of Children & Families*, 300 So. 3d 808, 811 (Fla. 1st DCA 2020) (child-dependency order and noting “time-sensitive nature of dependency proceedings”); *Demming v. Demming*, 251 So. 3d 284, 286 (Fla. 1st DCA 2018) (holding that trial court order “was legally sufficient to dissolve the marriage”); *Seigler v. Bell*, 148 So. 3d 473, 478 (Fla. 5th DCA 2014) (no final order on custody and visitation). Taishan found no reported Florida decision outside of a family law context that recognizes an appealable final judgment by its adoption of a magistrate’s recommendation.

This Court should not be the first to expand and extend that limited and disfavored family law doctrine to the very different context of disfavored default orders. This District applies “the well-established principle preferring the decision of an action on its merits.” *Lloyd*, 981 So. 2d at 639. Under that principle, “default judgments are generally not favored by the courts, and a court’s discretion should be liberally exercised and all reasonable doubt

resolved in favor of granting applications for relief so as to permit a determination of the controversy upon the merits.” *Paul v. Wells Fargo Bank, N.A.*, 68 So.3d 979, 982 (Fla. 2d DCA 1990) (citation omitted). That strong policy carries over to appeals with differential standards of review depending on whether the appellant seeks to reverse the reversal of a default (“gross abuse”) or seeks to reverse the denial of default relief (“lesser standard”). *Marshall Davis*, 558 So. 2d at 207-08.

Although *Norris* resolved the circuit court’s “irregularity” in favor of the important policy interest in upholding a marriage dissolution, courts in the default context are to resolve all doubts *against* upholding a default order. *Lloyd*, 981 So. 2d at 639-40. It would create bad policy to extend an infrequently and reluctantly approved family law practice to turn defective default orders into final judgments merely to obtain appellate jurisdiction—particularly in this case where Judge Gentile applied the well-established Florida policy against defaults and did not grossly abuse his broad discretion to grant relief. Moreover, treating the Amended Default Order as the nonfinal order that it is will work no injustice or prejudice here (as it might in the family-court setting). After dismissal of the appeal, the parties will simply continue to adjudicate their dispute on the merits, as strong Florida policy directs. And

KB can still pursue an appeal of the vacated default orders after final judgment is actually entered in this matter.

Refusing to interpret the Amended Default Order as a judgment would also send a strong signal to circuit courts and litigants to draft clear and definitive final judgments, as this Court encouraged in *Norris*. Florida Rule of Civil Procedure 1.490 requires that, after the magistrate judge submits a report and recommendation, the circuit judge “shall take appropriate action on the report.” If a trial judge intends to accept a magistrate’s recommendation to assess damages and enter a final judgment, the “appropriate action” is to enter a paper entitled “final judgment” that contains the necessary finality language. That simple required step clarifies the docket and alleviates the need for an appellate court to read tea leaves in the record to attempt to discern its jurisdiction. The Court should not encourage the disfavored practice in this case but should reject KB’s invitation to cobble together a final judgment where none exists.

## **2. Reversal of the Default Orders Was Not a “New Trial Order”**

The Court should reject KB’s secondary attempt to manufacture jurisdiction by recasting the circuit court’s order as an order “granting a new trial.” (App. Br. at 52). The plain language of Judge Gentile’s order shows

clearly that he did not issue an order granting a new trial. As captioned, Judge Gentile issued an “Order on Defendants’ Motion to Vacate Default Orders.” (A.1013).

A new trial order “essentially returns all of the parties to their pretrial posture.” *Millar Elevator Serv. Co. v. McGowan*, 804 So. 2d 1271, 1273 (Fla. 2d DCA 2002). To the extent that the magistrate’s hearing on damages was a “trial,” Judge Gentile did not merely return the case to its pretrial posture, with liability established by default and merely pending a “new trial” on damages. Rather, Judge Gentile vacated the defaults themselves, leaving the question of liability—on which there indisputably never has been any trial—open. (A.1016). The circuit court made clear that it was sending the case back to its very inception by ordering defendants to “respond” to the operative complaint “within 30 days of this Order.” (A.1017). Or as KB put it, “returning this case to go.” (App. Br. at 56).

Contrary to KB’s argument, nothing about the timing, the merits, or the alleged equities of this matter can magically transform an order granting relief from a nonfinal default order into a new trial order. KB cites no relevant case law to support that argument. KB claims that it “has not located a case that discusses this odd situation.” *Id.* That’s because this is not a “new trial” situation, and the Court should not exercise jurisdiction on that basis.

### 3. KB Is Not Entitled to Certiorari Review

The Court should similarly reject KB's tertiary attempt to manufacture jurisdiction by invoking certiorari. First, KB failed to file the required petition for certiorari. Fla. R. App. P. 9.100(b) ("The original jurisdiction of the court shall be invoked by filing a petition."). KB's notice of appeal cannot be construed as a petition for certiorari because the notice "was not in accordance with" Rule 9.100. *Lennar Homes, Inc. v. Dorta-Duque*, 972 So. 2d 872, 878 (Fla. 3d DCA 2007).

Second, KB cites but does not meet the high standard for certiorari. (App. Br. at 54) (listing three factors that a petitioner "must establish"). Far from a departure from the essential requirements of the law, Judge Gentile acted in complete accordance with the general Florida policy disfavoring defaults and the specific law of this District requiring a litigant to notify an opponent's known counsel before pursuing default proceedings. *See, e.g., Lloyd*, 981 So. 2d at 640-41. KB's brief never confronts head-on that strong policy headwind and delays even mentioning it until late, when KB finally "recognizes that the case law promotes the setting aside clerk's defaults in order to allow the parties to resolve a case on the merits." (App. Br. at 51). Thus, it is KB that proposes a deviation from clearly established law.

KB also recognizes, as it must, that any effort and expense from having to go back and prove their case on the merits as Florida law strongly favors is not an “injury” that “cannot be corrected on appeal.” (App. Br. at 55 (citing *Wright v. Sterling Drugs, Inc.*, 287 So. 2d 376 (Fla. 2d DCA 1973)). KB can fully pursue its complaints with Judge Gentile’s order on direct appeal after final judgment is entered. Nothing about the situs of Taishan’s principal place of business or its ownership structure are relevant to the certiorari analysis. (App. Br. at 56). KB has failed to establish any right to certiorari here. The Court should dismiss this nonfinal, interlocutory appeal.

## **II. THE TRIAL COURT PROPERLY VACATED THE CLERK’S DEFAULTS BECAUSE KB FAILED TO NOTIFY TAISHAN’S KNOWN U.S. DRYWALL LITIGATION COUNSEL**

### **A. This Court Reviews the Predicate Reversal of the Clerk’s Defaults for Gross Abuse of Discretion**

If the Court determines that it has jurisdiction because the Amended Default Order was a judgment, then it must determine the appropriate standard of review. KB is correct that the narrow issue of “whether a judgment is ‘void’ for purposes of Rule 1.540(b)(4) is a legal issue that is reviewed de novo.” (App. Br. at 41). But that does not end the analysis. Judge Gentile ruled that the default judgment here was “void” because the predicate clerk’s defaults were invalid given KB’s failure to notify known counsel prior to seeking entry of default. (A.1015) (“the invalid entry of default

renders [the judgment] ‘void’”) (quoting *Makes & Models*, 13 So. 3d at 182). Directly applicable governing law directs the Court to review that separate underlying determination regarding the clerk’s defaults “under an abuse of discretion standard.” *Lloyd*, 981 So. 2d at 639 (“We review an order denying a motion to vacate a clerk’s default under an abuse of discretion standard.”).

This Court has repeatedly and explicitly applied an abuse-of-discretion standard to review circuit court determinations about an invalid clerk’s default that then rendered the resulting default judgment void. In *Lloyd*, the appellant challenged the entry of both a clerk’s default and a default final order because of the failure to notify known counsel. This Court applied “an abuse of discretion standard” to hold that the clerk’s default was erroneous and then held that the error “renders a resulting judgment void.” *Id.* at 639-40. The Court remanded the case “with directions to vacate the clerk’s default and the default judgment.” *Id.* at 643.

A year later, this Court faced a nearly identical situation when a circuit court denied a defendant’s motion challenging a final judgment and the underlying clerk’s default. *Makes & Models*, 13 So. 3d at 180. Again, the Court held that “[a]n order denying a motion to vacate a clerk’s default is reviewed under an abuse of discretion standard.” *Id.* at 181 (citing *Lloyd*, 981 So. 2d at 639). The Court then conducted the same two-part analysis,

holding that “the circuit court should have vacated the default” and then holding that “[t]he invalid entry of the clerk’s default renders the final judgment void.” *Id.* at 182. Again, the Court remanded “with directions to vacate the clerk’s default and the final judgment.” *Id.*

KB tries to distinguish *Lloyd* (but not *Makes & Models*) because “the motion to set aside the default was filed quickly and denied.” (App. Br. at 41). But nothing in *Lloyd* (or any other case) suggests that timing plays a role in the standard of review or otherwise provides a basis for the Court to disregard its settled precedent. None of the cases on which KB relies for the standard of review involved review of an invalid ex parte clerk’s default under Fla. R. Civ. P. 1.500(a). See, e.g., *Rodriguez v. Thompson*, 235 So. 986 (Fla. 2d DCA 2017) (affirming default on liability and “setting aside damages judgment” to “hold a new trial on damages”).

Moreover, the reasoning of those cases is consistent with this Court’s two-step approach to reviewing entry of clerk’s defaults. This Court reviews the narrow question of whether a final judgment is void under a de novo standard because “[w]here a final judgment is void . . . the trial court has no discretion and is obligated to vacate the judgment.” *Id.* (quoting *Vercosa v. Fields* 174 So. 3d 550, 552 (Fla. 4th DCA 2015)); accord *Wiggins v. Tigrent*, 147 So. 3d 76, 80 (Fla. 2d DCA 2014) (“if a judgment previously entered is

void, the trial court must vacate the judgment”). That is precisely what the Court did in *Lloyd* and *Makes & Models*: once it determined under the abuse of discretion standard that the clerk’s defaults were invalid, it held automatically and without further explanation that the invalid default “render[ed] the judgment void.” *Makes & Models*, 13 So. 3d at 182; *Lloyd*, 981 So. 2d at 640 (recognizing the principle that invalid clerk’s default “renders a resulting judgment void”).<sup>4</sup>

An abuse-of-discretion standard is appropriate (and required) to review fact-bound issues such as whether a party had “actual knowledge that the defendant was represented by counsel and intended to defend the lawsuit, but failed to contact the defendant’s counsel prior to seeking default.” *Lloyd*, 981 So. 2d at 640. Abuse of discretion is also appropriate for a circuit court’s assessment of whether attorneys serving as officers of the court have complied with expected standards of “civility” and “professionalism.” *Makes & Models*, 13 So. 3d at 182.

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<sup>4</sup> The two-step process with two different standards here is analogous to the two-step summary judgment review process in which an appellate court “must first review the trial court’s evidentiary rulings under an abuse of discretion standard. . . . Then, with the record defined, . . . must review de novo the order granting summary judgment as a matter of law.” *Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 667-68 (5th Cir. 1999).

Thus, the Court should review Judge Gentile’s vacatur of the clerk’s defaults for abuse of discretion and then review de novo the vacatur of the resultingly invalid default reports and void Amended Default Order. Due to Florida’s strong policy in favor of merits determinations, the abuse standard is heightened here, and KB “must establish a **gross** abuse of the trial court’s discretion.” *Marshall Davis*, 558 So. 2d at 207-08 (Fla. 2d DCA 1990) (emphasis added); see also *George v. Radcliffe*, 753 So. 2d 573, 575 (Fla. 4th DCA 2000). (“[A] greater showing is required to reverse an order granting a motion to vacate a default than is required to reverse a denial of such a motion,” which “is consistent with Florida’s liberal policy in favor of vacating defaults so that controversies can be decided on the merits”) (citations omitted).

**B. Judge Gentile Did Not Abuse His Wide Discretion to Vacate a Clerk’s Default**

KB did not meet its burden “to establish a gross abuse of the trial court’s discretion to justify an appellate court’s reversal of a ruling on a motion to set aside a default.” *Marshall Davis*, 558 So. 2d at 207-08. Nor could it. KB “recognizes that the case law promotes the setting aside of clerk’s defaults in order to allow the parties to resolve a case on the merits.” (App. Br. at 51). KB admits that Florida law imposes “the duty to notify

opposing counsel in this context” (App. Br. at 27) and admits that that duty is consistent with this Court’s case law, *id.* at 28 (“This Court’s leading case on this common duty is the *Lloyd* case.”); *id.* at 30 (“[T]his Court issued . . . *Makes & Models*, which also recognized a duty to notify opposing counsel.”).

KB latches on to minor details to try to distinguish that governing case law but never shows that Judge Gentile was grossly unreasonable (or even wrong at all) in applying that law to vacate the clerk’s defaults here. Indeed, KB cites no Florida decision that reversed a trial court’s default relief based on a failure to notify known counsel. KB understatedly admits that “Florida courts have ***occasionally*** set aside a judgment when a plaintiff’s attorney had actual knowledge that a particular law firm represented the defendant in a dispute and that the defendant intended to contest the action.” (App. Br. at 20) (emphasis added).

The more accurate description is that virtually every Florida appellate court that has faced the situation of an ex parte default without notice to known counsel has ruled in favor of vacating the default and proceeding on the merits. See *Muhtar*, 239 So. 3d at 776; *M.W.*, 163 So. 3d at 523; *Nat’l Union Fire Ins. Co. v. McWilliams*, 799 So. 2d 378, 379 (Fla. 4th DCA 2001); *Nico Leasing v. Viacao Barao de Maua LTDA*, 668 So. 2d 335, 336 (Fla. 3d DCA 1996); *Tufo v. Oxford Resources Corp.*, 603 So. 2d 112, 113 (Fla. 4th

DCA 1992); *Ole, Inc. v. Yariv*, 566 So. 2d 812, 814 (Fla. 3d DCA 1990); *Gulf Maintenance & Supply, Inc. v. Barnett Bank of Tallahassee*, 543 So. 2d 813, 816 (Fla. 1st DCA 1989); *EGF Tampa Assocs. v. Bohlen*, 532 So. 2d 1318, 1321 (Fla. 2d DCA 1988). Judge Gentile certainly did not commit a gross abuse of discretion by doing the same thing here.

KB also does not show that Judge Gentile grossly abused his discretion in his factual findings, to which this Court must defer. See *Lynch v. State*, 2 So. 3d 47, 70 (Fla. 2008) (“With regard to factual questions, we defer to the findings of the trial court so long as they are based upon competent, substantial evidence.”) KB does not actually deny Judge Gentile’s central findings that (1) it “knew that the law firm of Hogan Lovells represented [Appellees] in drywall litigation” because both KB and Appellees were co-defendants in the drywall MDL; and (2) that “KB demonstrated that actual knowledge by sending Hogan Lovells pre-suit correspondence regarding the claims later included in this Charlotte Country suit.” (A.1014); see *Makes & Models*, 13 So. 3d at 181 (highlighting that plaintiff did not contest dispositive facts).

Judge Gentile’s vacatur of the clerk’s defaults was supported by the applicable law and factual record and thus did not amount to a gross abuse of his discretion. See *M.W.*, 163 So. 3d at 523 (affirming trial court default

vacatur due to failure to notify counsel and refusing “to hold that the trial court grossly abused its discretion in following the binding precedent of this court and requiring this case to be resolved on the merits”).

**C. Judge Gentile Correctly Applied This District’s Settled Law Requiring Vacatur of the Clerk’s Default When KB Failed to Give Notice of Default to Known Counsel**

Even if this Court were to conduct a full de novo review, it should hold that Judge Gentile properly vacated the clerk’s default based on the unbroken line of governing case law, the undisputed facts, the duty of courtesy and professionalism, and Florida’s strong policy preference for resolution on the merits. (A.1014).

This Court’s directly applicable governing case law requires affirmance of Judge Gentile’s Order. *Lloyd* confirmed the rule that “[a] trial court should vacate an ex parte default when ‘the plaintiff seeking default had actual knowledge that the defendant was represented by counsel and intended to defend the lawsuit, but failed to contact the defendant’s counsel prior to seeking default.’ ” 981 So.2d at 640 (quoting *Nat’l Union*, 799 So. 2d at 380). Applying a two-prong analysis, the Court held that the plaintiff violated that rule when it failed to give notice of default to an attorney whom plaintiff knew was actively defending the same defendant in a “related” action. *Id.* at 641-42. The court rejected the plaintiff’s counsel’s claim (like here) that

“he had no reason to believe” that defendant’s counsel was representing defendant “in both actions.” *Id.* at 642. This Court directed the trial court to vacate the default and the default judgment. *Id.* at 643.

Then, in *Makes & Models*, this Court followed *Lloyd* to hold that a trial court should have vacated a clerk’s default because the plaintiff failed to give notice in a Pinellas County action to counsel that plaintiff knew was representing the defendant in a related Hillsborough County action in which “both parties were actively participating.” 13 So. 3d 178, 181 (Fla. 2d DCA 2009). Although defense counsel never appeared or filed papers in the Pinellas action, the appellate court held that the lack of notice was improper, that the clerk’s default was invalid, and that the final judgment was void. *Id.* at 181-82.

Applying the first prong of the *Lloyd* analysis, the Court held that because the two lawsuits were so closely related, the plaintiff “had actual knowledge of Makes and Models’ intent to defend the Pinellas lawsuit.” *Id.* at 181. The second prong was satisfied because it was undisputed that the plaintiff knew that the defaulted defendant “was represented by counsel in the related Hillsborough lawsuit, which involved the same issues,” and that “both parties were actively participating in the Hillsborough lawsuit.” *Id.*

The court concluded with “one final observation” on a litigant’s obligations before pursuing a clerk’s default:

[Plaintiff’s] argument pressed for a strict and literal interpretation of the default rules without any regard for civility or for the professionalism expected when one party is aware that the opposing party is represented by counsel and intends to defend against the claims at issue. Although these are not difficult concepts to grasp, *post-Lloyd*, a party’s responsibilities when faced with similar circumstances should be clear.

*Id.* at 182. Here, KB’s failure to give notice of default to Taishan’s national drywall counsel occurred “*post-Lloyd*,” and thus, KB had a clear responsibility under governing law to serve Hogan Lovells with notice of the default proceedings.

KB does not dispute the essential facts proving that, as Judge Gentile found, KB and its lawyers at Carlton Fields knew from participation in the related drywall MDL starting in 2010 that Hogan Lovells was Taishan’s national counsel and was actively defending Taishan on all U.S. drywall claims. (A.1014); see *a/so* (A.395, 398) (Carlton Fields MDL appearances); (A.399-405) (Hogan Lovells MDL appearances); (A.939-50) (KB acknowledging national nature of drywall litigation, complex nature of MDL, and parties’ active participation in both); (SA.5-474) (exhibits submitted

below by KB—but omitted from KB’s Appendix here—showing Hogan Lovells’ active defense of Taishan).<sup>5</sup>

Much like in *Lloyd*, an “affidavit executed by [KB’s] . . . counsel that was filed in opposition to the motion to vacate conceded [KB’s] knowledge” that Hogan Lovells represented Taishan on all U.S. drywall claims and that it intended to defend them. 981 So. 2d at 641. The affidavit from Carlton Fields attorney Lannie Hough described and attached a June 15, 2011 letter to the specific Hogan Lovells lawyers (Frank Spano and Joe Cyr) who represented Taishan in the drywall MDL. (A.589 (Hough Aff.) at ¶ 6; A.596-97 (June 15, 2011 letter)). That letter involved one of the claims in this lawsuit and was sent months before KB initiated this legal action and more than two years before moving for default.

Mr. Hough admitted that KB “continued sending notices to Mr. Spano and Mr. Cyr, providing Taishan opportunities to inspect the implicated properties prior to commencement or [*sic*] remediation activities.” (A.589 at ¶ 8); see also A.596 (requesting Taishan’s attorneys to “advise

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<sup>5</sup> KB touts that Hogan Lovells filed challenges to personal jurisdiction in the MDL cases, while admitting that that issue was actively litigated for years. Nothing in the binding case law holds, or even suggests, that a counsel’s duty to notify known defense counsel before a default depends on the defenses that the plaintiff expects the defendant to assert.

immediately if Taishan wishes to . . . obtain samples of any drywall or other materials in advance of KB’s work”). Yet KB has never explained why it saw fit to send pre-suit notices inviting Hogan Lovells to preserve evidence from the subject properties before its remediation but then suddenly stopped communicating with those lawyers when it filed a lawsuit and then applications for clerk’s defaults seeking damages to recoup the costs of that same remediation.

The legal and professional obligation to provide notice of default proceedings to Taishan’s known counsel was even more acute given KB’s months-long struggles with foreign service (A.73, 101, 115, 589 at ¶ 7) and its receipt of Chinese judicial certificates stating that service had not been effected (A.147-48). KB not only fails to dispute any of that record, it fails to even mention that critical evidence to the Court in its otherwise lengthy Statement of the Case and Facts.

That undisputed record is fatal to one of the few arguments that KB made below: that it had “no reason to know” about Hogan Lovells.<sup>6</sup> This

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<sup>6</sup> In its briefing below, KB addressed the counsel-notice issue only in a late footnote, and thus failed to preserve most of the arguments raised for the first time in this appeal. (A.976). See *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) (“the specific legal argument or ground to be argued on appeal” “must

Court in *Lloyd* rejected the identical argument that a plaintiff and his counsel “had no reason to believe” that a particular lawyer was representing a defaulted defendant “in both actions” because that lawyer entered an appearance in a related action but not in the defaulted action on appeal. 981 So. 2d at 642. As discussed above, KB not only had reason to know, but, by sending pre-suit letters to Hogan Lovells, it demonstrated that it actually knew about Hogan Lovells’ defense of Taishan in the drywall claims at issue in this lawsuit. See *id.*

Moreover, KB and Carlton Fields had received Hogan Lovells’ notices of appearance for Taishan in the related MDL actions. As *Lloyd* held, “the receipt by Lloyd’s trial counsel of the [law] firm’s notice of appearance in the related . . . action was sufficient to invoke the requirement that Lloyd give notice to the [defendant] by serving the [law] firm before applying for the entry of default.” *Id.* at 643. Among several authorities, *Lloyd* relied on *Nat’l Union*, which vacated a default for failure to notify counsel whom the plaintiff knew represented the defaulted defendant in a related action. 799 So. 2d at 380. The appellate court rejected the trial court’s attempt to impose on the

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be presented to the lower court”); accord *Aills v. Boemi*, 29 So. 3d 1105, 1109-10 (Fla. 2010).

defaulted party a “requirement of making some effort to appear or expressing an intent to do so” in the defaulted action. *Id.*<sup>7</sup>

The Court should also reject KB’s other argument below that service of court papers on Taishan justified KB’s failure to notify known counsel before obtaining an ex parte clerk’s default. The law is clear: when notice to an attorney is required, “notice to the client is not an acceptable substitute for the required notice to opposing counsel.” *Miami-Dade Cty. v. Cribbs*, 937 So. 2d 1215, 1217 (Fla. 3d DCA 2006) (citation omitted). In *Tufo*, 603 So. 2d at 113, the court held that lack of notice to known counsel was sufficient to vacate a default final judgment even though the record contained certificates of service “on the several notices indicating service on [defendants] by mail.” The same was true in *Makes & Models*, where service copies of some of the filings in the case had been mailed to the correct address. 13 So. 3d at 180.

This Court explained why notice of an ex parte default application must go to known counsel regardless of whether it is served on defendant: “A default is a procedural matter within the control of the attorney, so plaintiff’s counsel should contact the attorney known to be representing a defendant to determine whether the latter intends to proceed in the matter before

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<sup>7</sup> KB relies on the dissent in *Nat’l Union*. (App. Br. at 32).

causing a default to be entered.” *Makes & Models*, 13 So. 3d at 181 (quoting *Gulf Maint. & Supply*, 543 So. 2d at 816). Moreover, the requirement is undergirded by expectations of “civility” and “professionalism,” *id.* at 182, required of lawyers who are also officers of the court.<sup>8</sup> This Court admonished that “these are not difficult concepts to grasp, *post-Lloyd.*” *Id.* Five years after *Lloyd* and four years after *Makes & Models*, KB’s lawyers did not grasp those concepts when they applied for ex parte defaults.

The obligation of lawyers to give notice of default to other lawyers, regardless of notice to the defendant, is heightened in a case like this involving foreign defendants facing thousands of similar tort claims from another country. From Taishan’s perspective, those foreign claims under a foreign country’s legal system had more than “a general thematic connection.” (App. Br. at 20). When Taishan was defaulted in MDL drywall cases in which KB had appeared, it hired Hogan Lovells as its U.S. counsel. Hogan Lovells spent years trying to undo those defaults, including the period

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<sup>8</sup> KB’s reference to the Rules of Professional Conduct is a true red herring. (App. Br. at 36-37). KB itself admits that “the case law does not rely on the Florida Rules of Professional Conduct.” *Id.* at 36. Instead, the expectations of civility and professionalism identified by this Court in *Makes & Models* arise from the policy of avoiding unnecessary and unfair defaults. 13 So. 3d at 181-82.

in 2013 when Carlton Fields cut off communications with Hogan Lovells and filed its own default applications in secret.

As KB points out, “Taishan is not a corporation on the New York Stock Exchange with banks [sic] accounts in every major U.S. city.” (App. Br. at 56). Taishan’s principal place of business is on another continent, 7,900 miles from Charlotte County. Taishan necessarily had to rely on its U.S. counsel to defend it against U.S. drywall claims. Florida is a global marketplace, and the foreign companies who trade here have a right to rely on the civility and professionalism of Florida lawyers to not take unfair advantage of the U.S. legal system. KB’s lawyers at Carlton Fields failed in their duty. The *Lloyd* two-prong test is satisfied, the ex parte clerk’s defaults entered without notice to known counsel were invalid, and the Court should affirm the vacatur of those defaults.

### **III. JUDGE GENTILE PROPERLY VACATED THE RESULTING DEFAULT DAMAGES REPORTS AND ORDER**

On several independent grounds identified by Judge Gentile, this Court should affirm the vacatur of the reports and recommendations of the magistrate (A.337, 340) and the Amended Default Order (A.345).

First, as discussed above, vacating the clerk’s defaults necessarily negated the subsequent default proceedings and rendered the subsequent

Amended Default Order void. (A.1015) (quoting *Makes & Models*, 13 So. 3d at 182). Once Judge Gentile properly exercised his discretion to vacate the clerk's defaults, he had "no discretion" and was "obligated to vacate the judgment." *Rodriguez*, 235 So. 3d at 987-88 (citation omitted).

Second, the reports and Amended Default Order were independently void for the same reason that the clerk's defaults were invalid: KB also failed to give Taishan's known U.S. counsel notice of the 2013 default damages proceeding. (A.1015) (quoting *Tufo*, 603 So. 2d at 113 ("the default judgment entered without notice is also void")). KB does not address that distinct consequence of its separate failure to notify known counsel of the default damages proceeding. (App. Br. at 48) (addressing only notice of damage hearing to defendants, not to defendants' counsel). Nor does KB attempt to distinguish *Tufo* on that basis. See *id.* at 34 (KB's only citation to *Tufo*). Thus, any objection to Judge Gentile's ruling on those grounds was waived. See *Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) ("An issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief.").

Third, the Court should affirm the vacatur of the magistrate's reports and the Amended Default Order because "the evidence submitted—a plaintiff-generated list of damages—was not a sufficient basis for fixing the

unliquidated property damages in this case.” (A.1016). KB admits that its “damages were unliquidated.” (App. Br. at 49). Assessing unliquidated default damages without a noticed evidentiary hearing is a “fundamental error” that renders any subsequent judgment “void.” *Ciprian-Escapa v. City of Orlando*, 172 So. 3d 485, 488 (Fla. 5th DCA 2015). A court may vacate a default judgment under Rule 1.540(b)(4) because of the failure to assess unliquidated damages in a noticed evidentiary proceeding. *See Krueger v. Ponton*, 6 So. 3d 1258, 1262 (Fla. 5th DCA 2009). KB also waived any objection to Judge Gentile’s unliquidated damages ruling; KB substantively addressed only the separate ground that the magistrate fixed damages without a jury trial although KB’s complaint requested a jury trial. (App. Br. at 49-50).<sup>9</sup> The Court should affirm the vacatur of the magistrate’s reports and the Amended Default Order.

#### **IV. KB’S OTHER ARGUMENTS HAVE NO MERIT**

##### **A. The Record Contains More Than Sufficient Evidence that KB Knew about Hogan Lovells**

KB’s primary argument on appeal is that Judge Gentile did not have sufficient evidence for his rulings. *See Shere v. State*, 742 So. 2d 215, 218

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<sup>9</sup> On the authority of *Curbelo*, 571 So. 2d at 444, Taishan does not seek to defend the ruling on the lack of a jury trial.

n.7 (Fla. 1999) (holding that a party “cannot raise the sufficiency of the evidence for the first time on appeal”). As shown above, KB cannot reasonably disclaim that the record was sufficient to find that KB and Carlton Fields knew that Hogan Lovells represented Taishan for U.S. drywall claims and intended to defend Taishan on those claims.

Instead, KB’s argument seems to be that the Court should reverse Judge Gentile because Taishan itself “provided no competent substantial evidence to support its belated motion, as was its obligation.” (App. Br. at 20-21). KB cites no authority to support that claimed “obligation,” nor is there any. In *Makes & Models*, the Court reversed a trial court’s erroneous refusal to vacate the clerk’s default, which relied on the fact that the defendant’s “motion was not verified or sworn and that [defendant] had not filed any affidavits in support of its motion.” 13 So. 2d at 180; *compare* App. Br. at 21 (stating that Taishan “filed no affidavit from anyone”).

KB cannot avoid or diminish the crucial Hough affidavit and letter to Hogan Lovells showing that KB and Carlton Fields knew the lawyers who intended to defend Taishan in these drywall claims. It doesn’t matter that the “pre-suit letter” was among the “extensive evidence” that KB filed. (App. Br. at 21). In *Lloyd*, critical evidence similarly came from an “affidavit executed

by [plaintiff's] trial counsel.” 981 So. 2d at 641. Nearly 150 years ago, the Florida Supreme Court set down the principle that defeats KB’s argument:

If the whole record contain evidence sufficient to make the plaintiff's case, he is entitled to it, though introduced by the defendant, even as the defendant is entitled to use any evidence produced by the plaintiff. The case stands upon the whole evidence before the court.

*Billings v. Stark*, 15 Fla. 297, 301 (1875). The record as a whole contains sufficient evidence to affirm the Order Vacating Defaults.

**B. KB Does Not Meaningfully Distinguish the Governing Precedent**

As shown above, the robust body of case law requiring notice to known counsel uniformly supports affirmance. KB cites no case granting the extraordinary relief that KB seeks here: appellate reversal of a circuit court’s exercise of broad discretion to vacate a clerk’s default. Lacking affirmative support, KB resorts to scattershot attempts to distinguish a few individual cases in the uniform case law. That effort fails both generally and specifically.

First, KB’s cramped and narrow approach to the case law is completely inconsistent with settled Florida policy—applied by Judge Gentile—under which the law “should be construed liberally to allow trial upon the merits rather than to encourage resolution of legal disputes by default.” *Nat’l Union*, 799 So. 2d. at 379; see also A.1015 n.1. This Court previously rejected an

appellant's similar urging of "a strict and literal interpretation of the default rules" in defense of an ex parte default without notice to counsel. *Makes & Models*, 13 So. 3d at 182.

The body of case law recognizing Florida's strong policy to resolve cases on their merits by liberally vacating improper defaults stands in stark contrast to KB's effort to nitpick individual precedents for inconsequential factual details that differ slightly from this case. What is important here and what requires affirmance is the remarkable uniformity of the case law: virtually every time a Florida appellate court has faced a failure to notify known counsel of default proceedings, it has sided with the defaulted party and reversed the trial court's erroneous failure to vacate the non-noticed default. See *M.W.*, 163 So. 3d at 521 (highlighting "sustained tradition of cases" so holding).

Most important, of course, are this Court's binding precedents in *Lloyd* and *Makes & Models*, which rejected in the strongest possible terms efforts like KB's to obtain secret defaults without notifying known counsel. The essential similarities between those two cases and this appeal are remarkable. In all three:

- The defaulted defendant's counsel had not yet entered an appearance in the case;

- The plaintiff’s counsel learned about defendant’s counsel through active participation in a related action;
- The facts satisfying the two-part *Lloyd* test were largely undisputed and derived primarily from *plaintiff’s* evidence.

KB does not analytically distinguish *Lloyd* and *Makes & Models* but just proclaims they are “dramatically different” and “totally different,” respectively.

(App. Br. at 29, 31).

KB offers a series of but-for hypotheticals that do not track the facts of *Lloyd* and are thus irrelevant. *Id.* at 29-30. On *Makes & Models*, KB asserts that “the federal [drywall] MDL did not **remotely** involve the ‘same issues’ as the [drywall] lawsuit filed by KB.” *Id.* at 31 (emphasis added). But the “issues” in the two related drywall actions were sufficiently the “same” to prompt KB to send pre-suit evidence-preservation notices for the same allegedly defective drywall involved in this lawsuit to the Hogan Lovells attorneys defending Taishan in the MDL, as Judge Gentile reasonably found. (A.1014).

KB’s attempt to explicate some of the other authority supporting affirmance here is equally ineffective. All of those cases are sufficiently similar to this case, and most important, they all reverse a circuit court’s failure to vacate based on the lack of notice to known counsel:

- *Nat’l Union*, 799 So. 2d at 380 – plaintiff learned about defendant’s counsel through related action. KB relies on the dissent.

- *Ole, Inc. v. Yariv*, 566 So. 2d at 814 – plaintiff’s counsel “clearly should have realized that [defendant] intended to defend this action.”
- *Tufo*, 603 So. 2d at 113 – defaulted defendants “had not filed any papers of record.”
- *Nico Leasing*, 668 So. 2d at 336 – “the plaintiff became aware that the defendant was or would be represented by counsel and desired actively to defend the case.”
- *Gulf Maint. & Supply*, 543 So. 2d at 816 – construing Florida Rules of Civil Procedure “liberally” to require notice of default application when plaintiff is “aware” of defendant’s counsel who intends to defend.
- *EGF Tampa Assocs.*, 532 So. 2d at 1320-21 – applying a “liberal construction” of the Rules and applying Florida “policy of liberality in the opening and vacating of default judgments” to reverse based on correspondence with out-of-state counsel.
- *Hanley v. Hanley*, 426 So. 2d 1230, 1232 (Fla. 2d DCA 1983) – faulting counsel for not affirmatively contacting other party’s counsel and holding that “deficiency in notice bears on due process.”
- *Smith v. Dawson*, 880 So. 2d 784, 785 (Fla. 2d DCA 2004) – attorney fee award vacated for lack of notice to counsel.
- *Muhtar*, 239 So. 3d at 776 – appellate counsel commended by court for conceding error and withdrawing appellate argument on client’s failure to notify defaulted defendant’s counsel.
- *Cribbs*, 937 So. 2d at 1217 – “service on the party’s attorney of record is required even when the party is served.”

But there is one noticeable difference between this case and all the other default cases that KB overlooks: the enormous size of the default

determination that KB was able to secure with affidavits and without attorney opposition. The prior decisions in this area reversed relatively small default judgments of less than \$100,000 and sometimes less than \$10,000. For example, in *Tufo*, the appellate court set aside a default judgment for \$18,000. 603 So. 2d at 113. Here, KB obtained a secret default determination for more than *100 times* that amount. What would be truly unprecedented is for this Court to reverse Judge Gentile's reasonable determination to vacate the defaults and thereby reinstate an error-ridden default order for more than \$18 million against a foreign defendant who had retained U.S. counsel who was actively defending it in directly related litigation and with whom KB's counsel communicated about the claims in the present lawsuit but then ceased communication upon the decision to file suit.

The Court should ignore KB's attempt to undermine the uniform "cases from the district courts of appeal law" as "common law" untethered to the Rules of Civil Procedure. (App. Br. at 27). That assertion is both wrong and irrelevant. *Lloyd* makes clear that the duty to notify known counsel of a default application arises out of Rule 1.500:

When the plaintiff is aware that the defendant is represented by counsel and intends to defend on the merits, Florida Rule of Civil Procedure 1.500(b) requires the plaintiff to serve the defendant with notice of the application for default and to present it to the court for entry. A clerk's default entered in accordance with

Florida Rule of Civil Procedure 1.500(a) under these circumstances is invalid and renders a resulting judgment void.

981 So. 2d at 640 (citation omitted). Even if the default notice case law were not so firmly rooted in the Rules, KB never says why that would be important, and it isn't. This Court must follow its binding precedent in *Lloyd* and *Makes & Models*. See *Chames v. DeMayo*, 972 So. 2d 850, 855 (Fla. 2007) (“the doctrine of stare decisis counsels us to follow our precedents”) (citation omitted).

KB also attempts to distinguish the uniform case law on notice to known counsel simply because Taishan filed its motion to vacate more than one year after entry of the Amended Default Order. (App. Br. at 35). But that fails for several reasons. First, obtaining a clerk's default without notice to known counsel renders the resulting judgment void, and Rule 1.540(b) exempts challenges to a void judgment from the Rule's one-year limit for other challenges. Second, KB actually cites no case that imposed a one-year limit in this setting; the proposed rule is a creature of their own wishful contortion of the procedural status.

Third, KB has fallen prey to the error of interpreting factual similarity as a rule of law. In many cases in which a plaintiff obtains a secret clerk's default without notice to known counsel, the resulting void judgment “first [comes] to

the knowledge of the defendants” when the plaintiff “attempt[s] to execute on the judgment.” *Tufo*, 603 So. 2d at 113; see also *Gulf Maint. & Supply*, 543 So. 2d at 815 (“first notice” from execution proceedings). Most plaintiffs naturally seek to enforce their default judgments shortly after obtaining them, so most motions to vacate are filed within a year of judgment. See, e.g., *Tufo*, 603 So. 2d at 113 (nine months); *Gulf Maint. & Supply*, 543 So. 2d at 815 (six months); *Ole, Inc. v. Yariv*, 566 So. 2d at 814 (“a matter of days”). But here, Taishan’s having to obtain relief from KB’s invalid default several years after entry is simply a function of KB’s complete inattention to its eight-figure purportedly final default judgment. KB abandoned the case after the 2013 Amended Default Order and did not seek to collect on the alleged judgment until 2019.

KB’s novel one-year rule would merely encourage gamesmanship by incentivizing tactical delays in the execution of unnoticed default judgments until after a year had passed. Ultimately, KB is arguing that Taishan should have no remedy for KB’s wrongful tactics of seeking a default multimillion-dollar recovery against defendants on another continent without ever just picking up the phone and alerting known US counsel. That is not and should not be the law in Florida. Judge Gentile recognized that Taishan was entitled

to relief, even after all these years, and that KB just needs to prove its entitlement to damages on the merits.

**C. The Failure to Provide Counsel with Notice of Default Made the Judgment Void under Binding Precedent**

KB cannot convincingly argue that the Amended Default Order in this case, if it is a judgment, is merely voidable and not void.<sup>10</sup> Two binding precedents from this Court, and persuasive authority from sister districts, directly hold that “[w]hen the plaintiff is aware that the defendant is represented by counsel and intends to defend on the merits, . . . [a] clerk's default entered . . . under these circumstances is invalid and renders a resulting judgment void.” *Lloyd*, 981 So.2d at 640; *accord Makes & Models*, 13 So. 3d at 182 (“invalid entry of the clerk’s default renders the final judgment void”); *Gulf Maint. & Supply*, 543 So. 2d at 817 (“the invalid entry of the default by the clerk under rule 1.500(a) in these circumstances renders the judgment void”).

In the face of that overwhelming binding precedent, the most that KB can do is to speculate that Judge Wallace was confused when he wrote unequivocally in *Lloyd* that judgments based on invalid clerk’s defaults are

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<sup>10</sup> KB made a void/voidable argument below only as to the issue of service on defendants themselves. (A.974).

“void.” (App. Br. 47). KB mentions the identical holding in *Gulf Maint. & Supply, id.* at 46-47, but does not claim that Judge Zehmer was confused about “void” judgments. KB does not mention Judge Villanti’s identical statement in the opinion for the Court in *Makes & Model*.

KB badly misinterprets *Winding Wood Condo. VI Ass’n v. Walls*, 196 So. 3d 489 (Fla. 2d DCA 2016). The central holding in *Winding Wood Condo* was that (unlike Taishan) the defendant failed to preserve for appeal its argument to set aside the clerk’s default based on a failure to notify counsel. *Id.* at 494 (citing *Tillman*, 471 So. 2d at 35). That was “the procedural posture” noted by KB that “required the defendant to argue that the judgment was void.” (App Br. at 46). This Court rejected the defendant’s direct assault on a final default judgment without first permissibly seeking to vacate the predicate clerk’s default. As the Court noted, the failure to notify counsel “was a matter that [defendant] might have argued as a ground for setting aside the default.” *Winding Wood Condo*, 196 So. 3d at 494. That is entirely consistent with the two-step analysis in the binding precedent of *Lloyd* and *Makes & Models* (cited throughout *Winding Wood Condo*), under which the failure to notify known counsel makes a clerk’s default “invalid,” which, in turn, “renders a resulting judgment void.” *Lloyd*, 981 So. 2d at 640; *accord*

*Makes & Models*, 13 So. 2d at 182 (“The invalid entry of the clerk’s default renders the final judgment void.”).

Even if the precedents were not so clear and binding, the rule that an invalid clerk’s default renders a resulting judgment void is consistent with more general principles of void judgments. In *Curbelo v. Ullman*, cited by KB as a leading case on void versus voidable (App. Br. at 49-50), the Florida Supreme Court explicitly distinguished between mistakes of law (voidable) and “issues of notice and participation,” including lack of notice to attorneys (void). 571 So. 2d 443, 445 (Fla. 1990) (citing *Ansel v. Kizer*, 426 So. 2d 671, 672 (Fla. 2d DCA 1982)). Cases involving notice to known counsel under Rule 1.500 have identified “due process considerations” that bar the use of ex parte clerk’s defaults. See, e.g., *Gulf Maint. & Supply*, 543 So. 2d at 816; *M.W.*, 163 So. 3d at 522 (“Notice is the first and most essential element of due process, and failure to give notice of a default, when required, makes a default void.”).

Moreover, a default entered without notice to known counsel “must be vacated without regard to whether the defendant can establish a meritorious defense or whether the defendant can demonstrate inadvertence or excusable neglect.” *Lloyd*, 981 So. 2d at 640. Similarly, “[i]f a judgment is void, a party is not required to demonstrate excusable neglect or a

meritorious defense.” *Hendrix v. Dep’t Stores Nat’l Bank*, 177 So. 3d 288, 290 (Fla. 4th DCA 2015). KB cannot overcome the explicit governing precedent and other persuasive authority.

If a default judgment without notice to counsel were merely voidable, it would reward precisely the type of behavior that KB pursued here: secretly obtain a default judgment without giving notice to known defense counsel, sit on it for a long period of time, and then plead the passage of time to deny relief once the scheme is finally discovered. That is not, and cannot be, the law, under which every wrong should have a remedy. Consistent with binding precedent, Florida’s strong merits policy, and the duty of courtesy and professionalism, Judge Gentile provided the appropriate remedy. This Court should affirm.

### **CONCLUSION**

Eighty years ago, the Florida Supreme Court made clear that defaults are “not [a] procedure intended to furnish an advantage to the plaintiff so that a defense may be defeated or a judgment reached without the difficulty that arises from a contest by the defendant.” *Coggin v. Barfield*, 8 So. 2d 9, 11 (Fla. 1942). And this Court has held that “a default is not designed to give a strategic advantage to the plaintiff so that it may obtain a judgment without

dealing with the defendants challenges and defenses.” *Makes & Models*, 13 So. 3d at 181 (citation omitted).

All Taishan is seeking here, and what Judge Gentile recognized was due under well-settled Florida law, is the opportunity to present its defenses to KB’s claims and to resolve those claims on the merits. KB strategically denied Taishan that opportunity many years ago when it failed to pick up the phone and let Taishan’s U.S. drywall counsel, Hogan Lovells, know about a lawsuit and default applications on the same claims about which KB had already corresponded with that counsel. That was wrong under any standard of review.

The Court lacks jurisdiction because the nonfinal Order Vacating Defaults did not grant relief from a judgment. If the Court exercises jurisdiction, it should affirm the circuit court’s vacatur of the invalid clerk’s defaults and the resulting void judgment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of May, 2021, a true and correct copy of the above and foregoing was filed and served by using the

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