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In The

District Court of Appeal of Florida
Fourth District

Case No. 4D23-1337
L.T. Case No. CACE21021140

OPTIMAL HEALTH PHARMACY, LLC, and SOUTH FLORIDA TITLE ASSOCIATES, LLC,

Appellants,

vs.

FI CAPITAL INVESTMENT 19, LLC

Appellee,

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida

ANSWER BRIEF OF APPELLEE FI CAPITAL INVESTMENT 19, LLC

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INTRODUCTION

This case presents one of those rare instances in the law which is truly black or white. The parties had an unambiguous contract which provided that if the real estate transaction did not close by October 15, 2021, then FI CAPITAL was entitled to have the full deposit immediately disbursed to it. There were no additional requirements or contingencies. The transaction did not close, but the deposit was not disbursed. So, FI CAPITAL sued to enforce its rights, and OPTIMAL and SOUTH FLORIDA TITLE rather than substantively defend, they asserted general denials and engaged in dilatory tactics. When FI CAPITAL filed for summary judgment and set the matter for hearing, OPTIMAL and SOUTH FLORIDA TITLE did not file a response or a statement of facts in opposition to the motion for summary judgment. Instead, they sought to continue the hearing (another attempt at delay), which was denied. In light of the undisputed summary judgment evidence before it, the trial court correctly granted summary judgment in FI CAPITAL's favor, which this Court should affirm.

This is an appeal of a trial court order denying a motion for rehearing (and the underlying order granting a motion for summary judgment).

For the reasons set forth more fully below, Appellee, FI CAPITAL INVESTMENT 19, LLC respectfully requests that this Court affirm the trial court's order in all respects.

PREFACE

In this Answer Brief, Appellant, OPTIMAL HEALTH PHARMACY, LLC will be referred to as "Optimal," and Appellant, SOUTH FLORIDA TITLE LLC will be referred to as "South Florida Title" Both Appellants shall collectively be referred to as "Appellants." Appellee, FI CAPITAL INVESTMENT 19, LLC, will be referred to as "FI Capital." References to the Record on Appeal will be (R. x) where x is the page number on which the reference appears.

STATEMENT OF FACTS AND CASE[1]

In July 2021, Appellant, OPTIMAL HEALTH PHARMACY, LLC, approached FI CAPITAL INVESTMENT 19, LLC, desiring to purchase

[1] Appellee would normally attempt to limit the statement of facts and case to responding to, supplementing as appropriate, or correcting, facts put forth by Appellants in their initial brief. However,

real property owned by FI CAPITAL and located at 231 SW 15th Street, Pompano Beach, FL 33060. (R-202, at ¶4). FI CAPITAL and OPTIMAL then negotiated and executed a Commercial Contract on July 30, 2021, for purchase and sale of the real property. (R-202 at ¶5; R-206-213).

The Commercial Contract was for an "as is" sale transaction, and provided for a due diligence period of 30 days from the Effective Date of the Contract. (R-208, at ¶7(b). Pursuant to the terms of the Commercial Contract, the sale had no financing contingency, and a closing date of September 14, 2021. (R-202-203, at ¶¶ 6, 8 & 12; R-206, 208 at ¶¶ 7, 4(a)). The Commercial Contract initially called for a total deposit of $150,000.00. (R-206, at ¶¶2, 2(a) & 2(b)). Appellant SOUTH FLORIDA TITLE ASSOCIATES, LLC was the designated Escrow Agent. (R-202, at ¶9; R-206, at ¶2(a). Also, as will be relevant in connection with the addenda to the Commercial Contract subsequently entered into between the parties, Paragraph 20 of the

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Appellants' initial brief does not contain a single citation to the record on appeal, and is largely a skewed presentation of Appellants' view of events as opposed to facts in the record. As such, Appellee submits the following statement of the facts and case properly cited to the record on appeal.

Commercial Contract provides in pertinent part that "*Handwritten or typewritten terms inserted in or attached to this Contract prevail over preprinted terms.*" (R-211, at ¶20, lines 288-289).

On August 12, 2021, FI CAPITAL and OPTIMAL entered into Addendum #1 to the Commercial Contract which modified some terms of the agreement that are not at issue in this appeal. (R-202, at ¶10; R-214). Appellant, OPTIMAL, did not terminate the Commercial Contract before the expiration of the Due Diligence Period, nor did it close on the transaction on September 14, 2021, as called for in ¶4(a) of the Commercial Contract. (R-203, at ¶12). As a result of OPTIMAL's failure to complete the purchase of the property on the scheduled September 14, 2021 closing date, OPTIMAL was in default of the Commercial Contract. (R-203, at ¶13). In fact, OPTIMAL acknowledged this in Addendum No. 2 that was later executed. (R-215). Even though OPTIMAL was in default of the Commercial Contract, in exchange for certain additional consideration in the form of additional deposit monies being posted, FI CAPITAL agreed to hold off on declaring a default. (R-215). Instead, FI CAPITAL and Defendant OPTIMAL negotiated and then

entered into Addendum No. 2 to the Commercial Contract on September 17, 2021. (R-203, at ¶14; R-215).

In the typewritten terms of Addendum No. 2, the parties mutually agreed, in pertinent part, that:

i. Appellant OPTIMAL acknowledged that it was in Default of the Commercial Contract for failing to close on September 14, 2021 (R-215, first and second preamble ¶);

ii. In consideration of the placement of an additional $100,000.00 deposit, FI CAPITAL would not enforce OPTIMAL's default, and the Parties agreed to extend the Closing date to October 15, 2021 (R-215, second preamble ¶, and ¶1), making the total deposit in escrow $250,000.00;

iii. Appellant OPTIMAL confirmed that all contingencies to the Commercial Contract had been satisfied or waived (R-215, at ¶4); and

iv. In the event that OPTIMAL failed to close the Purchase by close of business on October 15, 2021, the entire Escrow deposit of $250,000.00 was to be immediately disbursed to FI CAPITAL. (R-203-04, at ¶15; R-215, at first preamble, second preamble, ¶¶1, 4 & 6.

Appellant, OPTIMAL, failed to complete the transaction as required by the Commercial Contract and Addendum No. 2, by failing to close on or before October 15, 2021, or anytime thereafter. (R-204, at ¶19). As a result of the failure to timely close on the transaction, FI CAPITAL declared OPTIMAL in Default of the Commercial Contract and addenda thereto. (R-204, at ¶20). When the Escrow Agent SOUTH FLORIDA TITLE failed to immediately disburse the Deposit pursuant to clear and unequivocal language of Addendum No. 2, FI CAPITAL, through its counsel, made written demand for the disbursement of the Deposit. (R-204, at ¶21). FI CAPITAL has never received a writing from OPTIMAL disputing the return of the deposit. When OPTIMAL and SOUTH FLORIDA TITLE continued to fail and refuse to comply with the terms of the

Commercial Contract and Addendum No. 2, FI CAPITAL initiated the action below by filing a complaint in the circuit court. (R-15-32).

Procedural History

This action was initiated on November 29, 2021, when FI CAPITAL filed a complaint against OPTIMAL and SOUTH FLORIDA TITLE, containing a count for breach of contract and a second count for breach of escrow. (R-15-32). SOUTH FLORIDA TITLE was served on December 9, 2021, with a summons, via personal service on its registered agent, Duane Baum, who is also counsel in this proceeding. (R-37). OPTIMAL was served on December 8, 2021 via its registered agent. No challenges were raised as to service of process. (*See generally*, R-9-14).

When SOUTH FLORIDA TITLE did not respond to the complaint within the time prescribed, on January 3, 2022, FI CAPITAL filed a motion for clerk's default. (R-34). A clerk's default was entered on January 5, 2022, (R-36), and a final default judgment as to SOUTH FLORIDA TITLE was entered by the Court on January 6, 2022. (R-64-65). This final default judgment was ultimately vacated by the Court. (R-153).

On February 17, 2022, SOUTH FLORIDA TITLE filed a motion to dismiss. (R. 137). After FI CAPITAL moved for a judicial default for failure to respond to the complaint (R-264), on April 5, 2023, OPTIMAL filed a motion to dismiss. (R-268). On April 7, 2023, the trial court granted a judicial default against OPTIMAL, (R-277), which was later vacated upon OPTIMAL's motion for reconsideration. (R-372). The defaults and their subsequent vacatur are not directly at issue in the instant appeal.

FI CAPITAL, on February 17, 2023, filed a motion for summary judgment against both OPTIMAL and SOUTH FLORIDA TITLE, as to both counts. (R-191-215). The motion for summary judgment was supported by an affidavit of the person with actual, first-hand knowledge of the facts, the president of FI Capital Inc., as Managing Member of FI CAPITAL. (R-201, at ¶2). The affidavit attached admissible summary judgment evidence in the form of the Commercial Contract, Addendum No. 1, and Addendum No. 2. (R-206-215).

After numerous unsuccessful attempts (pursuant to Seventeenth Judicial Circuit Local Rule 10A) to coordinate a hearing

on the motion for summary judgment with counsel for OPTIMAL and SOUTH FLORIDA TITLE – and a prior history where counsel was always "unavailable" for hearings – FI CAPITAL filed a motion to special set the hearing on the motion for summary judgment. (R-216-221). In response, OPTIMAL and SOUTH FLORIDA TITLE filed a motion seeking to postpone any hearing on the motion for summary judgment until their pending motion to dismiss was heard and determined. (R-226). The trial court conducted a zoom hearing on March 27, 2023, where it heard and considered both motions. The trial court did not grant OPTIMAL and SOUTH FLORIDA TITLE's motion to postpone based upon the pending motion to dismiss, and instead, granted FI CAPITAL's motion to specially set the summary judgment hearing. (R-263). The trial court directed counsel for the parties to attempt to confer one last time, and then ruled that if no agreement of counsel was reached, FI CAPITAL was to unilaterally schedule the hearing on the motion for summary judgment. (R-263, at ¶2). No agreement as to scheduling was reached and on April 7, 2023, FI CAPITAL proceeded to schedule the hearing on the motion for summary judgment for May 1, 2023.

On April 19, 2023, due to a conflict on the trial court's schedule, the May 1, 2023 hearing was canceled, and the trial court, in an email from its judicial assistant to all counsel, directed that the matter be re-set on the trial court's Case Management System, advising that the trial court had new availability on May 3 and 4, 2023. The hearing on the motion for summary judgment was re-scheduled for May 4, 2023. On April 19, 2023 OPTIMAL and SOUTH FLORIDA TITLE then moved to reschedule the hearing until some unspecified date in June. (R-305). Then, on April 27, 2023, filed essentially the same motion as an emergency motion. (R-314). The trial court denied the emergency motion without a hearing by order dated April 28, 2023. (R-341).

On May 4, 2023, at 12:59 AM, OPTIMAL and SOUTH FLORIDA TITLE filed yet another motion seeking to continue the May 4, 2023 hearing and strike the April 19, 2023 notice of hearing. (*See generally* docket, R-9-14). No effort was made to have the motion heard prior to the special set hearing on the motion for summary judgment scheduled for later that day. (*Id.*).

Neither OPTIMAL or SOUTH FLORIDA TITLE filed a response or factual position opposing FI CAPITAL's statement of facts twenty days prior to the hearing as required by Fla. R. Civ. P. 1.510(c)(5). (*Id.*). Nor did either OPTIMAL or SOUTH FLORIDA TITLE file a memorandum of law in opposition to FI CAPITAL's motion for summary judgment. (*Id.*).

On May 3, 2023, Defendants did file a "Notice of Documents Filed as Evidence in Opposing Plaintiff's Motion for Summary Judgment." (R-348). This document attached several previously filed documents, namely 2 motions to dismiss, a notice of hearing, a notice of appeal (of an already disposed of appeal), a motion to vacate and set aside a default, and the emergency motion to continue the summary judgment hearing. (*Id.*). None of the filed documents contained affidavits, sworn interrogatory answers, excepts of sworn deposition testimony or other citation to summary judgment evidence in the record, as required by amended Fla. R. Civ. P. 1.510. (*Id.*). Nor did Appellants identify specifically how these documents establish a genuine issue of material fact.

The trial court proceeded with the hearing on May 4, 2023 on the motion for summary judgment, at which it made oral pronouncements that it was granting the motion for summary judgment, and identifying its reasons for the that ruling. The Court's ruling granting the motion for summary judgment was memorialized in its Summary Final Judgment rendered May 10. 2023. (R-366-371). In pertinent part, the trial court made findings that:

> 1. Plaintiff filed a motion for summary judgment on February 17, 2023, and contemporaneously served same upon Defendants.
> 2. The motion for summary judgment was supported by an Affidavit of Eric Amsallem, which was also served upon Defendants on February 17, 2023.
> 3. The hearing on Plaintiff's motion for summary judgment was noticed for hearing on May 1, 2023 in compliance with Fla. R. Civ. P. 1.510, allowing proper notice to Defendants.
> 4. Defendants had additional time to respond due to the fact that the Court reset the hearing on summary judgment from May 1, 2023 to May 4, 2023.
> 5. Defendants failed to file a response in opposition to the Motion for Summary Judgment that included Defendants' supporting factual position as required by Fla. R. Civ. P. 1.510(c)(5), despite ample opportunity to do so.
> 6. Defendant was aware of the hearing on the motion for summary judgment. Defendant on April 27, 2023 filed a motion seeking emergency relief to reschedule the hearing. The Court denied the emergency motion on April 28, 2023.

> 7. Further, after the April 28, 2023 Order, Defendants uploaded documents to the Court's case management portal in connection with the hearing (including a renewed motion to continue the summary judgment hearing which was filed after hours on the day before the hearing). Defendants did not seek to obtain a hearing or ruling on the renewed motion to continue.
> 8. At no time did Defendants seek leave of Court for additional time to respond to the Motion for Summary Judgment or obtain affidavits.
> 9. Defendants and their counsel failed to appear at the noticed hearing.

See Summary Final Judgment at ¶¶1-9. (R-366-371).

Accordingly, the trial court found that FI CAPITAL's motion for summary judgment was supported by undisputed summary judgment evidence and that pursuant to Fla. R. Civ. P. 1.510(e)(2) & (3), and Lloyd S. Meisels, P.A. v. Dobrofsky, 341 So. 3d 1131, 1134-35 (Fla. 4th DCA 2022), the entry of summary judgment was appropriate. (R-367, at ¶¶1-4). In the Summary Final Judgment, the trial court, in accordance with Fla. R. Civ. P. 1.510(a), detailed the reasons for granting the summary judgment. In its recitation of reasons the trial court also noted that:

> p. The record before the Court does not contain any claim asserted by Defendant Buyer OPTIMAL to the escrowed funds, nor is there any written

> instruction to the Escrow Agent not to disburse the escrowed funds.
>
> q. The Escrow Agent's has failed and/or outright refused to act in accordance with the explicit written and signed instructions of both Parties, and the terms of the Commercial Contract as amended by Addenda No. 1 and No. 2. Amsallem Affidavit ¶22.

Summary Final Judgment, at ¶¶4(p)-(q). (R-369).

On May 25, 2023, OPTIMAL and SOUTH FLORIDA TITLE filed a motion for rehearing and for stay of execution of summary final judgment filed May 10, 2023. (R-397). The motion for rehearing "objected" to or "challenged" certain findings of the trial court, but did not specifically identify or address what the trial court supposedly overlooked or misapprehended in makings its findings or how the findings were not supported by the record. (*Id.* at 397-400). Neither did the motion for rehearing provide opposing summary judgment evidence in the form of affidavit or sworn interrogatory answers or deposition testimony. (*Id.*). Finally, the legal arguments in the motion for rehearing did not challenge any of the legal conclusions made by the trial court in the summary final judgment. (*Id.* at 400-416). Instead, it complained again about the manner in which the hearing had been scheduled. (*Id.*).

The trial court, reviewed the Motion for Rehearing, and the record before it and then proceeded to prepare its own order on the motion. (R-454). The trial court's order stated that in deciding the motion for rehearing it "reviewed the file, the complete Court record, the affidavit filed, the belated answer filed, and all the baseless arguments of counsel." (R-454). The trial court then stated that "The Motion is **DENIED** in its' entirety." (*Id.* at ¶2)(emphasis in original). The trial court explained its denial, in pertinent part:

> … On February 17, 2023, Plaintiff filed its' Motion for Summary Judgment, and the filed emails show Defendant thwarted all attempts by Plaintiff to set a hearing through May of 2023, when Plaintiff obtained an order to set the hearing. On May 10, 2023, the Court entered an Order Granting Final Summary Judgment for Plaintiff because the well pled unrebutted sworn facts clearly showed Plaintiff entitled to Final Summary Judgment and Defendant filed no opposition sworn or otherwise to the motion. The Court also vacated an April 7, 2023, order entering a judicial default because Defendant argued that there had been no ruling on a Motion io Dismiss from February 17, 2022, and a second Motion to Dismiss from April 5, 2023, while also ordering Defendant to file its' Answer. An Answer was filed May 16, 2023, with no Affirmative Defenses!!!!.
> 3. The Motion is denied primarily because the record, the complaint and exhibits, the motion for summary judgment, the answer and the failure to respond to Plaintiff's Motion for Summary Judgment all show the defense has stalled and delayed this case for over a year with no defense. Just looking at the Second Addendum

> to the contract attached to the complaint, the Defendant admitted they breached the contract by failing to close and that Plaintiff was and is entitled to a full refund of its' deposit.
> 4. The Court herein advises Defendant that its' actions and filings in this case appear to be frivolous and the Court shall conduct a hearing of its' own volition per Florida Statute Sec. 57.105(1) whether the record supports sanctions as frivolous per statute or sanctions per *Kozel v. Ostendorf*, 629 So.2d 817 (Fla. 1993)… .

(R-455).

On September 20, 2023, the trial court conducted an evidentiary hearing on the Fla. Stat. §57.105 inquiry called for in the Order denying rehearing. (SR-523; R-455, at ¶4). The trial court gave Appellants' counsel the opportunity to address the court's concerns as to whether or not their defense of the underlying action was frivolous. (*Id.*). On September 30, 2023, the trial court entered an order on the §57.105 inquiry, ruling:

> The Court finds that [Appellants'] defense of this action was 'frivolous or so devoid of merit both on the facts and the law as to be completely untenable as it is contradicted by the undisputed admissible evidence in the record before this Court, and despite multiple opportunities to do so, [Appellants] and their counsel have presented no material facts which through the application of then existing law would establish a viable defense.

(SR-568, at ¶1). The trial court also found that the absence of any viable defense to the claim for release of the deposit existed before the lawsuit was even filed, when Optimal failed to close on October 15, 2021 and SOUTH FLORIDA TITLE did not disburse the deposit despite the unequivocal, and unconditional, language of Addendum No. 2. (SR-569, at ¶4).

On June 1, 2023, Defendants filed a notice of appeal directed to Order Denying the Motion for Rehearing and Stay of Execution of the Summary Final Judgment Filed May 10, 2023.[2] (R-457).

SUMMARY OF THE ARGUMENT

Summary Judgment was properly entered. FI CAPITAL filed a motion for summary judgment with a factual position supporting entry of summary judgment, and citing to summary judgment evidence (as described in Rule 1.510(c)(1)(a), (2) and (4)). OPTIMAL and SOUTH FLORIDA TITLE did not file either an opposing factual position citing to summary judgment evidence or a memoranda of law in opposition to the entry of summary judgment at least 20 days

[2] Appellants' notice of appeal only identifies the Order Denying Rehearing as being appealed, but does attach (without reference) the Summary Final Judgment to the Notice of Appeal. (R-457).

prior to the hearing on the summary judgment motion as required by amended Fla. R. Civ. P. 1.510(c)(5). The "evidence" that Appellants claim was filed the day before the hearing on the motion to summary was: (i) untimely under the rule; (ii) non-specific, contrary to the requirements of the case law interpreting Rule 1.510; and (iii) not proper admissible summary judgment evidence which demonstrated a genuine issue of material fact in this case.

Appellants in their Initial Brief raise little in the way of substantive complaints about the Final Summary Judgment, instead predominantly complaining about the manner in which the hearing on the motion for summary judgment was scheduled. The hearing was properly set pursuant to an order of the trial court allowing its unilateral setting. And the Initial Brief does not cite to any authority for the proposition that the failure to coordinate a non-evidentiary hearing on a motion for summary judgment in accordance with a local rule is a due process violation. Rather, Appellants authorities regarding due process concerns are all inapposite as they involve evidentiary hearings or trials, and not a hearing on a motion for summary judgment under the amended Rule 1.510.

For these reasons, the trial court's order should be affirmed in all respects.

Standard of Review

"A trial court's denial of a motion for rehearing is usually subject to an abuse of discretion standard of review; however when the motion only addresses issues of law the standard of review is de novo." Lopez v. Avatar Prop. & Cas. Insur. Co., 313 So. 3d 230, 236 (Fla. 5th DCA 2021); Bank of Am. N.A. v. Eastridge, 253 So. 3d 722, 728 (Fla. 5th DCA 2018)(citations omitted).

The standard of review of an order entering final summary judgment is *de novo*. Full Pro Restoration v. Citizens Prop. Ins. Corp., --- So. 3d ---, 2023WL2506157 at *2 (Fla. 3d DCA Mar. 15, 2023); Volusia Cnty v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). In cases decided under Florida's "new" summary judgment standard, summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," and the "correct test for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Full Pro, 2023WL2506157 at *2; In re Amends. To Fla. Rule of Civ. Proc.

1.510, 317 So. 3d 72, 75 (Fla. 2021)(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "Put simply, '[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.'" Full Pro, 2023WL2506157 at *2, citing Anderson, 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted); Navarro v. Citizens Prop. Ins. Corp., 353 So. 3d 1276 (Fla. 4d DCA 2023).

ARGUMENT

This case is simple: there was a Commercial Contract and two Addenda executed between the parties. The transaction was required to close on or before October 15, 2021. It did not. The contract, specifically Addendum No. 2, provided unequivocally that if the transaction did not close on or before October 15, 2021, the Escrow Agent (South Florida Title) was to immediately disburse the $250,000.00 deposit to the Seller (FI CAPITAL). The language of the Addendum set forth a binary proposition. There were no other conditions or requirements.

A. Appellants Key Underlying Premise That Local Rule 10A Was Violated is Flawed and Belied by the Record

Without addressing the substance of the trial court's ruling,

Appellants' initial brief is instead premised upon their erroneous contention that the hearing on the motion for summary judgment was not properly coordinated with Appellants' counsel, which they claim violated Seventeenth Judicial Circuit Local Rule 10A, and in turn Appellants' due process rights. This argument is wrong legally and factually, and Appellants do not cite to a single case supporting their contention that this issue – which is at best logistical – impacts the proper entry of the summary final judgment.

First, the record does not support Appellants' position that the hearing was noticed in violation of Local Rule 10A. Instead, the record shows that FI CAPITAL's counsel attempted to confer on numerous occasions, only to have Appellants' counsel not respond. (R-216). FI CAPITAL's counsel had previously had experiences where, when attempting to confer on scheduling, Appellants' counsel always stated that they were unavailable on the dates proposed by FI CAPITAL's counsel, and never offering available dates of their own. When this began to happen again in connection with the hearing on the motion for summary judgment, FI CAPITAL filed a motion with the trial court seeking to have the trial court intervene and specially

set the summary judgment hearing. (R-216).

The trial court granted FI CAPITAL's motion to specially set the summary judgment hearing, (R-263), and directed counsel for the parties to attempt to confer one last time. If this last conferral was unsuccessful for any reason, the trial court ordered that FI CAPITAL was to unilaterally schedule the hearing on the motion for summary judgment. (R-263, at ¶2). No agreement as to scheduling was reached and on or about April 7, 2023, FI CAPITAL proceeded to schedule the hearing on the motion for summary judgment.

As the record demonstrates, the hearing on FI CAPITAL's motion for summary judgment was set pursuant to the directives in the trial court's March 28, 2023 order. (R-263). More significantly, nowhere in Appellants' initial brief, do the Appellants explain what arguments or summary judgment evidence[3] they were unable to present to the trial court before it considered the motion for summary

[3] The amended Fla. R. Civ. P. 1.510 requires the movant and the party opposing the summary judgment to rely upon and direct the court to summary judgment evidence. Fla. R. Civ. P. 1.510(c). The rule identifies the types of information or summary judgment evidence that parties may cite to or rely on, which includes any affidavits, answers to interrogatories, admissions, depositions, and other materials that would be admissible in evidence. Fla. R. Civ. P. 1.510(c)(1)(a), (2) and (4).

judgment as a result of the unsubstantiated claim of failure to confer on the scheduling of the hearing.

Appellants do not cite any caselaw to support their position that the failure to comply with a local rule regarding scheduling matters constitutes a violation of due process rights.

More fatal to Appellants' arguments is that nowhere in the Initial Brief does either Appellant explain how the "supposed" failure to coordinate the hearing date prevented or precluded them during the 56 days between the filing of the motion for summary judgment and the Rule 1.510(b) deadline for filing a memorandum of law in opposition to, or a factual position statement (supported by affidavit or other admissible summary judgment evidence) in opposition to FI CAPITAL's motion for summary judgment. Despite the mandatory nature of such filings under amended Fla. R. Civ. P. 1.510, see discussion infra, Appellants offer no legal justification for failing to do so. Likewise, Appellants' Initial Brief does not explain why the motion for rehearing filed before the trial court (R-397) contains no proffer of any legal arguments or admissible summary judgment evidence that the trial court should have considered and which would

have compelled a ruling denying summary judgment.

As such, Appellants have demonstrated no error in how the summary judgment hearing was scheduled, no violation of due process rights, and this Court should affirm the entry of summary final judgment.

B. Appellants' Arguments Regarding Their Eleventh Hour Filing of "Evidence" in Opposition to Summary Judgment Are Incorrect Under the New Summary Judgment Rule

In Argument Section II of the Initial Brief, Appellants claim that the trial court erred in granting summary judgment because Appellants filed a document self-servingly titled "Defendants' Notice of Documents Filed as Evidence Opposing Plaintiff's Motion for Summary Judgment." Initial Brief at 23-26, referring to R-348 (hereinafter the "Notice of Evidence"). Appellants position that this filing is in any way cogent to the motion for summary judgment is legally incorrect for several reasons.

First, Appellants argument is solely based upon the decision in State Farm Mut. Auto. Ins. Co. v. Figler Family Chiropractic, P.A., 189 So. 3d 970 (Fla. 4th DCA 2016) which they cite in the initial brief. See Initial Brief at 23-24. This decision was rendered under the pre-

amendment summary judgment rule and as such, would be distinguishable and inapplicable to this appeal. See, Meisels, 341 So. 3d at 1135, n.2 (decisions decided under old summary judgment rule are distinguishable).

More troublesome, however, is that even though inapplicable, the premise which Appellants present to this Court, namely that the trial court's failure to consider the "Notice of Evidence" was somehow a violation of due process, is more from the dissent in State Farm than the majority holding. State Farm Mut. Auto. Ins., 189 So. 3d at 975-979 (Klingensmith, J., dissenting).

In fact, contrary to Appellants' argument, the majority in State Farm ruled that a party opposing summary judgment that failed to specifically identify evidence in response to a motion for summary judgment upon which it intended to rely prior to the deadline called for in [prior] Rule 1.510 should not be permitted to rely upon it at the hearing on the motion for summary judgment. Id. at 974-975 ("Generic 'for any purpose' notices of evidence to oppose summary judgment are 'shot gun' defensive tactics that do not assist the court in carrying out 'the higher purpose of the administration of justice.'"). Appellants in their filing did not specifically identify in any way how

by merely refiling previously filed documents, without explanation or argument, that any of the filed documents purportedly created a genuine issue of material fact or otherwise legally defeated FI CAPITAL's motion for summary judgment.

Appellants argument also fails because the matters set forth in the "Notice of Evidence" are in fact not proper summary judgment evidence. The Notice of Evidence referenced[4] prior filed documents, specifically: 2 motions to dismiss, a notice of hearing, a notice of appeal (of an already disposed of appeal), a motion to vacate and set aside a default, and the emergency motion to continue the summary judgment hearing. (R-348). Again, there was no specific explanation as to how Appellants intended to rely on these documents in opposition to summary judgment.

The federal summary judgment standard, as articulated in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), applies to motions for summary judgment filed in Florida after May 1, 2021. In re Amends. to Fla. R. of Civ. P. 1.510, 309 So. 3d 192, 192–94 (Fla. 2020). Under this standard, the question is

[4] The Notice of Evidence purported to be filing the documents, and listed them, but did not actually attach any documents. (R-348-349).

"whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " Id. at 193 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Under that standard, FI CAPITAL met its burden of proving a breach of the contract by OPTIMAL and SOUTH FLORIDA TITLE in the motion for summary judgment and factual support statement with attached affidavit. At that point the burden shifted to OPTIMAL and SOUTH FLORIDA TITLE. DJB Rentals, LLC v. City of Largo, 2023 WL 5184322, at *8 (Fla. 2d DCA Aug. 11, 2023). Appellants had to "do more than simply show that there is some metaphysical doubt as to the material facts." In re Amends. to Fla. R. of Civ. P. 1.510, 309 So. 3d at 193 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). Because OPTIMAL and SOUTH FLORIDA TITLE did not present admissible evidence that would persuade a reasonable jury to render a verdict in its favor, there was no issue of fact regarding a material issue as framed by the operative pleadings, and summary judgment in favor of FI CAPITAL was proper. Full Pro Restoration v. Citizens Prop. Ins. Corp., --- So. 3d ---, 2023WL2506157 at *2 (Fla. 3d DCA Mar. 15, 2023)("[t]he correct test

for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'"); Levin v. Rosenblum, 133 So. 2d 577, 577 (Fla. 3d DCA 1961) ("[S]ummary judgment is proper in those instances where the pleadings, depositions, affidavits and exhibits on file in the cause fail to demonstrate that there is any triable issue of fact."). "Put simply, '[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.'" Full Pro, 2023WL2506157 at *2, citing Anderson, 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted); Navarro v. Citizens Prop. Ins. Corp., 353 So. 3d 1276 (Fla. 4d DCA 2023); see also, Rich v. Narog, 366 So.3d 1111, 1120 (Fla. 3d DCA 2022)(under Florida's new summary judgment standard, conclusory affidavit is insufficient to create a triable issue of fact).

None of the documents listed in the "Notice of Evidence" contained affidavits, sworn interrogatory answers or excepts of sworn deposition testimony of the type that under the new summary judgment rule would be summary judgment evidence upon which the trial court could rely or which would be admissible and allow a reasonable jury to render a verdict for the Appellants. As such, this

Court should affirm the Summary Final Judgment.

C. The Motion for Summary Judgment Was Ripe for Determination

Appellants incorrectly claim that the trial court erred in granting summary judgment because they assert the matter was not ripe due to the pendency of motions to dismiss. It is axiomatic, and in fact specifically stated in the rule that "[a] party may move for summary judgment at any after the expiration of 20 days from the commencement of the action… ." Fla. R. Civ. P. 1.510(b). The rule does not require that the defendants have filed an answer prior to filing or consideration of a motion for summary judgment.

Appellants in support of their position cite to Singh v. Kumar, 234 So. 3d 1 (Fla. 4th DCA 2017). Even setting aside that Singh predates the amendment to Rule 1.510, the case is still completely distinguishable. In Singh the trial court entered a default judgment without resolving pending motions to set aside a prior default. This Court held that in that specific circumstance it was error for the trial court to enter judgment. Singh, 234 So. 3d at 3. In other words, Singh did not involve entry of summary judgment with a pending motion to dismiss. The other authorities cited by Appellants on this

issue similarly involved motions to vacate a default.

In the present case, FI CAPITAL filed a motion for summary judgment in compliance with the new summary judgment rule. Appellants elected to not specifically respond in opposition to the motion for summary judgment, despite the response being mandatory. Under the new rule, any issue which the Appellants believed could or should defeat summary judgment needed to be asserted in opposition to the motion for summary judgment and filed and served at least 20 days prior to the summary judgment hearing. If Appellants needed additional time to develop evidence of a material issue of fact, they could have filed a sworn motion for additional time pursuant to Fla. R. Civ. P. 1.510(d). Appellants did not do so, and do not cite to any authority under amended Rule 1.510 which precludes entry of summary judgment where there is a pending motion to dismiss. As such, this Court should affirm the Summary Final Judgment.

D. The Trial Court Did Not Abuse its Discretion in Denying Appellants' Repeated Motions to Continue the Summary Judgment Hearing

"[T]he granting or denying of a motion for continuance is within the discretion of the trial judge and a gross or flagrant abuse of this

discretion must be demonstrated by the complaining party before this court will substitute its judgment for that of the trial judge." Full Pro Restoration v. Citizens Prop. Ins. Corp., --- So. 3d ---, 2023WL2506157 at *3 (Fla. 3d DCA Mar. 15, 2023), citing Tr. Real Est. Ventures, LLC v. Desnick, 278 So. 3d 242 (Fla. 3d DCA 2019), and Stern v. Four Freedoms Nat'l Med. Servs. Co., 417 So. 2d 1085, 1086 (Fla. 3d DCA 1982).

In the case below, the trial court noted on other occasions from a review of the entire record that Appellants appear to have engaged in dilatory conduct. See, e.g., Order Denying Motion for Rehearing and For Stay of Execution of Summary Final Judgment Filed May 10, 2023, And For Sanctions (R-454, 455)("On February 17, 2023, Plaintiff filed its Motion for Summary Judgment, and the filed emails show Defendant thwarted all attempts by the Plaintiff to set a hearing through May of 2023, when Plaintiff obtained an order to set the hearing."). The trial court further stated that "[t]he motion [for rehearing] is primarily denied because the record, the complaint and exhibits, the motion for summary judgment, the answer and the failure to respond to Plaintiff's Motion for Summary Judgment all show the defense has stalled and delayed this case for over a year

with no defense." (R-455, at ¶3). In light of that, the trial court was well within its sound discretion to deny the motions for continuance as to the hearing on FI CAPITAL's motion for summary judgment. Ziegler v. Klein, 590 So. 2d 1066, 1067 (Fla. 4th DCA 1991)("A motion for continuance is addressed to the sound judicial discretion of the trial court and absent abuse of that discretion the court's decision will not be reversed on appeal."); see Jean v. County Sanitation Inc., 596 So. 2d 1245, 1246–47 (Fla. 4th DCA 1992). Factors to be considered in determining whether the trial court abused its discretion in denying the motion for continuance include whether the denial of the continuance creates an injustice for the movant; whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices; and whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance. See Jean, 596 So. 2d at 1246–47; Silverman v. Millner, 514 So. 2d 77, 78–79 (Fla. 3d DCA 1987); Tsavaris v. Tsavaris, 244 So. 2d 450, 452–53 (Fla. 2d DCA 1971). In the present case, there were no facts presented to the trial court by Appellants to demonstrate these factors were present. Instead, Appellants only presented complaints in the form of legal conclusions. Where the

trial court finds that the motion for continuance is for dilatory purposes, it is not an abuse of discretion to deny the continuance. Belkova v. Deer Run Prop. Owners' Assn., Inc., --- So. 3d ---, 2023WL5419586 at *5 (Fla. 4th DCA Aug. 23, 2023).

Significantly, Appellants never filed a motion which complied with Fla. R. Civ. P. 1.510(d) seeking additional time to present facts certified as being essential to its position. In fact, at the time of the hearing on the motion for summary judgment there was no pending or outstanding discovery. Instead, they only complained that hearings which had been set far in advance were inconvenient, because, *inter alia,* counsel claimed to have other things to do, such as a tour of his child's school. (*Initial Brief* at 5; R-317 (emergency motion to set summary judgment hearing for June) and R-406 (motion for rehearing)).

In light of these circumstances, and the absence of Appellants offering a legally cognizable reason that would have required the continuance of the hearing on the motion for summary judgment, the Appellants have not shown a "gross or flagrant abuse of discretion" in denying the motions to continue the summary judgment hearing. Full Pro, 2023WL2506517 at *3; Canakaris v. Canakaris, 382 So. 2d

1197, 1203 (Fla. 1980)("Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court.").

Consequently, this Court should affirm the summary final judgment.

E. The Authorities Cited by Appellants on Due Process are Inapposite

The cases cited by Appellants at Pages 38 through 40 of the Initial Brief in support of its claim of due process violations are inapposite. Appellants cite to decisions involving a party being prevented from presenting evidence or testimony at an evidentiary hearing or a trial. Vollmer v. Key Develop. Prop., Inc., 966 So. 2d 1022, 1027 (Fla. 2d DCA 2007)(party denied right to testify despite their request at evidentiary hearing); Dobson v. U.S. Bank Nat'l Assn., 217 So. 3d 1173, 1174 (Fla. 5th DCA 2017)(due process violated where trial ended without one party being allowed to introduce testimony or evidence); Pettry v. Pettry, 706 So. 2d 107, 108(Fla. 5th DCA 1998)(denial of right to present witnesses by one party but not the other at evidentiary hearing was due process

violation); Weiser v. Weiser, 132 So. 3d 309, 311 (Fla. 4th DCA 2014)(due process violation to deny motion solely because time allotted by the trial court for such hearing ran out before two other motions were heard by the trial court); Smith v. Smith, 964 So. 2d 217, 218 (Fla. 2d DCA 2007)(due process violation where one party to proceeding was prevented from presenting testimony of witnesses at evidentiary hearing); VMD Fin. Svcs., Inc. v. CB Loan Purchase Assoc., LLC, 68 So. 3d 997, 999 (Fla. 4th DCA 2011)(due process violation where party prevented from presenting evidence due to a stipulation that they were not a party to); Douglas v. Johnson, 65 So. 3d 605, 607 (Fla. 2d DCA 2011)(court refused to allow party to have an evidentiary hearing it was legally entitled to, where the party could have presented witnesses and evidence, violating due process); and Fla. Dept. Law Enforcement v. Real Property, 588 So. 2d 957, 972 (Fla. 1991)(FDLE violated due process where it seized real property, including residential property, before giving claimants notice and an opportunity to be heard).

That is simply not what occurred in this case below. The trial court set a non-evidentiary hearing on a motion for summary judgment. Under the clear text of Fla. R. Civ. P. 1.510, Appellants

were not only afforded the opportunity but were mandatorily required to file an opposing (if any) factual position to FI CAPITAL's motion for summary judgment, which the trial court would have then been required to consider. The ability and requirement to file a response and opposing, if any, factual position was totally separate and independent from any hearing or counsel's ability to be present for the hearing. Appellants should have filed the required opposition to preserve any arguments. They did not do so. Nor did Appellants file any motion seeking additional time to file their opposition, including opposing factual statement, as provided in Fla. R. Civ. P. 1.510(d).

More fundamentally, the new summary judgment rule does not abridge a party's due process right to a trial by jury. As explained by the First District in Whitlow v. Tallahasse Mem. Healtcare, Inc., --- So. 3d ---, 2023WL5255766 at *4 (Fla. 1st DCA Aug. 16, 2023):

> With the Florida Supreme Court's adoption of the new rule, upon the filing of a summary judgment prior to the commencement of trial in this state, it becomes incumbent on the non-movant to come forward with evidence showing a "dispute about a material fact [that] is 'genuine,' " or, in other words, demonstrate that "the evidence is such that a reasonable jury could return a verdict for the" party opposing the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The nonmovant's right to a jury trial extends

> only to "factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250, 106 S.Ct. 2505.

Whitlow, 2023WL525766 at *4. Appellants' did not satisfy this minimum threshold. As there was no violation of Appellants' due process rights, this court should affirm the Summary Final Judgment.

F. The Trial Court Correctly Granted Summary Final Judgment Where Appellants Filed No Opposing Factual Position and Did Not Specifically Respond to the Motion for Summary Judgment

Because the record does not demonstrate the existence of any genuine issue of material fact, the trial court correctly granted FI CAPITAL's motion for summary judgment under amended Fla. R. Civ. P. 1.510.

FI CAPITAL filed the motion for summary judgment on February 17, 2023. (R-191). In accordance with the requirements of the amended summary judgment rule (Fla. R. Civ. P. 1.510(c)), Plaintiff also simultaneously filed the affidavit of Eric Amsallem in support of the motion for summary judgment on February 17, 2023. (R-201). The issues in this action all revolve around the Commercial Contract

and related addenda executed between the parties. Notably, the Amsallem Affidavit had attached to it, and authenticated so as to make admissible, true and correct copies of the Commercial Contract (R-206-213), Addendum No. 1 (R-214), and Addendum No. 2 (R-215).

It is undisputed that the amended Florida Rule of Civil Procedure 1.510, which became effective on May 1, 2021, and "govern[s] the adjudication of any summary judgment motion **decided on or after that date, including in pending cases**" applies to this case. Lloyd S. Meisels, P.A. v. Dobrofsky, 341 So. 3d 1131, 1136 (Fla. 4th DCA 2022)(emphasis added in original)(citing In re Amendments to Fla. R. Civ. P. 1.510, 317 So. 3d 72, 77 (Fla. 2021)).

The trial court correctly applied the amended rule to the facts of the underlying case, and granted summary judgment. Under the amended rule, summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). In applying the amended rule, "the correct test for the existence of a genuine factual dispute is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " Meisels, 341 So. 3d at

1136; In re Amendments to Fla. R. Civ. P. 1.510, 317 So. 3d at 75 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

As further stated by the Meisels Court, the significance of this change, was explained by the Florida Supreme Court when it was adopted:

> Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct 1769, 167 L.Ed. 2d 686 (2007). In Florida it will no longer be plausible to maintain that "the existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised." Bruce J. Berman & Peter D. Webster, Berman's Florida Civil Procedure §1.510:5 (2020 ed.) (describing Florida's pre-amendment summary judgment standard).

In re Amendments to Fla. R. Civ. P. 1.510, 317 So. 3d at 75–76. Meisels, 341 So. 3d at 1134.

This is why under the amended rule it is required for both parties to specifically put forth in their factual positions admissible

summary judgment evidence to allow the trial court to properly consider and decide the motion. In fact, as this Court has held, the filing of a response with an opposing (if any) factual position is now mandatory. Meisels, 341 So. 3d at 1135. As stated by this Court,

> The amended rule require[s] the defendants to serve a response to the motion for summary judgment. Rule 1.510(c)(5) states that "the nonmovant must serve a response." There is no wiggle room in the word "must." That word makes the filing of the response mandatory. On a motion for summary judgment, by requiring the nonmoving party to take a definite, detailed position, the rule promotes deliberative consideration of the motion.

Meisels, 341 So. 3d at 1135.

That is not to say that the mere failure to file a response is sufficient—without more—to compel entry of a summary judgment. Fuentes v. Luxury Outdoor Design, Inc., 361 So. 3d 385, 386 (Fla. 4th DCA 2023). As the Fuentes court explained,

> Rather, the rule provides that "**[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by rule 1.510(c), the court may,"** among other things, **"consider the fact undisputed for purposes of the motion,"** or "**grant summary judgment if the motion and supporting materials – including the facts considered undisputed –**

> **show that the movant is entitled to it[.]"** Fla. R. Civ. P. 1.510(e) (2022); see also Lloyd S. Meisels, P.A., v. Dobrofsky, 341 So. 3d 1131, 1134-36 (Fla. 4th DCA 2022)(recognizing that pursuant to rule 1.510(c)(5), the requirement of filing a response is mandatory, and if one is not filed, rule 1.510(e) **"provides discretionary options for the trial court,"** including **"grant[ing] summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it"**). Further, the rule requires the trial court to "state on the record the reasons for granting or denying the motion." Fla. R. Civ. P. 1.510(a).

Fuentes, 361 So. 3d at 386-387 (emphasis in original).

Neither South Florida Title nor OPTIMAL filed a factual position opposing Plaintiff's motion for summary judgment, as required by amended Fla. R. Civ. P. 1.510(c). Instead, on the day before the scheduled hearing on Plaintiff's motion for summary judgment, South Florida Title and OPTIMAL filed a "Notice of Documents Filed as Evidence in Opposing Plaintiff's Motion for Summary Judgment." (R-348). This document referenced previously filed documents: 2 motions to dismiss, a notice of hearing, a notice of appeal (of an already disposed of appeal), a motion to vacate and set aside a default, and the emergency motion to continue the summary

judgment hearing. (*Id.*). None of the documents contained affidavits, sworn interrogatory answers or excepts of sworn deposition testimony. (*Id.*). This was legally insufficient to satisfy Rule 1.510(c).

As stated by the Meisels court, allowing a party to merely rely on or cite to prior filings would

> undermine the rule's intent to have the parties take definite, detailed positions on summary judgment motions. Without filing a response, a nonmoving party pursues a risky course by waving at the record, leaving the trial court to mine for nuggets of triable fact that would preclude summary judgment. "The court need consider only the cited materials, but it may consider other materials in the record." Fla. R. Civ. P. 1.510(c)(3); see also Cole v. McAllister, 548 F. Supp. 3d 985, 991–92 (D. Idaho 2021)("[T]he Court is not required to comb through the record to find some reason to deny a motion for summary judgment. Instead, the party opposing summary judgment must direct [the Court's] attention to specific triable facts.")(internal quotation marks and citations omitted).

Meisels, 341 So. 3d at 1135.

In their Initial Brief, Appellants fail to address how entry of the Summary Final Judgment by the trial court deviated from the requirements of Fla. R. Civ. P. 1.510, and the caselaw cited above, particularly in light of their failure to file a response in opposition or

a contravening factual position. The trial court correctly reviewed the admissible summary judgment evidence before it (in the form of FI CAPITAL's affidavit), and having been presented no contravening facts sufficient to dispute FI CAPITAL's entitlement to relief, exercised its discretion under the amended Rule 1.510 and binding precedent, to determine that FI CAPITAL's factual position was undisputed and granted summary judgment. This Court should affirm.

CONCLUSION

For the reasons set forth above, Appellee FI CAPITAL INVESTMENT 19, LLC, respectfully requests that this Court affirm the trial court's Summary Final Judgment, and Order Denying Motion for Rehearing and Stay of Execution of the Summary Final Judgment Filed May 10, 2023 in all respects.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 6th day of October, 2023, a true and correct copy of the foregoing was filed with the Clerk of the Second District Court of Appeal, by using the Florida Courts e-Filing Portal, which will send an automatic e-service e-mail to the following parties registered with the e-Filing Portal system: Duane E. Baum, (e-mail: duane@dbaumlaw.net), Law Office of Duane E. Baum, P.A. 1200 South Pine Island Road, Suite 600, Plantation, FL 33324, counsel for OPTIMAL HEALTH PHARMACY, LLC., and Kishasha B. Sharp (email: ksharp@kbsharppalaw.com), Co-Counsel for OPTIMAL

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045(e), undersigned counsel hereby certifies that this brief complies with the applicable font and word count requirements, as same is submitted in Bookman Old Style 14-point font and does not exceed 13,000 words.

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