

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO.: 4D23-1049
LT CASE NO.: 502021CA006826XXXXMB

RELIANCE RIDGE, LLC and WHITE OAK RUN, LLC,

Appellants,

v.

MAGNIFICO CAPITAL, LLC,

Appellee.

APPELLEE'S ANSWER BRIEF

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PREFACE

Appellant Reliance Ridge, LLC will be referred to as “Reliance Ridge”. Appellant White Oak Run, LLC will be referred to as “White Oak Run”. Collectively Reliance Ridge and White Oak Run will be referred to as “Appellants”.

Appellee Magnifico Capital, LLC will be referred to as “Magnifico Capital” or “Appellee”.

Citations to the general record/index on appeal are referred to page as “R.____”.

STATEMENT OF THE CASE AND OF THE FACTS

The underlying civil action originates from an unsecured loan transaction between WOR Holdings, LLC (“WOR Holdings”) and Appellants made on April 24, 2018 evidenced by a \$3,070,000.00 Promissory Note (“Note”) that was subsequently replaced by a \$2,000,000.00 Amended Promissory Note (“Amended Note”) executed on July 30, 2018. (R.17)

Reliance Ridge was formed on January 12, 2017. (R.1628). White Oak Run was formed on June 8, 2017. (R.1632) Both were formed by Brian Mylett (R.1382-3). As of April 2018 WOR Holdings owned 100% of the membership interests in Appellants. (R.1674) Appellants owned a West Virginia drug treatment facility. (R.1382) The facility was known at the time as “White Oak Run Treatment Center”. (R.108)

Harmony Ridge Holdings, LLC (“Harmony Ridge Holdings”) was formed on April 2, 2018 to acquire the facility from WOR Holdings and operate it as Harmony Ridge Recovery Center. Allerand Recovery Holdings, LLC (“Allerand Recovery Holdings”) and Harmony Recovery Group, LLC (“Harmony Recovery Group”) were each 50% members in Harmony Ridge Holdings. Harmony Recovery Group was appointed as the initial manager of Harmony Recovery Holdings. Louis Devaleix was the

manager of Harmony Recovery Group. Richard Sabella was the manager of Allerand Recovery Holdings. (R.1636-73)

On April 24, 2018 WOR Holdings sold 100% of the membership interests in Appellants to Harmony Ridge Holdings. The purchase price was \$3,160,000.00 payable \$90,000 immediately, delivery of the \$3,070,000.00 Note executed by Appellants, and a guaranty by Harmony Ridge Holdings of a consolidated loan agreement with Allerand Recovery Holdings as lender. As part of this transaction there was no loan agreement, security agreement or other loan documents pledging collateral to be executed and delivered by Appellants for the \$3,070,000.00 Note. (R.1674-80)

Pursuant to the initial approved budget set forth in Harmony Ridge Holdings' LLC Agreement, the drug treatment facility was anticipated to start showing a profit in December 2018. (R.1660)

On April 25, 2018 Appellants executed and delivered the unsecured Note to WOR Holdings in the amount of \$3,070,000.00. (R.17)

According to Richard Sabella's sworn statement, in July 2018, Allerand Recovery Lease Holdingco, LLC, an Allerand related entity, which was leasing medical space from 2521 Metrocentre, LLC ("Metrocentre"), an entity

affiliated with Brian Mylett, gave Metrocentre a concession that restored the rent to a higher amount in exchange for WOR Holdings reducing the principal amount owed by Appellants from \$3,000,000.00 to \$2,000,000.00. (R.737)

On July 30, 2018, Appellants executed the unsecured Amended Note in the amount of \$2,000,000.00 to give effect to this reduction.

(R.737,1687-92) The Amended Note had the following defined terms:

Principal Amount: \$2,000,000

Maturity Date: April 30, 2020

Net Profits After Breakeven: In respect of any month following the month in which Breakeven (as defined below) occurs, that amount of money as shall be the excess of (i) the actual revenue generated and received in such month by the treatment facility now known as White Oak Run (“WOR”) over (ii) the cash expenses actually paid in respect of the operations of WOR in such month.

Breakeven: That point in time at which Borrowers shall have (i) paid in full all amounts owing by them under a certain \$1,025,500 loan facility to Allerand Recovery Holdings, LLC; (ii) established from cash flow of WOR an operating reserve in the amount of \$400,000; and (iii) made distributions to the parent company of Borrowers such as to cause such parent company to have experienced an internal rate of return of 9% per annum in respect of all monies or other things of value

contributed to the capital of Borrowers on or after the Date of Note.

Put simply, “Net Profits after Breakeven” was defined as the profits from the White Oak Run (“WOR”) drug treatment facility for each month after Breakeven occurred. (R.29)

“Net Profits after Breakeven” only applied to monthly payments of mandatory principal and not to the amount of principal due and payable by Appellants on the Maturity. As set forth in the Amended Note, the monthly payments of mandatory principal could only be collected from the “Net Profits after Breakeven”. The terms of the Amended applicable to the argument raised by Appellants provide in pertinent part as follows:

FOR VALUE RECEIVED, WHITE OAK RUN, LLC, . . . and RELIANCE RIDGE, LLC, . . . “Borrowers” . . . HEREBY PROMISE TO PAY . . . the Principal Amount (or so much thereof as may be outstanding from time to time), together with accrued and unpaid interest thereon as set forth in this Note.

. . .

The obligations of Borrowers under this Note are joint and several.

. . .

- (i) Commencing on the 15th day of the month following the month in which **Breakeven** shall have occurred, and on the 15th day of each calendar month thereafter until all amounts evidence by this Note

have been paid in full, Borrowers shall make a **mandatory payment of principal** in an amount equal to the **Applicable Percentage (as defined below) of the Net Profits after Breakeven** in respect of the immediately preceding calendar month; and

- (ii) **Unless sooner paid in full, all amounts of principal evidenced by this Note shall be due and payable by Borrowers on the Maturity Date.**

All payments received by Lender hereunder **shall be applied to the reduction of the Principal Amount.** **“Applicable Percentage” means** (A) 70% until Lender shall have received \$70,000 under the provisions of clause (i) above; (B) 60% until Lender has received \$60,000 under the provisions of clause (i) above in addition to the amounts referred to in clause (a) immediately preceding this clause; and (C) 50% in respect to all other payments to Lender contemplated in clause (i) above.

If Borrowers fail to timely make any payment due under this Note, the outstanding Principal Amount shall immediately become due and payable at the option of the holder of this Note, **notwithstanding the Maturity Date.**

...

NOTWITHSTANDING ANY CONTRARY PROVISION HEREOF OR ANY OTHER AGREEMENT, EXCEPT FOR THE PAYMENT OF THE INITIAL PAYMENT (WHICH SHALL BE A GENERAL UNSECURED OBLIGATION OF BORROWERS), THE AMOUNTS EVIDENCED BY THIS NOTE MAY ONLY BE COLLECTED FROM THE **APPLICABLE PERCENTAGE OF THE NET PROFITS AFTER BREAKEVEN**, IT BEING UNDERSTOOD THAT THE AMOUNT OF BORROWERS' OBLIGATIONS HEREUNDER SHALL IN ALL EVENTS AND AT ANY TIME BE LIMITED TO THAT AMOUNT OF MONEY AS SHALL CONSTITUTE THE **APPLICABLE PERCENTAGE OF THE TOTAL AMOUNT OF NET PROFITS**

AFTER BREAKEVEN GENERATED BY BORROWERS AS OF SUCH TIME. NEITHER BORROWER NOR ANY OTHER PERSON OR ENTITY SHALL BE PERSONALLY OBLIGATED TO MAKE ANY PAYMENT IN RESPECT OF THIS NOTE EXCEPT TO THE EXTENT SET FORTH IN THIS PARAGRAPH.

(R.29-34)(Emphasis Added in Bold and Underline)

On February 19, 2019, Allerand Recovery Holdings provided Appellants and Harmony Ridge Holdings a Notice of Default and Acceleration of various loan documents, but the only stated defaults in the notice were of non-monetary defaults of various sections of a Consolidated Loan Agreement dated as of April 23, 2018.¹ (R.139,262-4,737)

On February 20, 2019, Allerand Recovery Holdings removed Harmony Recovery Group as manager of Harmony Recovery Holdings and appointed itself as the manager. (R.139,266-8)

As of February 20, 2019, Allerand Recovery Holdings was effectively in sole control of managing both Appellants when it became manager of Harmony Ridge Holdings, which was the sole member of each Appellant. Pursuant to Section 6 of each operating agreement the Appellants were

¹ The loan agreement and loan documents referenced in this letter are not part of the Record. However, the Amended Note does reference a \$1,025,500.00 loan facility. (R.38)

managed by their sole member. (R.1629,1633)

As established by Appellant's default, Breakeven as defined in the Amended Note, occurred in March 2019.² (R.19)

In March 2019, which was the month when Breakeven occurred (as established by the Default) and a month after Allerand Recovery Holdings had gained control of the management and affairs of both Appellants, Richard Sabella orchestrated a series of transactions that ultimately rendered Appellants insolvent and transferred all assets, including control of the drug treatment facility, to a newly created company controlled by Richard Sabella. The initial step included a series of simultaneous transactions that occurred on March 18, 2019. (R.1693-9)

On March 18, 2019, Allerand Recovery Holdings, Gary Troast, and Edward Welke organized Harmony Ridge Recovery Center, LLC ("Harmony Ridge Recovery Center"), as a newly created West Virginia limited liability

² Whether Breakeven occurred is irrelevant. As set forth by the terms of the Amended Note, Breakeven was only relevant as to whether mandatory monthly payments of principal had to be paid prior to Maturity Date. Magnifico Capital sought and obtained a default judgment based upon the failure to pay the \$2,000,00.00 due and payable at Maturity Date. The trial court awarded prejudgment interest from May 1, 2020 not April 15, 2019. (R.1135-55;1350-1)

company. (R.1693)

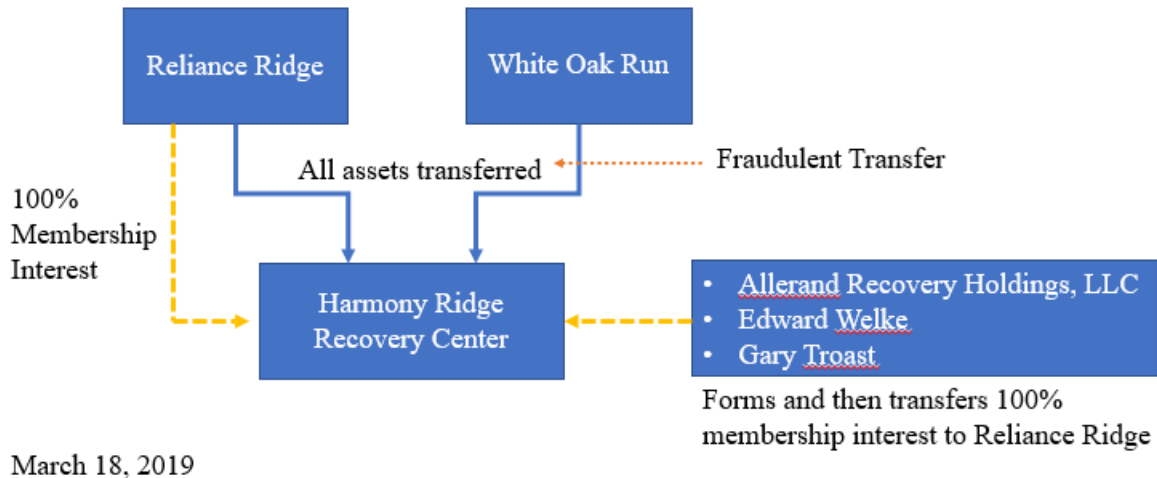
On March 18, 2019, Allerand Recovery Holdings, Gary Troast, and Edward Welke assigned and transferred 100% of their membership interest in Harmony Ridge Recovery Center to Reliance Ridge. (R.1693)

On March 18, 2019, Reliance Ridge executed a single member operating agreement of Harmony Ridge Recovery Center, which acknowledged that Reliance Ridge acquired all of the interest of the original organizers of Harmony Ridge Recovery Center. (R.1697)

On March 18, 2019, Appellants assigned, conveyed, and transferred all of their assets to Harmony Ridge Recovery Center. This transfer included operational control of the drug treatment facility. (R.1695)

Richard Sabella signed all of the documents that were executed on March 18, 2019 that transferred Appellants' assets, including the drug treatment facility, to Harmony Ridge Recovery Center. As a result, Richard Sabella made it impossible for Appellants to earn any revenue from operating the WOR Facility. (R.1694,1696,1699)

The March 18, 2019 transactions are visually depicted in the below diagram:



After Richard Sabella had transferred all assets and control of the WOR facility from Appellants to Harmony Ridge Recovery Center, he then orchestrated the next step in the scheme by removing Harmony Recovery Group from any involvement in Harmony Ridge Holdings (R.1824-58)

On March 21, 2019 Allerand Recovery Holdings, Harmony Ridge Holdings, and Appellants filed a lawsuit in the 15th Judicial Circuit styled *Harmony Ridge Holdings, LLC et al. v. Harmony Recovery Group, LLC*. (R.1824-58)

On March 25, 2019 Allerand Recovery Holdings, Harmony Ridge Holdings, and Appellants (“Allerand Parties”) and Harmony Recovery Group, Louis Devaleix, and other individuals (“HRG Parties”) entered into a Settlement Agreement. Pursuant to the Settlement Agreement all interest

of Harmony Recovery Group in Harmony Ridge Holdings was redeemed effective as of March 25, 2019. (R.1824-58)

As of March 25, 2019 Allerand Recovery Holdings was the sole member of Harmony Ridge Holdings, which was the sole member of Reliance Ridge, which was the sole member of Harmony Ridge Recovery Center. Harmony Ridge Recovery Center was the owner and operator of the WOR drug treatment facility. (R.1693-99;1825-58)

Richard Sabella then orchestrated the next step in his scheme by having Reliance Ridge transfer its 100% membership interest in Harmony Ridge Recovery Center to Allerand Recovery Holdings. According to an affidavit by Richard Sabella, Allerand Recovery Holdings became the owner of 100% of the membership interest in Harmony Ridge Recovery Center by agreements and notices, all dated as of March 25, 2019. (R.139)

The March 2019 transactions orchestrated by Richard Sabella made Appellants' insolvent. As of March 25, 2019 Appellants had no control or ownership of the WOR drug treatment facility. Appellants were thus unable to generate any further monthly profits from the drug treatment facility. (R.1693-99;1825-58)

As established by the Default, Appellants did not make any monthly

payments of principal in April 2019 or any subsequent months prior to Maturity Date. (R.19, ¶25)

According to an affidavit by Richard Sabella, in December 2019 Brian Mylett became a debtor in the Mylett Bankruptcy Case. (R.142) Richard Sabella was aware Brian Mylett was subject to the bankruptcy proceedings. (R.133) In the bankruptcy proceeding Brian Mylett listed on his schedule of assets a 2018 note from Appellants to WOR Holdings due April 2020 in the amount of \$2,000,000.00. (R.133,304)

As established by the default, Appellants failed to pay all amounts of principal due under the Amended Note on the Maturity Date of April 30, 2020. (R.19-20, ¶¶26-27)

On November 9, 2020, the Chapter 7 bankruptcy trustee filed a Notice of Abandonment of any interest in WOR Holdings and the 2018 Note from Appellants. (R.143,315) As set forth in the Notice of Abandonment the abandonment would be deemed approved without necessity of hearing or order if no objection was filed within fourteen days of the notice. (R.315)

On December 7, 2020, approximately one month after the bankruptcy trustee filed a notice of abandonment of any interest in the 2018 Note from Appellants, Allerand Capital, LLC (“Allerand Capital”) organized Horizon

Holdingsco, LLC (“Horizon Holdingsco”). Allrand Capital was the initial sole member of Horizon Holdingsco. (R.1756) Richard Sabella is the manager of Allrand Capital. (R.1716)

On December 7, 2020, Michael D. Moccia, Esq. organized LOMDM Management, LLC (“LOMDM”). (R.1707-10) Michael D. Moccia, Esq. is the sole authorized member of LOMDM. LOMDM are the initials for Law Office of Michael D. Moccia. (R.858)

On December 7, 2020, Allrand Capital, as the sole member, and LOMDM, as the initial non-member Manager, executed an operating agreement for Horizon Holdingsco. (R.1756-8) Section 4 of the operating agreement states as follows:

4. **Management of the Company.** The business and affairs of the Company shall be managed by a single non-member manager (the “Manager”), who shall have the exclusive power and authority, on behalf of the Company, to take any action of any kind not inconsistent with the provisions of this agreement and to do anything and everything it deems necessary or appropriate to carry on the business and purposes of the Company. **Unless and until replaced by the Member in a written instrument, the Manager shall be LOMDM.** The Manager shall at all times serve without compensation of any kind. (Emphasis Added)

Allrand Capital never replaced LOMDM as Manager of Horizon Holdingsco. (R.1411) Although the operating agreement listed Allrand Capital as the

sole member and LOMDM as the Manager, the Articles of Organization for Horizon Holding transmitted to the Division of Corporations on December 4, 2020 did not list a manager and erroneously listed Kay Caliendo as the only authorized member. (R.1702-5)

According to Richard Sabella, Horizon Holdingco was organized for the sole purpose of liquidating a “bunch of other companies”, including Appellants. (R.1394). Richard Sabella aggregated “all of [Allerand’s] no longer useful companies” into Horizon Holdingco. (R.1399) Richard Sabella’s plan was for Horizon Holdingco to be formed only to be dissolved, but the “no longer useful companies” would never be dissolved. (R.1399,1416)

Appellants were never dissolved. Michael D. Moccia, Esq. testified that Appellants could have been dissolved (R.1459-60), but they were purposefully never dissolved (R.1483). Michael D. Moccia, Esq. testified it was purposeful that Articles of Dissolution were not filed for either Appellant. (R.1484) Certificates of Existence for Reliance Ridge dated October 19, 2021, February 24, 2022, March 16, 2022, and September 20, 2022 were admitted into evidence at the September 27, 2022 evidentiary hearing on the verified amended motion to vacate default. (R.1623-6)

On December 8, 2020, Allerand Recovery Holdings and Harmony Ridge Holdings quitclaimed all of their membership interest in Appellants and fourteen other entities to Horizon Holdingco pursuant to a Resignation of Agent, Officer or Manager and Quitclaim Assignment of Equity Interests in Business Entities executed as of December 8, 2020 (“Quitclaim Assignment”). Richard Sabella executed the Quitclaim Assignment in his individual capacity and as an authorized signatory for eight entities, including Allerand Capital, Allerand Recovery Holdings, and Harmony Ridge Holdings. The membership interests in the sixteen limited liability companies, including both Appellants, were transferred to Horizon Holdingco pursuant to the Quitclaim Assignment. As of this date, Horizon Holdingco owned 100% of the membership interest in both Appellants. (R.1711-2)

On December 11, 2020, just four days after Horizon Holdingco was organized, Allerand Capital withdrew and resigned as the sole member and manager³ of Horizon Holdingco. (R.1409,1716) Richard Sabella testified that he wanted the world to understand that he “was no longer liable for any

³ It is unknown why Allerand Capital resigned as the manager when LOMDM was appointed as the initial manager of Horizon Holdingco pursuant to the December 7, 2020 operating agreement and was never replaced.

actions that this company took.” (R.1398) According to Richard Sabella, “[t]he idea was Horizon [Holdingsco] was no longer going to be a Richard Sabella controlled company.” (R.1400). Yet, Richard Sabella organized Horizon Holdingsco to be controlled at all times by LOMDM, which was controlled by his attorney, Michael D. Moccia, Esq.⁴ (R.1756-8)

On December 15, 2020, WOR Holdings assigned the Note and Amended Note to Magnifico Capital (R.18,20,35). WOR Holdings endorsed the original Note to Magnifico Capital. (R.28)

On January 11, 2021, one month after Allerand Capital withdrew and resigned as the sole member and manager of Horizon Holdingsco, Allerand Capital, Allerand Recovery Holdings, and Harmony Ridge Holdings, submitted to LOMDM a Notice of Abandonment of All Interests in Horizon Holdingsco and all its Subsidiary Entities. The entities managed by Richard Sabella through a notice by Richard Sabella notified LOMDM that they

⁴ Richard Sabella testified that Michael D. Moccia, Esq. was both his attorney and acting as the dissolution agent of Horizon Holdingsco from June 9, 2021 through July 18, 2021. (R.1481) Based upon Richard Sabella’s testimony he thought that making his attorney control the company that he organized as opposed to him was significant for the world to believe the company was not controlled by him, directly or indirectly. (R.1400)

abandoned any right, title, or interest in any entities owned or controlled by Horizon Holdingco. (R.1717-8) However, there was no interest to abandon as the entities managed by Richard Sabella had already transferred 100% of the membership interest in the Subsidiary Entities to Horizon Holdingco. (R.1711-2)

On January 12, 2021, one day later, Allerand Capital, as former member, and LOMDM, as Manager and dissolution agent, executed Articles of Dissolution of Horizon Holdingco. The Articles of Dissolution state that the sole material assets of Horizon Holdingco are interests in certain limited liability companies described in Schedule A. Both Appellants are included in Schedule A. The Articles of Dissolution specifically disclose that LOMDM is the Manager of Horizon Holdingco. (R.1719-21)

On June 1, 2021, Magnifico Capital initiated this action by filing the Complaint. (R.16-48) The Complaint alleges in pertinent part to this appeal as follows:

9. On or about July 30, 2018 White Oak Run and Reliance Ridge executed an Amended and Restated Promissory Note as of July 1, 2018 in the principal amount of \$2,000,000.00 payable to WOR Holdings, a Delaware limited liability company, with a Maturity Date of April 30, 2020 (“Amended and Restated Promissory Note”).

...

22. Reliance Ridge and White Oak Run were obligated to make

payments of the amount evidenced by the Amended and Restated Promissory Note as follows:

- a. Mandatory monthly payment of principal in an amount equal to the Applicable Percentage (as defined in the Amended and Restated Promissory Note) on the Net Profits after Breakeven (as defined in the Amended and Restated Promissory Note) commencing on the 15th day of the month following the month in which Breakeven (as defined in the Amended and Restated Promissory Note) shall have occurred; and
- b. All remaining amounts of principal due and payable on the Maturity Date of April 30, 2020.

...

26. Reliance Ridge and White Oak Run failed to pay the Amended and Restated Promissory Note when due on the Maturity Date of April 30, 2020.

...

28. Reliance Ridge and White Oak Run owe Magnifico Capital \$2,000,000.00 in principal together with interest from the date of default at the Default Rate, which is 18% per annum or the highest non-usurious rate permitted under applicable law, whichever is less.

As of June 1, 2021, Horizon Holdingco still owned 100% of the membership interest in both Appellants. (R.1465-8,1711-2)

On June 9, 2021, before either Appellant was served, Michael D. Moccia, Esq. became aware of this lawsuit. (R.1448-9) Michael D. Moccia, Esq. became aware of this lawsuit from an email sent by Richard Sabella enclosing a copy of the summons and complaint filed in this action. (R.1449,1479) As of June 9, 2021, Horizon Holdingco still owned 100% of the membership interest in both Appellant. (R.1465-8,1711-2)

Magnifico Capital obtained service of process on Reliance Ridge on June 21, 2021 but no later than June 30, 2021. (R.51-56) Reliance Ridge's designated Registered Agent was served on June 30, 2021. (R.51)

Magnifico Capital obtained service of process on White Oak Run on June 21, 2021 but no later than July 17, 2021 (R.63-68) White Oak Run's designated Registered Agent was served on July 17, 2021 (R.63)

As of July 19, 2021, Horizon Holdingco still owned 100% of the membership interest in both Appellants and Michael D. Moccia, Esq. was still managing of both Appellants. (R.1465-8)

Instead of having Appellants defend the lawsuit, Michael D. Moccia, Esq. decided to have Horizon Holdingco abandon any membership interest in Appellants. (R.1465-8)

On July 20, 2021, Michael D. Moccia, Esq., as authorized member of LOMDM, as dissolution agent of Horizon Holdingco, as sole owner of White Oak Run, issued a Certificate of Membership Interest of 100% Membership Interest in White Oak Run and a Certificate of Membership Interest of 100% Membership Interest in Reliance Ridge to Hare & Co., LLC ("Hare & Co") FBO Florida Department of Financial Services. (R.1739-40)

Michael D. Moccia, Esq. was asked why he sought to have Horizon

Holdingco abandon the membership interest of Appellants instead of having Appellants defending the lawsuit. Michael D. Moccia, Esq. testified as follows:

Q. When you did the submission to the Department of Financial Services, Horizon—based upon your testimony, Horizon Holding Co. would have been the sole member of Reliance Ridge and White Oak Run, correct?

A. Yes.

Q. Why didn't they defend the lawsuit, instead of submitting the membership interest in White Oak Run and Reliance Ridge to the Florida Department of Financial Services?

A. When you say the lawsuit, you mean the current lawsuit?

Q. Yeah, the current lawsuit.

A. Well, so the ball—as you can see, the ball started getting rolling on this back in, you know, January or so. You know, once we took a look at the lawsuit, we just went ahead with what we had planned on doing because at that time we did not believe that there was anything in that lawsuit to be concerned about. We believed that the lawsuit was an unliquidated sum. And because we believe it was an unliquidated sum, it was going to require an affidavit. And our position on that was anybody providing an affidavit would be perjuring themselves, and we would just address that if there were any future claims for fraudulent transfer or whatever.

It wasn't until that the motion for default judgment was filed that we realized that we were trying to claim that this was [sic] a liquidated sum

And it wasn't really until the time that the motion was filed stating that

it was a liquidated sum that we thought there was really anything to defend.

Q. But you were aware of the lawsuit on . . . June 8, 2021, or around that time?

A. If that's the date that I put in the privilege log, then that would be correct, or around that time.

Q. And you would have been aware of the lawsuit as of July 20, 2021?

A. Yes.

Q. And as of July 19, 2021, the membership interest in White Oak Run and Reliance Ridge had not yet been remitted to the Department of Financial Services, Division of Unclaimed Property?

A. That would be a fair, fair characterization.

Q. So instead of Horizon Holding Co. deciding to have White Oak Run and Reliance Ridge defend the lawsuit, it chose instead to remit the membership interest to the Department of Financial Services, Division of Unclaimed Property?

A. Well, as the dissolution agent holding LLCs that were believed to be valueless, there was no point in defending a lawsuit where it didn't seem that there was any reason to believe that it was collectable....

(R.1465-8)

Hare & Co., LLC is Massachusetts limited liability company organized on July 3, 2012. (R.1627)

As of July 20, 2021 Hare & Co owned 100% of the membership interest

in both Appellants. (R.1739-40) As of July 20, 2021, pursuant to Appellants' operating agreements, Hare & Co was managing the business and affairs of Appellants. (R.1628-35)

On July 24, 2021, Kay Caliendo, Allerand Capital, mailed a summons and complaint filed in this action to S. Brian Bull, Esq., attorney for Magnifico Capital, with the handwritten notation "Return to Sender. Allerand Recovery has no interest in Harmony Ridge Holdings LLC." on the first page of the summons. (R.1046-9;1050-88)

On August 10, 2021, Magnifico Capital filed a motion for default by the trial court against Appellants. In ¶2 of the motion, Magnifico Capital references Magnifico Capital's discovery that "Appellants engaged in a series of fraudulent transfers with the actual intent to hinder and delay ... transferred all assets to a third party and ceased all business operations ... attempted to make themselves unamenable to service of process." (R.69-75)

On August 10, 2021, on the same day of the motion for default, Michael D. Moccia, Esq. mailed the original membership certificates for both Appellants to The Depository Trust Company. (R.1730,1739-40)

On August 25, 2021, the motion for default was noticed for hearing on

September 22, 2021. (R76-8)

On September 22, 2021, the Court conducted a Zoom hearing on the motion for default. (R.85-6) Michael D. Moccia, Esq. did not make an appearance in this lawsuit, but he did attend the Zoom hearing to observe the proceedings. (R.1750) The trial court granted the motion for default and entered a default against Appellants on September 23, 2021. (R.85-6)

On October 14, 2021, Allerand Recovery Holdings filed a motion to intervene. (R.105-319)

On March 22, 2022, the trial court conducted an evidentiary hearing on the motion to intervene. (R369-71)

On April 8, 2022, the trial court denied the motion to intervene. (R.369-71)

On April 11, 2022 Horizon Holdingco executed an Assignment of LLC Interest in the Course of Dissolution. In this assignment Horizon Holdingco states that it is the owner of the interests in Appellants. However, Horizon Holdingco does not state how it became the owner of the interests. In this assignment Horizon Holdingco states that it assigns all interest in Appellants to ARHM Investco, LLC (“ARHM Investco”) (R.1872-3)

On April 11, 2022, ARHM Investco executed a superseding operating

agreements for Appellants. (R.1874-79)

On April 11, 2022, Appellants filed a verified motion to vacate default. (R.372-409)

On August 23, 2022, Appellants filed a verified amended motion to vacate default. (R.734-814) Appellants attached to the verified motion Ratification and Joinder Instruments stated to be executed by Appellants effective as of August 12, 2022. (R.803-6) Richard Sabella as authorized person of ARHM Investco, as authorized signatory of Appellants, executed the Ratification and Joinder Instruments. Paragraphs F-H of the Ratification and Joinder Instruments clearly recite that the membership interests in both Appellants were quitclaimed to Horizon Holdingco and that pursuant to the Quitclaim Assignment Horizon Holdingco became the sole member of both Appellants. Appellants introduced both Ratification and Joinder Instruments into evidence at the evidentiary hearing on the motion to vacate default. (R.1880-83)

On September 20, 2022, Magnifico Capital filed a response to the verified amended motion to vacate default attaching excerpts of deposition transcripts of Richard Sabella and Michael D. Moccia, Esq. (R.820-1107)

On September 27, 2022, the trial court conducted an evidentiary

hearing on Appellants’ verified amended motion to vacate default. Richard Sabella and Michael D. Moccia, Esq. testified at the hearing. Based upon Richard Sabella and Michael D. Moccia, Esq.’s testimony it was clear to the trial court that it was a “tactical decision” on the part of Appellants not to defend the lawsuit. (R.1505)

After considering the written submissions of the parties and conducting the evidentiary hearing the trial court specifically made a finding that Appellants did not establish excusable neglect as Appellants made a “tactical decision” not to defend. The trial court found that the “tactical decision” was “not excusable neglect” but rather “was an intentional choice.” (R.1505)

On October 6, 2022, the trial court entered a written order denying Appellants’ amended verified motion to vacate default. (R.1131)

The following table, compiled from evidence at the evidentiary hearing, illustrates how each Appellant always had a member managing the business and affairs of Appellants:

Management/Control of Reliance Ridge and White Oak Run

Dates	Sole Member/ Managing Member of Appellants	Manager of Sole Member/Managing Member of Appellants	Manager of Manager of Sole Member/Managing Member of Appellants
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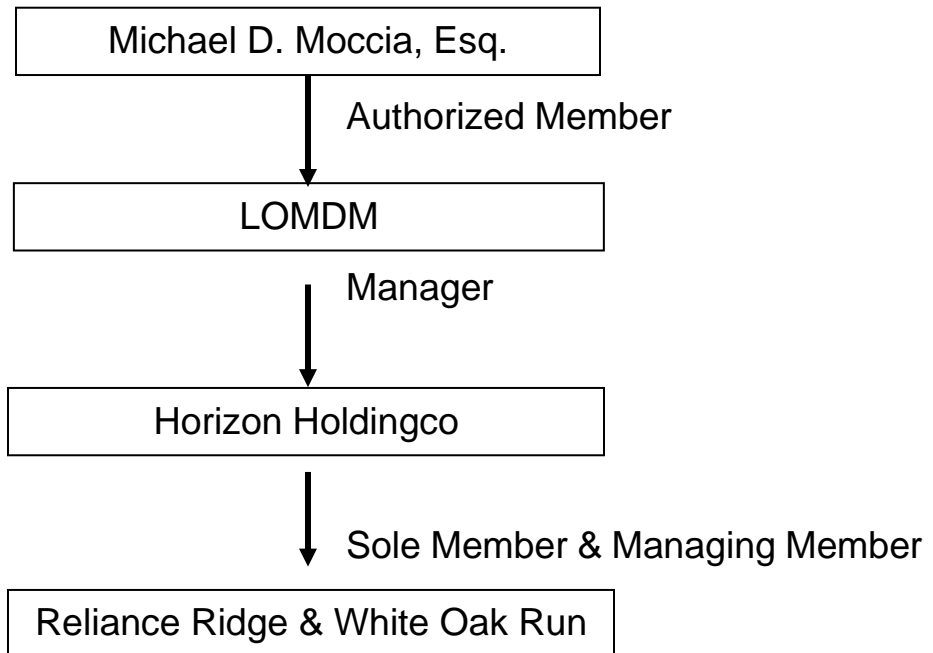
6/8/2017 - 4/23/2018	WOR Holdings	Brian Mylett	
4/24/2018 - 2/19/2019	Harmony Ridge Holdings	Harmony Recovery Group	Louis Devaleix
2/20/2019 - 12/7/2020	Harmony Ridge Holdings	Allerand Recovery Holdings	Richard Sabella
12/8/2020 – 7/20/2021	Horizon Holdingsco	LOMDM	Michael D. Moccia, Esq.
7/20/2021 – 4/11/2022(?)	Hare & Co	? ⁵	
4/11/2022	Horizon Holdingsco	LOMDM	Michael D. Moccia, Esq.
4/11/2022 - 9/27/2022	ARHM Investco	Richard Sabella	

At the time of the filing of the Complaint and at the time service of process was obtained over Appellants, Michael D. Moccia, was the sole human being that was managing the affairs of Appellants.

A chart demonstrating that Michael D. Moccia, Esq. was in sole and

⁵ There is no evidence in the Record as to who managed Hare & Co. There is also no evidence in the Record as to when, if, or how Hare & Co transferred its 100% membership interest in Appellants to Horizon Holdingsco. The Assignment of LLC Interest in the Course of Dissolution dated as of April 11, 2022 simply stated as fact that Horizon Holdingsco was the owner of the interests in Appellants. (R.1872)

complete control of Appellants at all times relevant after the commencement of this case (June 1, 2021 – July 21, 2021) is set forth as follows:



On November 14, 2022, Magnifico Capital filed a motion for final default judgment on Count I. In the motion for final default judgment Magnifico Capital sought a default judgment for the \$2,000,000.00 Principal Amount that was due and payable on Maturity Date of April 30, 2020 together with prejudgment interest. (R.1135-55)

On April 8, 2023, the trial court entered Final Judgment on Count I in the principal amount of \$2,000,000.00 together with prejudgment interest in the amount of \$1,045,000.00 (18% default interest from May 1, 2020) for the total sum of \$3,045,000.00. The trial court determined that the damages

sought in Count I were liquidated. (R.1350-1)

On April 28, 2023, Appellants filed a notice of appeal. (R.1357-60)

STANDARD OF REVIEW

An order denying a motion to vacate is reviewed on an abuse of discretion standard. See *Wiggins v. Brightview Landscape Services, Inc.*, 337 So.3d 793, 795 (Fla. 4th DCA 2022); See also *Williams v. Skylink Jets, Inc.*, 229 So.3d 1275, 1278 (Fla. 4th DCA 2017).

The standard of review as to whether damages sought in the Complaint are liquidated or unliquidated is a question of law subject to *de novo* review. *Williams*, 229 So.3d at 1278.

SUMMARY OF ARGUMENT

The trial court properly denied Appellants' motion to vacate default as they failed to establish excusable neglect and due diligence in seeking relief from the default. Appellants, which were effectively controlled by Richard Sabella, were playing games. At the time the lawsuit was filed Michael D. Moccia, Esq. was in control of Appellants. Michael D. Moccia, Esq., presumably after consultation with Richard Sabella, made an intentional decision that Appellants would not defend the lawsuit. After the trial court weighed the evidence and made credibility determinations, it specifically found that Appellants failed to establish excusable neglect as the decision not to defend was a "tactical decision." It would have been an abuse of discretion if the trial court vacated the default since the trial court specifically found that Appellants failed to establish excusable neglect.

The trial court properly awarded \$2,000,000 in damages in the default judgment. The damages sought in Count I for breach of the Amended Note were liquidated as Magnifico Capital sought as damages \$2,000,000.00 in unpaid principal that was due and payable at Maturity Date. The \$2,000,000.00 in damages could be determined with exactness from the allegations in the Complaint and the Amended Note attached.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION TO VACATE DEFAULT AS APPELLANTS FAILED TO ESTABLISH EXCUSABLE NEGLIGENCE OR DUE DILIGENCE

Magnifico Capital recognizes that courts prefer to decide cases on the merits. However, this is not a situation where the default should be vacated. In fact, the trial court could not vacate the default as it specifically found that Appellants' failed to establish excusable neglect. Rather, as the trial court found, the default resulted from an intentional, conscious "tactical decision" not to defend this lawsuit.

"In order to set aside a default, a defendant must show that the default [1] resulted from excusable neglect; [2] that the defendant had a meritorious defense; and [3] that the defendant used due diligence in seeking relief from the default." *Wiggins*, 337 So.3d at 795. "Failure to satisfy any one of these elements will result in denial of the motion to vacate." *Benefit Admin. Sys., LLC v. West Kendall Baptist Hosp., Inc.*, 274 So.3d 480, 483 (Fla. 3d DCA 2019).

The trial court could only exercise discretion to vacate the Default if Appellants demonstrated excusable neglect in failing to timely file a response

and due diligence in seeking relief after discovery of the default. See *id.* Appellants had the burden of demonstrating excusable neglect and due diligence in seeking relief after discovery of the default. Appellants failed to demonstrate excusable neglect or due diligence in seeking relief after discovery of the default. The trial court specifically found that Appellants failed to prove excusable neglect. (R.1505)

Excusable neglect occurs “where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir.” *Somero v. Hendry General Hosp.*, 467 So.2d 1103, 1106 (Fla. 4th DCA 1985).

This was not a situation of a system gone awry. This is not a situation where inaction resulted from a clerical or secretarial error. This is not a situation where inaction resulted from a calendaring error. This is not a situation where inaction resulted from a reasonable misunderstanding that a response to the complaint was not yet required. This is not a situation where inaction resulted from a reasonable misunderstanding that a response was not required because of ongoing settlement negotiations. This is not a situation where inaction resulted because a complaint was misrouted from client to the attorney. This is not a situation where inaction resulted from a

miscommunication between client and attorney. This is not a situation where inaction resulted from misplacement of the complaint. This is not a situation where inaction resulted because the complaint was forwarded to the wrong address. This is not a situation where inaction resulted from the complaint being mishandled. This is not situation where inaction resulted because Appellants were unaware a lawsuit was filed.

This is a situation where inaction resulted from the intentional act of Appellants not responding to the lawsuit. This is a situation where inaction resulted from the intentional act of Michael D. Moccia, Esq. choosing to ignore the necessity of Appellants to take appropriate action to timely respond to the Complaint. Michael D. Moccia, Esq. was fully aware that the Complaint was filed against Appellants. Michael D. Moccia, Esq. was in communication with Richard Sabella shortly after this lawsuit was filed. Richard Sabella emailed Michael D. Moccia, Esq. a copy of the complaint and summons eight days after the lawsuit was filed. Michael D. Moccia, Esq. testified that he was an experienced litigation attorney that was familiar with Florida Rules of Civil Procedure. (R.1446-7) Michael D. Moccia, Esq. was fully aware of the legal consequences of Appellants not responding to the Complaint. (R.1447) Michael D. Moccia, Esq. had sole control over

Appellants. Michael D. Moccia, Esq. made a “tactical decision” not to have Appellants defend the lawsuit.

Pursuant to the operating agreements of Appellants, the business and affairs were managed by their sole member acting in its capacity as the managing member. At the time the lawsuit was filed and service of process was obtained over Appellants, Horizon Holdingco was the sole member of both Appellants. Horizon Holdingco, as the sole member, was managing all business and affairs of Appellants. Whoever managed Horizon Holdingco was managing the business and affairs of each Appellant. LOMDM was the Manager of Horizon Holdingco.⁶ Michael D. Moccia, Esq. was the authorized member of LOMDM. As such Michael D. Moccia, Esq. was the sole person in control of both Appellants at the time the lawsuit was filed and at the time service of process was obtained. Michael D. Moccia, Esq. intentionally ignored the necessity for Appellants to take appropriate action after being served with the Complaint knowing full well the consequences of not defending. Michael D. Moccia thought the lawsuit was

⁶ Even if LOMDM was not appointed as the Manager of Horizon Holdingco in the operating agreement, LOMDM would have the powers of a sole manager of Horizon Holdingco pursuant to Section 605.0407(3),(4), Florida Statutes as the appointed dissolution agent of Horizon Holdingco.

not worth defending. This is not excusable neglect.

“[A] default will not be set aside where the defaulted party or his attorney . . . **intentionally ignored the necessity to take appropriate action**; that is to say, where the conduct could reasonably be characterized as partaking of gross negligence or as constituting a willful and intentional refusal to act.” *Bethesda Mem’l Hosp. Inc., v. Laska*, 977 So.2d 804, 807 (Fla. 4th DCA 2008)(Emphasis Added); *see also Somero*, 467 So.2d at 1105-6(holding that “a default will not be set aside where the defaulted party or his attorney (1) simply forgot or (2) **intentionally ignored the necessity to take appropriate action**; that is to say, where the conduct could reasonably be characterized as partaking of gross negligence or as constituting a willful and intentional refusal to act.”)(Emphasis Added); *cf Quest Diagnostics, Inc. v Haynie*, 320 So.3d 171, 175 (Fla. 4th DCA 2021). “A conscious decision not to comply with the requirements of the law [to answer the complaint] cannot be ‘excusable neglect’ under the rule [1.540] or any other equivalent requirement.” *Peterson v. Lake Surprise II Condo. Assoc.*, 118 So.3d 313 (Fla. 3d DCA 2013).

Rule 1.540 was never intended to relieve a party from its own tactical mistakes. *See State Farm Mut. Auto Ins. Co. v. Isom*, 681 So.2d 1170,

1172 (Fla. 5th DCA 1996)(“[R]ule 1.540 does not provide relief for judgmental mistakes nor tactical errors of counsel nor from mistakes of law. This rule merely provides relief from judgments based on mistakes which result from oversight, neglect or accident.”)

Instead of having Appellants defend this lawsuit, Michael D. Moccia, Esq. made the “tactical decision” to make it appear that Horizon Holdingco abandoned its membership interest in Appellants.⁷ Michael D. Moccia, Esq., an experienced litigation attorney, who had sole control over

⁷ Horizon Holdingco was the entity that sought to “abandon” the so-called “unclaimed” membership interests in Appellants. Pursuant to the Quitclaim Assignment Horizon Holdingco was the sole member of each Appellant. As such Horizon Holdingco’s 100% membership interest in both Appellants would not have been considered “unclaimed property” under Chapter 717, Florida Statutes. The only purported “abandoned” and “unclaimed property” that could have possibly been considered abandoned would have been Allrand Capital’s disclaimed membership interest in Horizon Holdingco. Although not relevant to the issues on appeal, there is no provisions in Chapter 717 or FAC Chapter 69G-20 for abandoning an intangible membership interest in a limited liability company, as only cash distributions or securities can be abandoned. This makes logical sense as every state has statutory provisions on how a member may withdraw/dissociate as a member. A person that is a member in an LLC is a member until that person is dissociated or withdraws as a member. In Florida the power to dissociate as a member is set forth in Section 605.0601. Once a member withdraws, then there is no membership interest to abandon as the member is no longer a member.

Appellants at the time, had full knowledge that Appellants' failure to defend would result in a default. The default was the natural result of an intentional, conscious "tactical decision" by Michael D. Moccia, Esq., who was in sole control of both Appellants at the time, to intentionally ignore the necessity for Appellants to take appropriate action to file a response to the complaint in this lawsuit.

Michael D. Moccia, Esq. testified that "once we took a look at the lawsuit" Appellants did not defend "[b]ecause at that time, we did not believe that there was anything in that lawsuit to be concerned about" and "there was no point in defending a lawsuit where it didn't seem that there was any reason to believe that it was collectable." (R.1466-8)

Michael D. Moccia, Esq., may have actually believed that the lawsuit was nothing to be concerned about. Michael D. Moccia, Esq., may have actually believed that a judgment would not be collectible. Michael D. Moccia, Esq. may have actually believed that it was proper to "abandon" the membership interests in Appellants. Michael D. Moccia, Esq., who had sole control over both Appellants at the time the lawsuit was filed and at the time service of process was effected, was mistaken if he truly held these beliefs.

Regardless, any mistaken belief, tactical mistake, ignorance of the law,

or failure to understand the consequences of not defending the lawsuit does not constitute excusable neglect. See *Elliot v. Aurora Loan Services, LLC*, 31 So.3d 304, 307 (Fla. 4th DCA 2010)(noting that ignorance of the law and failure to understand consequences does not constitute excusable neglect); see also *Madill v. Rivercrest Comm. Assoc.*, 273 So.3d 1157, 1161 (Fla. 2d DCA 2019)(“[E]xcusable neglect cannot be based upon an attorney’s misunderstanding or ignorance of the law...”); *Geer v. Jacobsen*, 880 So.2d 717, 720-21 (Fla. 2d DCA 2004)(“The attorney’s errors, even if constituting mistakes of law, tactical errors, or judgmental mistakes, do not constitute excusable neglect. Similarly, an attorney’s inadvertence or ignorance of the rules does not constitute excusable neglect.”); *Duckworth v. Duckworth*, 414 So.2d 562, 564 (Fla. 3d DCA 1982)(“[A]n attorney’s mistaken view of the law does not amount to excusable neglect requisite to vacating a default....”); see also *Locke v. Whitehead*, 321 So.3d 278, 281 (Fla. 4th DCA 2021)(reversing a trial court’s decision that homeowners established the requisite excusable neglect when they admitted that the reason for not timely responding was, by their own admission, plainly due to ignorance of the law and failure to understand the consequences).

It is the role of the fact finder, not the appellate court, to weigh the evidence and credibility of the witnesses. The trial court weighed the evidence, made credibility determinations, and specifically found that Appellants failed to establish excusable neglect as the decision not to defend was a “tactical decision.” A trial court’s finding will be upheld when there is competent substantial evidence to support the finding. This finding was supported by competent substantial evidence, as Michael D. Moccia, Esq. testified that he intentionally abandoned any interest in Appellants instead of having Appellants defend while he was in control of Appellants because “once we took a look at the lawsuit ... at that time, we did not believe that there was anything in that lawsuit to be concerned about. . . . [T]here was no point in defending a lawsuit where it didn’t seem that there was any reason to believe that it was collectable.” (R.1464-8)

The trial court did not abuse its discretion in denying the motion to vacate as Appellants failed to establish excusable neglect. In fact, it would have been an abuse of the trial court’s discretion to vacate the default since the trial court specifically found that Appellants failed to establish excusable. See *Rodriguez v. Falcones*, 314 So.3d 469, 471 (Fla. 3d DCA 2020).

Although the trial court made no oral findings during the evidentiary hearing or any written findings in its order concerning Appellants' due diligence in seeking to vacate the default, the Appellants also failed to establish that they acted with any due diligence. For this reason, the trial court also did not abuse its discretion in denying the motion to vacate.

Appellants lacked due diligence as they waited six months to file a motion to vacate default. The default was entered against Appellants on September 23, 2021. Michael D. Moccia, Esq., who filed the motion to vacate and made an appearance on behalf of both Appellants, was present at the hearing on the motion for default to observe the proceeding. Appellants were existing companies at all times relevant.

According to the evidence at the evidentiary hearing neither Appellant was ever dissolved. Michael D. Moccia, Esq. testified it was purposeful that Articles of Dissolution were never filed. (R.1484) Both Appellants continued their existence. Certificates of Existence for Reliance Ridge dated October 19, 2021, February 24, 2022, March 16, 2022, and September 20, 2022 were admitted into evidence at the September 27, 2022 evidentiary hearing on the verified amended motion to vacate default. (R.1623-6)

According to the evidence at the evidentiary hearing, i.e., the Certificate of Membership Interest issued on July 20, 2021 for each Appellant, Hare & Co was the sole member of both Appellants from July 20, 2021 until at least April 8, 2022. Pursuant to Appellants' operating agreements Hare & Co, which were Appellants' sole member, was managing the business and affairs of Appellants. Hare & Co managed both Appellants from July 20, 2021 until at least April 8, 2022.

Appellants presented no evidence at the hearing as to what due diligence was undertaken by Appellants, while managed by Hare & Co, seeking relief from the default during the period from September 23, 2021 until April 8, 2022. Appellants argued that no one was in control and managing Appellants during this period, but this was argument was entirely speculative and not supported by any competent substantial evidence. The evidence was undisputed that a Certificate of Membership of 100% of the membership interest in each Appellant was issued to Hare & Co on July 20, 2021. As of that date Hare & Co was the sole member of each Appellant. Appellants' operating agreements clearly provided that they were managed by the sole member.

The unexplained delay of six months while Appellants were managed by Hare & Co before Appellants sought to vacate the default did not constitute due diligence. See *Locke*, 321 So.3d at 282 (holding that waiting more than five months between learning of the default and filing the motion to vacate did not constitute due diligence); *Hepburn v. All Am. Gen. Constr. Corp.*, 954 So.2d 1250, 1252 (Fla. 4th DCA 2007)(finding a four-month delay in moving to vacate a default judgment precluded the granting of a motion to vacate); *Chetu, Inv. C. Franklin First Fin., Ltd.*, 276 So.3d 39, 41 (Fla. 4th DCA 2019)(finding that an unexplained two-month delay precluded a finding of due diligence).

The trial court did not abuse its discretion in denying Appellants' motion to vacate default.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE \$2,000,000.00 IN UNPAID PRINCIPAL DUE AND PAYABLE ON MATURITY DATE AS SET FORTH IN THE AMENDED NOTE CONSTITUTED LIQUIDATED DAMAGES

The damages sought in Count I for breach of the Amended Note were liquidated. Magnifico Capital sought as damages \$2,000,000.00 in unpaid principal that was due and payable at Maturity Date. Appellants' arguments as to why the damages are unliquidated have nothing to do with

the amount due and payable, but rather concern liability, which was admitted upon Default.

It is well established under Florida law that the effect of a default is that a defendant admits all well-pleaded allegations of a complaint, including a plaintiff's entitlement to liquidated damages. See *Bodygear Activewear, Inc. v. Counter Intelligence Services*, 946 So.2d 1148, 1150 (Fla. 4th DCA 2006). "Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law." *Id. quoting Pierce v. Anglin*, 721 So.2d 781, 783 (Fla. 1st DCA 1998)(*quoting Bowman v. Kingsland Dev., Inc.*, 432 So.2d 660, 662 (Fla. 5th DCA 1983)).

The damages sought in Count I are liquidated because the proper amount, i.e., \$2,000,000.00 in unpaid principal, was able to be determined with exactness from the cause action as pled and from the pleaded agreement between the parties. No evidentiary hearing or testimony was needed to determine the amount of contract damages. Appellants do not seem to dispute that the amount of unpaid principal is \$2,000,000.00. The exact amount of principal sought in Count I for breach of the Amended Note,

i.e., \$2,000,000.00, was determined with exactness from the pleadings and the terms of the Amended Note being sued upon. See *Schuler v. Sandy T. Fox, P.A.*, 2022 WL 5237208 (Fla. 3d DCA Oct. 6, 2022)(holding that law firm’s breach of contract damages, which consisted of \$36,631.15 in principal and \$2,655.21 interest, were liquidated because “[a]ccording to the Complaint, Schuler breached the attorney-client Fee Agreement by failing to pay \$36,631.15.”); see also *Bodygear Activewear*, 946 So.2d at 1150 (noting that damages are unliquidated only if testimony must be taken to determine the exact amount of damages and that damages are liquidated if due directly on a negotiable instrument).

Schuler, establishes that contract damages are liquidated when the allegations make clear the exact amount sought pursuant to a pleaded agreement and attached exhibits. *Schuler* involved an appeal of an order denying a motion to vacate a default judgment on a claim that it improperly awarded unliquidated contract damages. In *Schuler*, a law firm sought \$36,631.15 in unpaid attorney fees together with interest based upon a breach of an attorney-client fee agreement together with \$18,488.02 in equitable relief based upon a claim of unjust enrichment. A default was entered. A default judgment in the amount of \$59,484.73 was entered.

The judgment included \$39,286.36 stemming from a written contract for legal services and \$18,488.002 for unjust enrichment. A motion to vacate the default judgment was heard. The trial court found that the \$18,488.02 in damages for unjust enrichment and quantum meruit were unliquidated and vacated the judgment as to those damages. However, the trial court did not vacate the portion of the final judgment for the unpaid attorney's fees pursuant to the contract finding that the amount of principal and interest sought were liquidated. The former client did not object to the partial vacation of the judgment, which generally is not permissible. The former client appealed claiming that the reduced amount awarded for contract damages was unliquidated.

In *Schuler*, the Third District affirmed “because the contract damages are liquidated since the exact amount can be determined from the pleadings.” *Schuler*, 2022 WL 5237208 at *1. The law firm's complaint specifically alleged that “Schuler breached the attorney-client Fee Agreement by failing to pay \$36,631.15.” *Id.* at *3. The damages could be determined with exactness from the complaint. *Id.* Since default admits the allegations in the Complaint, no testimony was necessary to fix the amount

since the allegations alleged with exactness that the amount of contract damages was \$36,631.15.

The damages in Count I are likewise liquidated because Magnifico Capital is seeking a precise amount of contract damages based upon the Amended Complaint. The allegations, including the attachment of the Amended Note, present the quintessential definition of liquidated damages. *See Schultz Builders & Pools, Inc. v. Icon Welding & Fabrication, LLC*, 2023 WL 4479407 (Fla. 2d DCA 2023)(holding that plaintiff sought liquidated damages as the complaint alleged that defendant failed to pay the final amount of \$100,480, which was supported by the contract and invoice records)

The damages in Count I are also liquidated because “[a]ctions for sums directly due on negotiable instruments are for liquidated damages....” *Bodygear Activewear*, 946 So.2d at 1150.

Appellants argue that the Amended Note is not a negotiable instrument. Appellants contend that the Amended Note lacks an unconditional promise to pay a fixed amount. Appellants’ argument is based upon a mistaken interpretation that the promise to pay principal on Maturity Date was limited to just the “Net Profits after Breakeven”. As explained

infra, Appellants interpretation of the Amended Note is incorrect and would lead to absurd results. Regardless, even if Appellants' interpretation is correct regarding the limitation of a remedy, the Amended Note would still be a negotiable instrument. In the Amended Note, Appellants made an unconditional promise to pay the \$2,000,000.00 principal, which is a fixed amount of money, on or before the Maturity Date of April 30, 2020, which is at a definite time. See Section 673.1014. Even if Magnifico Capital's remedy was limited to just "monthly profits", the Amended Note is a negotiable instrument because pursuant to Section 673.1061(2) a promise is not made conditional because payment is limited to resort to a particular fund or source.

The damages sought in Count I would still be liquidated even if the Amended Note is not a negotiable instrument as they are capable of being determined with exactness from the admitted allegations and Amended Note, which was a contractual agreement on the part of Appellants to pay \$2,000,000.00 in principal. The Amended Note clearly stated that the \$2,000,000.00 in principal was due and payable at Maturity Date. In Count I Magnifico Capital sought as contract damages the \$2,000,000.00 in principal that was due and payable on the Maturity Date of April 30, 2020.

The amount of damages sought in Count I is not only pled with exactness and certainty in ¶28 of the Complaint, but it is also the exact amount of principal that was due and payable on the Maturity Date as ascertained from the Amended Note. The Default established that no payments of principal were made. As such there would not be any need to present any testimony or evidence to establish \$2,000,000.00 in remaining principal is the exact damages owed.

Appellants, imply that Magnifico Capital blindly pleaded \$2,000,000.00 as damages. Specifically, on pages 15-16 of the Initial Brief, Appellants state “[w]here a complaint alleges a monetary amount of damages without explaining how that amount was determined, the amount is ‘not liquidated....’” On page 19 of the Initial Brief, Appellants state “blindly pleading a sum certain does not turn unliquidated damaged into liquidated damages.” Magnifico Capital recognizes that damages are not necessarily liquidated just because a complaint seeks a sum certain. There are certain circumstances when damages will not be liquidated even though an exact amount of damage are alleged. If a value judgment is required to determine damages, then the damages are not liquidated.

Appellants rely on *Ciotto v. Hubsch*, 302 So.3d 497 (5th DCA 2020), *Rich v. Spivey*, 922 So.2d 326 (Fla. 1st DCA 2006), and *United States Fire v. C&C Beauty Sales, Inc.*, 674 So.2d 169 (Fla. 3d DCA 1996) to argue that the trial court could not rely upon the allegations in the Complaint as to the amount of damages. Appellants reliance on these cases is mistaken. These cases are factually and legally dissimilar. None of them involved contract damages based upon a pleaded agreement. All three cases involved plaintiffs seeking damages for stolen property. Although the plaintiffs alleged specific monetary damages as the value of the stolen property, the damages were unliquidated because the value of the stolen property was based only on plaintiffs' estimation of value and were not an exact calculation as required for liquidated damages. The determination of damages for stolen property will always require the taking of testimony to ascertain facts upon which to base a value judgment of the value of the property stolen.

However, unlike the damages sought by the plaintiffs in *Ciotto*, *Rich*, and *United States Fire*, Magnifico Capital did not blindly plead damages of \$2,000,000.00. Magnifico Capital did not pull \$2,000,000.00 out of the thin air. Magnifico Capital sought \$2,000,000.00 as the unpaid principal that

was due and payable under the Amended Note. Magnifico Capital's allegations explained how the \$2,000,000.00 amount was determined. Appellants signed an Amended Note agreeing to pay \$2,000,000.00 on or before the Maturity Date. Magnifico Capital alleged that Appellants did not make any payments of principal. The contract damages were exact and capable of determination from the allegations, pleaded agreement, and a simple mathematical calculation. It is a simple mathematical calculation to determine \$2,000,000.00 in unpaid principal was due and payable at Maturity Date based upon the allegations and attached Amended Note. The mathematical calculation of the damages based upon the allegations and Amended Note is set forth as follows:

[$\$2,000,000$ principal - $\$0$ payments = $\$2,000,000.00$ principal still owed]

Magnifico Capital would point out that Appellants never contended that \$2,000,000.00 is the improper amount of principal due and payable on Maturity Date. Appellants simply want to argue that they are not liable for the damages. Magnifico Capital would also point out that Appellants never contended that they made any payment to reduce the principal owed under the Amended Note. Regardless, Appellants waived any defense of payment as a result of the default. Payment is an affirmative defense that

must be pled and the failure to plead payment waives that defense. *Goldberger v. Regency Highland Condo. Ass'n*, 452 So.2d 583,585 (Fla. 4th DCA 1984). As such, based upon the default and failure to assert payment as a defense. the undisputed amount owed under the Amended Note was the \$2,000,000.00 in principal together with prejudgment interest from the date of default.

Appellants' primary argument as to why the damages are unliquidated does not concern the amount but rather that they should not be liable for the damages based upon all caps language near the end of the Amended Note makes the damages unliquidated. Initially, it should be pointed out that this argument goes to liability and not amount. The Default admits liability.

Additionally, Appellants would have this Court interpret the all caps language at the end in isolation from the remainder of the terms of the Amended Note. Courts must construe a contract as a whole and give effect, where possible, to every provision of the agreement. *Colombo v. Robertson, Anschutz & Schneid, P.L.*, 341 So.3d 1126 (Fla. 4th DCA 2022). This Court must also construe the Amended Note in such a way as to give reasonable meaning to all provisions, rather than leaving part of it useless. *Herrington v. Certain Underwriters at Lloyd's London*, 342 So.3d 767 (Fla.

4th DCA 2022). This Court must be mindful that the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.

The Amended Note was given to represent an agreement by the Appellants to repay a debt in the principal amount of \$2,000,000.00. The principal amount was due and payable on Maturity Date, but the Amended Note specified circumstances when monthly payments of principal would be mandatory prior to Maturity Date. Specifically, mandatory monthly payments of principal were required after Breakeven. The amount of the mandatory monthly payments was to be equal to the “Applicable Percentage of the Net Profits after Breakeven.” “Net Profits after Breakeven” was defined as the monthly profit for any particular month after Breakeven. It is important to note that “Net Profits after Breakeven” only applied to monthly payments and had no relevance to the reduce the amount of principal to be repaid. The all caps language was intended to make it clear that if there were no profits in any month, then Appellants had no obligation to make a payment.

Appellants’ interpretation that the amount of principal due and payable on Maturity Date is limited to the “Applicable Percentage of the Net Profits

After Breakeven” would render the language on page 2 of the Amended Note that all amounts of principal evidenced by this Note **shall** be due and payable by Appellants on the Maturity Date meaningless. This Court cannot construe the Amended Note to render the Appellants’ obligation as specifically set forth on page 2 to repay the \$2,000,00.00 principal on or before Maturity Date meaningless.

The all caps language, when read in conjunction with the entirety of the Amended Note, including the entirety of page 2 and the definitions of “Net Profits after Breakeven” and “Breakeven” on page 1, make it clear that the all caps language pertains to the timing, obligation, and collection of any monthly payments to be made prior to Maturity Date **NOT** the remaining amount of principal that is due and payable on Maturity Date.

Page 2 of the Amended Note specifies the obligations of the Appellants to make payments. Pursuant to the terms of the Amended Note, unless sooner paid in full, all amounts of principal evidenced by the Amended Note shall be due and payable by the Appellants on the Maturity Date. The amount of principal evidenced by the Amended Note was \$2,000,000.00. The Maturity Date was April 30, 2020. Pursuant to the terms of the Amended Note the \$2,000,000.00 in principal was due and payable on April 30, 2020

unless sooner paid in full. This amount is liquidated.

Page 2 of the Amended Note also specifies that Appellants were to make monthly payments in an amount equal to the “Applicable Percentage of the Net Profits after Breakeven”. Pursuant to subsection (i) on Page 2 of the Amended Note, Appellants were not obligated to make any monthly payment of principal until after Breakeven occurred. The \$2,000,000.00 in principal does not disappear if Breakeven never occurred. If Breakeven never occurred, then the full amount of the \$2,000,000.00 principal was still due and payable on April 30, 2020. If Breakeven occurred, then the month after Breakeven and every subsequent month until the Maturity Date, the Borrowers were to make a mandatory payment of principal in an amount equal to the “Applicable Percentage of Net Profits after Breakeven” based upon profits the prior month. As set forth in the all caps language, the Appellants had no personal obligation to make the monthly payments except in the amount of the Applicable Percentage of Net Profits for each month after Breakeven. Only the monthly payments could be collected from the net profits, which insured that the Lender could not go after Appellants for any monthly payment if there was no monthly profit the month before.

Whether Appellants received a profit for any month following Breakeven is completely irrelevant to the amount of principal due and payable under the Amended Note on the Maturity Date. Likewise, the “Applicable Percentage of Net Profits after Breakeven” is only applicable to the monthly payments. The amount due and payable on Maturity Date, unlike the obligation to make monthly payment, has no reference or limitation to any “Applicable Percentage of Net Profits after Breakeven” since it only applies to monthly payments. The amount due and payable on Maturity Date is not dependent upon whether Breakeven occurred. The amount due and payable on Maturity Date is not dependent upon any monthly profits. The amount due and payable on Maturity Date is the remaining principal.

The definition of “Net Profits after Breakeven” on page 1 of the Amended Note also makes it clear that this phrase pertains solely to the obligation to make monthly payments NOT the amount due and payable on the Maturity Date. “Net Profits after Breakeven” is specifically defined as the “actual revenue generated and received in such month” over “expenses actually paid . . . in such month.” “Net Profits After Breakeven” are measured monthly. “Net Profits After Breakeven” would fluctuate monthly. If Breakeven occurred, then for each subsequent month after Breakeven, the

Defendants were obligated to make a mandatory monthly payment in the amount based upon the Applicable Percentage of Net Profits after Breakeven. If there were no profits in any particular month after Breakeven, then Defendants would not have any obligation to make a payment. However, Net Profits After Breakeven was never a factor to reduce the amount of principal owed pursuant to the Amended Note. The remaining principal was due and payable by Appellants on the Maturity Date. This is clearly specified on page 2 of the Note.

Since the Net Profits after Breakeven, by definition, only concern monthly payments, the “Applicable Percentage of Net Profits after Breakeven” would also by extension only concern monthly payments. It makes no logical sense to state that the obligation to make the \$2,000,000.00 in principal on Maturity Date is capped at 50%-70% of the net profit during March 2020, which would be month used to determine “Net Profits after Breakeven” in April 2020. This is because the “Applicable Percentage of Net Profits after Breakeven” has nothing to do with the amount owed and only has relevance to the monthly payments, i.e. what amount, if any, is payable each month after Breakeven and prior to Maturity Date. It would be nonsensical to use the “Applicable Percentage of Net Profits after

Breakeven” to determine the amount of principal that needs to be paid on the Maturity Date.

The absurdity of Appellants’ interpretation that Magnifico Capital could only go after the monthly profits, i.e., “Net Profits after Breakeven”, to collect the \$2,000,000.00 principal is further demonstrated by a hypothetical default immediately after Breakeven occurred. This hypothetical also demonstrates why the damages sought, i.e., \$2,000,000.00 in principal, are liquidated.

The Amended Note provides for mandatory monthly payments of principal after Breakeven. In this hypothetical, Breakeven occurs in March 2019, the WOR drug treatment facility generates \$100,000.00 in net profits in March 2019, Appellants fail to make the April 2019 mandatory monthly payment of \$70,000.00, and the Lender accelerates the principal based upon the default. In this hypothetical, Appellants made no prior payment of principal. Pursuant to the Amended Note, on April 15, 2019 Appellants were to make a mandatory monthly payment of principal in the amount \$70,000.00 (70% of the March 2019 monthly profits, i.e., “Applicable Percentage of Net Profits after Breakeven.”). The April 2019 mandatory monthly payment of \$70,000.00 principal can only be collected from the

“Applicable Percentage of the Net Profits After Breakeven”, which is just a defined accounting term and not an asset or collateral. Upon a default and acceleration, Lender would not be limited to a judgment of \$70,000.00, which represents 70% of the monthly profits for March 2019, i.e. “Applicable Percentage of Net Profits after Breakeven”. Rather upon default, Lender would be entitled to a \$2,000,000.00 judgment, which represents the remaining principal. This is clearly set forth on Page 2 of the Amended Note as follows:

If Borrowers fail to timely make any payment due under the Note, the outstanding Principal Amount shall immediately become due and payable at the option of the holder of this Note, notwithstanding the Maturity Date.

Based upon this language, if Appellants failed to make the hypothetical \$70,000.00 mandatory monthly payment of principal due on April 15, 2019 then \$2,000,000.00, i.e., “the outstanding Principal Amount shall immediately become due and payable.” It would be absurd to argue that Lender could only collect \$70,000.00 upon a default of the very first mandatory monthly payment when a default entitled the Lender to accelerate the entire principal amount of \$2,000,000.00. However, this is exactly Appellants’ argument.

The intent of the all caps language at the end of the Amended Note concern payments of mandatory monthly principal and not the principal due and payable at Maturity Date. To the extent the all caps language could be construed in such a manner that Appellants were never obligated to pay back the Principal except from monthly net profits, then this language is repugnant to the express clause on page 2 obligating Appellants to pay all remaining amounts of principal on the Maturity Date. Thus the all caps language at the end of the Amended Note cannot stand. “Where two clauses of an agreement are repugnant and cannot stand together, the first shall be received and the latter rejected.” *Boden v. Atlantic Federal Savings and Loan Assoc.*, 396 So.2d 827, 829 (Fla. 4th DCA 1981).

Appellants also argue that the all caps language makes the Amended Note a nonrecourse loan. It does not. “A ‘nonrecourse loan’ is ‘[a] secured loan that allows the lender to attach only the collateral, not the borrower’s personal assets, if the loan is not repaid.’” *Castellanos v. Reverse Mortgage Funding, LLC*, 320 So.3d 904, 906 fn 4 (Fla. 3d DCA 2021) *quoting* Black’s Law Dictionary (11th Ed. 2019). “Net profits” is not a collateral. “Net profits” is not property. “Net profits” is an ethereal concept. One cannot levy or foreclose on “net profits”. “Net profits” is simply an accounting term. It is

simply a determination of profit by subtracting actual cash expenses from actual revenue. The “Applicable Percentage of Net Profits after Breakeven” is also just a defined accounting term. It is not collateral. It is not an asset that Magnifico Capital could have collected upon.

Any construction of the all caps language that purports to limit collection of the principal due on Maturity Date to just “Applicable Percentage of Net Profits after Breakeven” would also be patently unreasonable and thus unenforceable. Any contractual provision that limits a party’s respective remedies must be reasonable to be enforced. *Ocean Dunes of Hutchinson Island Development Corp. v. Colangelo*, 463 So.2d 437, 439 (Fla. 4th DCA 1985). There is no ability of a Lender to foreclose or collect from “Applicable Percentage of Net Profits after Breakeven.” This is not a tangible or even an intangible asset that could be considered collateral or security for nonpayment, such as inventory, equipment, real property, accounts receivable, or stock or member interests. Appellants did not pledge any asset as collateral. There is no security agreement. This unreasonableness is further established by Appellants’ intentional actions in fraudulently transferring their assets to make it impossible for there to be any net profits.

Appellants are seeking to take advantage of the situation that they caused by transferring ownership and control of the WOR Facility.

Also, if the parties intended the Amended Note to be a non-recourse loan, with neither Appellant having any obligation to repay the \$2,000,000.00 principal in full on the Maturity Date, then the Amended Note would not have made the obligation to repay the Principal to be joint and several. Page 2 on the Amended Note states:

“The obligations of Borrowers under this Note are joint and several.”

When a contractual obligation to repay is joint and several it means that if that obligation is not performed then each party may be liable for the entire damages resulting from the failure to perform. See *First American Bank v. Poplar Creek, LLC*, 188 N.E. 3d 780, 787 (Ill. 1st Dist. 2020). If Lender could only collect the \$2,000,000.00 principal from monthly profits and could not go after both Appellants, then there would not have been any point of setting forth that the obligations under the Amended Note were joint and several.

Lastly, Appellants’ argument that they are not liable for any amount due and payable on the Maturity Date based upon the all caps language at the end of the Amended Note is all academic as the Default terminated their ability to defend and contest liability. Appellants’ argument that they are not

personally liable or that Magnifico Capital can only collect from the “Applicable Percentage of Net Profits after Breakeven” concerns liability NOT the amount. The issue of whether Appellants have personal liability was resolved by the Default. If Appellants wanted to argue that they had no liability, then they should have defended and filed an affirmative defense. Magnifico Capital would then have been entitled to file a Reply to avoid such affirmative defense. Specifically, Magnifico Capital would have filed a Reply pointing out that (1) any purported limitation of Lender’s remedies are unenforceable, and (2) Appellants breached the implied covenant of good faith and fair dealing by intentionally transferring all assets making them insolvent and using that as a defense.

Appellants also argue that the default judgment should be set aside because the complaint fails to state a cause of action.

Initially, Appellants failed to preserve for appellate review the defense of failure to state a cause of action because it was raised for the first time on appeal. *Johnston v. Hudlett*, 32 So.3d 700, 703 (Fla. 4th DCA 2023). The amended verified motion to vacate default did not argue that Magnifico Capital failed to state a cause action. The proposed answer did not assert as an affirmative defense that Magnifico Capital failed to state a cause of

action.

Additionally, the complaint states a cause of action. “The elements of a breach of contract action are: (1) a valid contract, (2) a material breach, and (3) damages.” *J.J. Gumberg Co. v. Janis Services, Inc.*, 847 So.2d 1048, 1049 (Fla. 4th DCA 2003). Magnifico Capital alleges the existence of a valid contract, a material breach, and damages.

Bottomline, the \$2,000,000.00 in unpaid principal sought by Magnifico Capital in Count I for breach of the Amended Note constitutes liquidated damages.

CONCLUSION

Richard Sabella did his very best to have his cake and eat it too. Richard Sabella was aware that Appellants owed \$2,000,000.00 pursuant to the Amended Note. Richard Sabella wanted all of the benefits of the WOR drug treatment facility, i.e., the income stream, but none of the liability, i.e., having to pay back the \$2,000,000.00 principal. He took over control of Appellants the moment the WOR facility started showing a profit. He fraudulently transferred all assets making it impossible for Appellants to earn any profits after Breakeven or have any ability to pay back the \$2,000,000.00 principal. He used smoke and mirrors to make it difficult for the Lender to sue Appellants.

When this lawsuit was filed he thought he had nothing to worry about as he made Appellants uncollectible. Appellants did not defend. Instead Richard Sabella's attorney, who controlled Appellants, improperly sought to "abandoned" Appellants thinking nothing bad could happen. However, when they realized that Magnifico Capital had unraveled the scheme, they did everything they could to stop a judgment. At first, Richard Sabella had Allerand Recovery Holdings seek to intervene to keep a judgment from being entered. When that failed, he sought to "reclaim" Appellants so he could use

Appellants to keep a judgment from being entered.

The trial court properly denied the motion to vacate the default as Appellants failed to establish excusable neglect and due diligence. Appellants made a “tactical decision” not to defend.

The trial court properly determined that the \$2,000,000.00 in unpaid principal sought in Count I constituted liquidated damages.

This Court should affirm on all aspects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on October 4, 2023 that a true and correct copy of the foregoing document was filed electronically and was sent by E-Mail from the Florida Courts' E-Filing Portal system, to:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the brief complies with the applicable font requirement in Rule 9.045(b) and the 13,000 word count limit set forth in Rule 9.210(a)(2)(B) for a computer-generated answer brief.

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