No_____

IN THE

Supreme Court of the United States

JAFFAN INTERNATIONAL, LLC,
Petitioner,

v.

RADHE KRISHNA PROPERTIES, LLC,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal Second District of Florida

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

Stephen J. Bagge,
CAREY, O'MALLEY,
WHITAKER, MUELLER,
ROBERTS & SMITH,
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Counsel for Petitioner
Jaffan International, LLC

APPENDIX

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APPENDIX A

DISTRICT COURT OF APPEAL
OF FLORIDA SECOND DISTRICT

JAFFAN INTERNATIONAL, LLC,
Appellant, v.
RADHE KRISHNA PROPERTIES, LLC,
Appellee.
No. 2D2024-0016

February 12, 2025

Appeal from the County Court for Hillsborough County; Miriam Valkenburg, Judge.
Stephen J. Bagge of Carey, O'Malley, Whitaker, Mueller, Roberts & Smith, P.A., Tampa, for Appellant.

Ronald D. Edwards, Jr., and Michael S. Provenzale of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., of Orlando, for Appellee.

PER CURIAM.

Affirmed.
KHOUZAM, ROTHSTEIN-YOUAKIM, and LABRIT, JJ., Concur.

Opinion subject to revision prior to official publication.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA SECOND DISTRICT

1700 N. Tampa Street, Suite 300, Tampa FL 33602

March 25, 2025

JAFFAN INTERNATIONAL, LLC,
APPELLANT(S)
CASE NO.: 2D2024-0016
L.T. No.: 21-CC-92536
V.

RADHE KRISHNA PROPERTIES, LLC,
APPELLEE(S).

BY ORDER OF THE COURT:

Appellant's Motion for Rehearing and for Written Opinion is denied.

Appellee's Response is noted.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Mary Elizabeth Kuenzel
2D2024-0016 3/25/25
Mary Elizabeth Kuenzel, Clerk
2D2024-0016 3/25/25

DS

Served:

STEPHEN JAMES BAGGE HILLSBOROUGH CLERK
RONALD DAVID EDWARDS, JR. MICHAEL S.
PROVENZALE JAMES EDWARD WALSON

IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

CASE NO.: 21-CC-092536 / Div. I

RADHE KRISHNA PROPERTIES, LLC,

Plaintiff,

vs.

JAFFAN INTERNATIONAL, LLC,

Defendant.

/

FINAL JUDGMENT OF EVICTION

THIS CAUSE came on to be heard on December 15, 2023 on Plaintiff's Amended Motion for Default Final Judgment of Eviction Pursuant to the Court's Ruling Prior to Defendant's Bankruptcy Filing (Which Bankruptcy Has Now Been Dismissed) (the "Motion"), and the Court having taken evidence, heard testimony, reviewed the pleadings, the Motion, Defendant's response to the Motion and other matters filed, and being advised in the premises, it is thereupon ORDERED and ADJUDGED as follows:

1. In accordance with Florida Statute § 83.232, this Court entered its Order of Notification ("Order") in this nonresidential eviction action on September 2, 2021.

2. The Order stated that Defendant "shall

immediately pay into the registry of the Court any undisputed amount of rent" and "[i]n all cases, the Tenant must deposit into the Court Registry any rent accruing during the pendency of the action."

3. The Order further stated that "[f]ailure of the Tenant to pay the rent into the Court Registry pursuant to this Order shall be deemed an absolute waiver of the Tenant's defenses, except the defenses of payment or satisfaction of the rent."

4. It is undisputed that at least the sum of $5,564.00 is due under the subject commercial lease on a monthly basis. *See* Defendant's Verified Motion to Determine Rent, at ¶ 13 ("the Court should determine the rent due to Landlord as $5,564.00, which is the monthly rent").

5. Indeed, Defendant deposited the amount of $5,564.00 into the Court Registry on October 5, 2021, in compliance with the Court's Order and Florida Statute § 83.232 providing that the undisputed amount of rent accruing during the pendency of this action had to be deposited into the Court Registry. Significantly, Defendant's deposit of $5,564.00 on October 5, 2021 was made more than 15 days *after* Defendant filed its Verified Motion to Determine Rent. Defendant clearly understood its obligation under the Order notwithstanding having filed a Verified Motion to Determine Rent.

6. Defendant subsequently failed to deposit any rent into the Court Registry for the months of November 2021, December 2021 or January 2022.

7. On February 2, 2022, Defendant filed a Voluntary Petition for relief under Title 11 of the United States Code (the Bankruptcy Code). That bankruptcy filing stayed this action until the bankruptcy was

dismissed for cause by the bankruptcy court on August 10, 2023, which ended that stay. Thereafter Defendant subsequently failed to deposit any rent into the Court Registry.

8. The Court heard testimony of the principal of Defendant at the hearing. Defendant's witness testified that he did not deposit rental into the Court Registry as required by § 83.232, Florida Statutes, for the months of November 2021, December 2021 or January 2022. Defendant's witness further testified that Defendant did not deposit rent into the registry following the dismissal of its bankruptcy proceeding for cause. Defendant's witness admitted that rent is due on or before the tenth (10th) of the month and that December rental was not tendered to Plaintiff and was not deposited into the Court Registry as of the date of the hearing. Defendant did not attempt to deposit funds rejected by the Plaintiff into the Court Registry.

9. Despite its failure to deposit any rent into the Court Registry after October 5, 2021, Defendant remains in possession of the subject premises and continues to defend against this nonresidential eviction action.

10. The issues raised at the hearing were all previewed at the Court's case management conference held in November. Defendant had ample opportunity to present evidence at the hearing and was on notice of the issues as early as the case management conference.

11. Defendant's failure to deposit the undisputed amount of rent is deemed "an absolute waiver of the tenant's defenses" and, as a result, Plaintiff "is entitled to an immediate default for possession without further notice or hearing thereon." § 83.232(5), Fla.

Stat.

12. As a result, Florida law mandates that this Court enter an immediate default final judgment of possession and writ of possession to and in favor of Plaintiff pertaining to the subject premises. *Kosoy Kendall Assocs., LLC v. Los Latinos Rest. Inc.*, 10 So. 3d 1168 (Fla. 3d DCA 2009) ("Upon the lessee's failure to timely deposit a monthly rental payment into the registry as required by court order1 under section 83.232, Florida Statute, the petitioner-landlord was absolutely entitled to an ex parte, immediate default for a writ of possession of the premises by section 83.232(5), Florida Statute.") (citations omitted).

13. Notably, "[w]here the tenant has not paid the rent into the registry of the court in accordance with court order and the statute, the landlord is entitled to a writ of possession without further hearing. The trial court exercises no discretion, and the landlord is entitled to the issuance of the writ of possession as a matter of right." *Poal Wk Taft, LLC*, 45 So. 3d at 39 (also stating "[a]lthough the result may seem harsh in a case like this, there is no equitable exception to the statute."); *see also* 214 Main St. Corp. v. Tanksley, 947 So. 2d 490, 492 (Fla. Dist. Ct. App. 2006) (Noting that "[c]ases addressing this statute support the view that the Landlords here are entitled to a writ of possession" and holding that "the plain meaning of section 83.232(5) [ ] indicates that the legislature intended that a landlord's right to possession be absolute. The statute does not allow for a procedure whereby a trial court may excuse the tenant's noncompliance with its prior order. Therefore, we conclude that the trial court erred in setting aside the default and writ of possession based upon the finding that the late November payment was the result of excusable neglect.").

14. Defendant's reliance upon *Axen v. POAH Cutler Manor, LLC*, 323 So. 3d 800 (Fla. 3d DCA 2021) is erroneous. *Axen* involved a residential eviction. Florida's Landlord and Tenant Act unambiguously distinguishes between residential and nonresidential tenancies and the proceedings applicable to each. Indeed, a key difference between them concerns the payment of rent into the court registry. The nonresidential statute applicable in this case provides that when the court enters an order requiring rent to be paid into the court registry, a default is mandatory when the tenant fails to pay rent into the registry pursuant to that order. § 83.232(5), Fla. Stat. *Axen* has no application here as it addresses the payment of rent into the court registry under the residential statutory framework.

15. The Court considered the impact of the bankruptcy and the dismissal of the bankruptcy for cause and the lifting of the automatic stay and finds that the Court has the authority to apply Florida Statute § 83.232(5) to the facts.

16. Defendant's claims of res judicata, collateral estoppel, equitable mootness, and other arguments are all defenses and said defenses are waived in light of the noncompliance with Florida Statute § 83.232(5).

17. In light of the foregoing, Plaintiff's Motion is GRANTED as required by Florida Statute § 83.232(5).

18. The Clerk of this Court is hereby ordered to issue a Writ of Possession in favor of Plaintiff and against Defendant, JAFFAN INTERNATIONAL, LLC, to the Sheriffs of the State of Florida commanding the Sheriff of Hillsborough County, Florida to place

Plaintiff in possession of the following premises:

2001 East Fowler Avenue Suite B

Tampa, Florida 33612 after posting said Writ(s) conspicuously on the premises.

19. **The Clerk of Court shall not issue the Writ of Possession until fifteen (15) days following the date of this Final Judgment of Eviction.**

20. Plaintiff is the prevailing party in this eviction action and is entitled to an award of its attorneys' fees and costs. This Court reserves jurisdiction to award attorneys' fees and costs incurred by Plaintiff in this action.

DONE and ORDERED in Chambers at Tampa, Hillsborough County, Florida this _____ day of _____, 2023.

Electronically Conformed 12/22/2023

/s/ Miriam Valkenburg

MIRIAM VALKENBURG

County Judge

Dated: April 22, 2022

/s /Roberta A. Colton
United States Bankruptcy Judge

United States Bankruptcy Court, M.D. Florida,
Tampa Division.
IN RE: JAFFAN INTERNATIONAL, LLC, dba Crave Restaurant and Bar, Debtor(s).
Case No. 8:22-bk-00459-RCT

MEMORANDUM DECISION AND ORDER FOLLOWING TRIAL ON AMENDED MOTION FOR RELIEF FROM THE AUTOMATIC STAY, DENYING REQUEST TO LIFT THE STAY, AND DIRECTING ADDITIONAL ADEQUATE PROTECTION

On April 19, 2022, the Court conducted a near day-long trial on the Amended Motion for Relief from the Automatic Stay (Doc. 23) (the "Motion") filed by Radhe Krishna Properties LLC (the "Landlord") and Debtor's opposition to the Motion (Doc. 34). The trial on the Motion was set after two preliminary hearings and with the benefit of supplemental briefing by the parties[1] and was limited in scope to the narrow issue of whether the term of the lease between the parties had been properly extended.[2]

At trial, the Court heard testimony of Nilesh Sutaria, Landlord's corporate representative, Maher Jaffan, Debtor's president and principal, and Tushar Choksi, Mr. Sutaria's brother-in-law and the proprietor of a grocery store located in the same shopping center as Debtor. The Court admitted fifteen exhibits offered by the Landlord and twenty-one offered by the Debtor.[3] After the close of the evidence, the Court provided the

parties until April 22 to file their closing arguments. Both arguments were timely filed.[4]

Based on the documentary evidence and credible testimony adduced at trial, and upon due consideration of the parties' papers, together with the record and the relevant case law, the Court finds that the Motion should be denied, without prejudice. But the Court also finds that for the Debtor to continue to enjoy the benefit of the automatic stay, additional adequate protection must be provided to Landlord.

Jurisdiction

This Court has jurisdiction over this proceeding under 28 U.S.C. §§ 157 and 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(G).

Facts

In August 2016, Debtor and Landlord entered into a lease agreement for the premises located at 2001 East Fowler Avenue, Suite B, Tampa, Florida 33612 (the "Property"), with an initial five-year term commencing September 1, 2016, and ending August 31, 2021 (the "Lease").[5] At the Property, Debtor operates a Mediterranean restaurant and bar named Crave Restaurant and Bar. Though the lease term commenced on September 1, 2016, Debtor did not open its doors officially until July 2018. The restaurant's opening was delayed, in part, due to zoning issues. Prior to opening the restaurant's doors, Mr. Jaffan invested significant sums to prepare the premises for Debtor's intended purpose and to resolve the zoning issues.

The parties' first three years under the terms of the lease, while not overly fraught with controversy, were not smooth sailing. Debtor struggled to pay rent timely, and there was confusion over which party was

responsible for the payment of the utilities related to Debtor's use of the Property. In October 2019, the parties entered into a *Settlement Agreement and Amendment to Lease* (the "Addendum")[6] that in relevant part, contained broad mutual releases, clarified the party responsible for the payment of utilities, provided a means for Debtor to cure disputed unpaid rent for the period ending October 31, 2019, and amended the lease to change the due date for the payment of rent from the first of the month to the tenth.

It is undisputed that the Lease and Addendum constitute the entire formal written agreement between the parties. The relevant provisions of the Lease are:

[2.3] B. RENEWAL OPTIONS. [Debtor] shall have two (2) renewal options, for a period of five (5) years each, which such renewal options may be exercised in accordance with the provisions contained in Section 24 hereof (the Initial Term and any exercised renewal option shall collectively be referred to herein as the "Term").

5.1 LEASE TERM. The Term of this Lease starts on the Commencement Date, and continues for the number of Lease Years specified in Section 2.3. The Term shall end upon the passing of said number of Lease Years after the Commencement Date, subject to extension upon [Debtor's] exercise of its renewal option described in Section 2.3 B.

17.1 LATE CHARGES.... Should [Debtor] fail to pay any such Rent or other monetary obligation when due, then interest shall accrue from five (5) days after the due date as the rate of fifteen percent (15%) per annum, but not greater than the maximum rate permitted by law (the "Default Rate"), together with a late charge of [$150.00] to cover Landlord's extra expense involved in

collecting such delinquent sums. ...

17.2 EVENTS OF DEFAULT: REMEDIES. The following shall constitute Event of Default by [Debtor]:

A. [Debtor] fails or refuses to pay any Rent, other monies payable as Rent under this Lease at the specified time and place and such default should continue for more than five (5) days; or, ...

C. [Debtor] shall be late twice during the Lease Year[7] in the payment of Rent or other sums or charges due Landlord under this Lease or shall repeatedly default in the keeping, observing or performing of any other covenants or agreements herein contained to be kept, observed or performed by [Debtor] ....

17.3 NO WAIVER. No waiver of any agreement of this Lease, or of the breach thereof, shall be taken to constitute a waiver of any subsequent breach of such agreement, nor to justify or authorize the non-observance of any other occasion of the same or any other agreement hereof; nor shall the acceptance of Rent by Landlord at any time when [Debtor] is in default be construed as a waiver of such default or of Landlord's right to terminate this Lease on account of such default; nor shall any waiver or indulgence granted by Landlord to [Debtor] be taken as an estoppel against Landlord, it being expressly understood that if at any time [Debtor] shall be in default hereunder, an acceptance by Landlord of Rent during the continuance of such default or the failure on the part of Landlord promptly to avail itself of such other rights or remedies as Landlord may have, shall not be construed as a waiver of such default, but Landlord may at any time thereafter, if such default continues, terminate this Lease on account of such default in the manner herein provided.

23.1 NOTICE. Any bill, statement, notice,

communication or payment which Landlord or [Debtor] may desire or be required to give to the other Party shall be in writing and shall be sent to the other Party b[y] either: (a) certified mail, return receipt requested, postage prepaid; (b) personal delivery; (c) nationally recognized overnight delivery service; or (d) facsimile with a "hard copy" sent by either of the means provided in (b) or (c) above to the address specified in Section 1.0, ... and such notice shall be deemed delivered and received: (i) if by certified mail, upon three (3) days after being deposited in an official United States Post Office, postage prepaid; (ii) if by courier, upon delivery by courier; (iii) if be nationally recognized overnight delivery service, one (1) day after the deposit thereof with all delivery charges prepaid; or (iv) if by facsimile, on the date of transmission, provided that such facsimile is sent on a business day and a confirmation sheet is received and a copy of the notice is simultaneously delivered by either of the means provided in (b) or (c) above, respectively. Nothing contained herein shall limit either Party from posting notices in a manner authorized by Florida law.

3 SECTION 24.0 OPTION TO RENEW.

Provided [Debtor] is not in default, and has not been in default, of any provisions of this Lease, Landlord grants to [Debtor] the right to extend this Lease for two (2) periods of five (5) years, under the same terms and conditions as the Initial Term, except that Minimum Annual Rent shall be as stated in Section 2.4 hereof.

If [Debtor] elects to exercise this option, [Debtor] shall notify Landlord in writing at least six (6) months prior to the end of the Initial Term. If this Lease is terminated during the Initial Term for any reason whatsoever, [Debtor] shall have no rights to extend this

Lease pursuant to this Section. [Debtor]'s failure to provide the written notice as required herein shall render such options null and void.

Shortly after the Addendum was executed, the COVID-19 pandemic gripped the nation, causing interruptions in Debtor's business which, in turn, caused Debtor to fall behind on its rent obligations under the Lease. Debtor failed to pay rent in April and May 2020, and again in November and December 2020. However, it is undisputed that the unpaid amounts, plus late fees, were cured prior to the expiration of the initial term of the lease.[8]

By letter dated October 28, 2020 (the "Renewal Notice"),[9] Debtor advised Landlord of his intent to renew the Lease for the second five-year term. Debtor also advised that it planned to remodel the bathrooms and kitchen at the Property and would be closed during the month of November for the renovations.[10] During the end of 2020 and into the late spring of 2021, Debtor made several upgrades to the Property and paid for repairs to mechanical systems, aimed at improving its customers' experience and responding to their health and safety concerns related to the COVID-19 pandemic.[11] Mr. Jaffan testified that all of these expenses were incurred "in anticipation of renewal" of the Lease.

Mr. Jaffan sent the Renewal Notice by first class mail to Landlord at the address contained in the Lease. It was not returned to him as undeliverable. Nonetheless, Mr. Sutaria testified that the Renewal Notice was not received. In fact, Mr. Sutaria testified that he first learned Debtor took the position that it had renewed the

lease in late August 2021, when Debtor's counsel, Mr. Bagge, responded to an August 13, 2021, demand letter sent by his counsel, Mr. Edwards.[12]

Throughout their relationship, the parties typically have communicated by text and email. Mr. Sutaria's communications with Debtor were somewhat limited. Mr. Sutaria, who resides in Jacksonville, actively participated at the outset of the relationship and played a significant role in the negotiation and preparation of the Lease, but thereafter he did not communicate regularly with the Debtor. Rather, one of Mr. Sutaria's business partners, Hitesh Kotecha, was responsible for regular communications with Debtor. Oddly, Mr. Kotecha did not testify at trial.

In describing Debtor's relationship with Landlord, specifically on the issue of late payments, Mr. Jaffan said: "everything was cooperated." Mr. Jaffan testified that Mr. Kotecha verbally agreed to a payment arrangement whereby Debtor would make double rent payments beginning in April 2021 until the four-month, largely pandemic-related arrearages were cured.[13] Although Debtor ultimately failed to make good on the agreement, Mr. Jaffan stated that regarding tardy payments, Debtor was never charged attorney fees or interest, only late fees.

Mr. Sutaria described Debtor as habitually late with the payment of rent. In his words, Debtor "never paid on time." Mr. Sutaria conceded, however, that as and as a result of the Addendum, Debtor was current, and the payment-related defaults were washed away.[14] Debtor's reprieve was short lived, as Debtor resumed making delinquent rent payments in February 2020.[15] Mr. Sutaria did not dispute that from time to time, primarily before the Addendum, the Landlord

accommodated Debtor with an "adjustment" to the payment due date.[16] However, he stated that any such adjustment was neither a "waiver" of the late payment default nor a "modification" to the Lease. At all times, Landlord maintained its position that late payments were not acceptable as a matter of course and that the expectation was that rent would be paid on time as agreed.[17]

Regarding Debtor's improvements and updates to the Property, Mr. Sutaria claimed he was unaware of any such improvements. He indicated that in mid-August 2021, he visited the Property to investigate a leak in a bathroom sink but he did not notice any difference to the bathroom; his last time seeing the bathrooms was in 2017. His August 2021 visit to investigate the leak was his first visit to the Property in several years.

Mr. Sutaria often relied upon his brother-in-law, Mr. Choksi, to stay abreast of developments at the shopping center. Though not an employee or formal agent of Landlord, Mr. Choksi served in the capacity of agent on limited occasions and for discrete purposes as directed by Mr. Sutaria.[18] Mr. Sutaria did not dispute that Mr. Choksi spoke to Mr. Jaffan regarding matters at the Property, but stated that when he did, he did not do so as an agent of Landlord.

For his part, Mr. Choksi verified that sometimes he would help the Landlord. Though he spends nearly every day at the shopping center, Mr. Choksi indicated he had not noticed Debtor's renovation efforts and stated he had not been inside the Property for years, though he did state that he helped unload the large pizza oven that Debtor installed in his kitchen. He also testified that he accompanied Mr. Sutaria when he inspected the bathrooms at the Property in mid-August

2021. On most points, Mr. Choksi's testimony was not terribly credible. He denied observing even the substantial outdoor renovations by Debtor. The Court believes that he was aware of Debtor's renovation efforts and had been inside the Property on occasion, and that he very likely conveyed his observations to the Landlord.

On April 16, 2021, Landlord's counsel sent Debtor two notices of default: the first monetary and the second non-monetary.[19] In the first, Landlord asserted that Debtor owed $27,820.00 for back rent for five months, "exclusive of late fees/charges, interest, attorney's fees and costs."[20] In the second, Landlord asserted non-monetary defaults including, inter alia, construction of unapproved structures.

Debtor responded through counsel by letter dated May 3, 2021.[21] With regard to the alleged unapproved structures, Mr. Bagge noted that a code enforcement case had been opened in October 2019 regarding the complained-of improvements, but Debtor was found "in compliance" and the case dismissed. Further, Mr. Bagge noted that the structures had existed for years even prior to the execution of the Addendum. Regarding the past due rent, which accrued during the pandemic, Debtor asserted that Landlord had agreed to a deferred payback agreement whereby Debtor would cure when the business environment improved.[22] Mr. Jaffan testified that business was "picking up" and "much better now."[23]

By letter dated May 20, 2021, Mr. Edwards responded to Mr. Bagge.[24] He put aside the non-monetary defaults and focused on two points. First, though lauding Debtor's effort to cure rent arrears, he noted that Landlord disputed the existence of any deferred payback

agreement. He offered to provide a "payoff" to cure Debtor's monetary obligations. Second, he noted that Debtor had not exercised the Lease renewal option timely nor could have as at the relevant time, Debtor was (and remained) in default under the Lease's terms.

In the May 20 letter, Mr. Edwards also mentions that discussions between the parties had begun regarding the expiration of the initial term and that Landlord had secured a new tenant set to occupy the Property on September 1. Based upon the correspondence, the Court presumes that discussions were in their nascent stages. Though mentioned in the letter, the Court notes that no mention of the new tenant was made at trial.

On August 13, 2021, Mr. Edwards sent Mr. Bagge another letter.[25] As in his prior letter, Mr. Edwards notes that the Lease was set to expire on August 31 at the end of the initial term and requests that Mr. Bagge assist in coordinating a date for a moveout walkthrough. Again, he mentions a new tenant set to take possession on September 1. And he states, as of that date, Debtor still owed past due rent for two months, excluding accrued late fees/charges, interest, attorney's fees and costs. No mention is made of non-monetary defaults.

Mr. Bagge responded by letter dated August 27, 2021.[26] He asserted that Debtor had timely renewed the Lease and disputed that the term was set to expire on August 31. Further, having become current on its monthly rent obligations in the week prior, Debtor claimed it was in compliance with all its obligations under the Lease.

Debtor did not vacate the Property on August 31. Rather, to date, Debtor remains in possession of the Property and continues to operate its restaurant business.

On September 1, 2021, the day after the expiration of

the Lease's initial term, Landlord commenced an action in state court asserting that Debtor was a holdover tenant at sufferance and seeking its eviction from the Property.[27] Debtor timely answered the state court complaint and as it disputed the amount of the rent due, filed a motion to determine rent. Debtor claimed it had extended the lease and that Landlord was not entitled to double rent as alleged.[28] Debtor's motion to determine rent was never decided.[29]

On the morning of January 28, 2022, shortly before what appears to have been a final pretrial conference, Landlord moved for a default judgment on the basis that Debtor had not complied with its obligations to pay rent into the court registry. Though it paid the regular, *i.e.*, non-doubled, rent for September 2021 into the registry, Debtor did not deposit any further rent into the state court registry due to the pendency of the motion to determine rent.

Before the state court could render its decision, which appears to have been favorable to the Landlord, on February 4, 2022, Debtor filed this bankruptcy case.

At trial, Debtor admitted that it had no proof of mailing the Renewal Notice to Landlord, be that receipt or otherwise. Further, Debtor conceded that in all the various correspondence or conversations, Landlord never used the term "waiver" nor expressly waived the defaults under the Lease.

Mr. Jaffan candidly and credibly testified that should it be determined that the Lease expired, there was no realistic possibility of Debtor relocating its business. He noted that Debtor cannot remove the fixtures it installed nor get back what it spent to "build out" the Property. Further, there was no guarantee that Debtor's regular clientele would follow the restaurant should it

move, and Mr. Jaffan lacked the financial resources necessary to invest to develop a new customer base.

As of the date of trial, Debtor was not current on its rent obligations as no rent was paid or deposited into the state court registry for the four-month period beginning October 2021 through the filing of Debtor's bankruptcy petition. It was not disputed that Debtor was current on its post-petition rent obligation.[30] Nonetheless, Mr. Jaffan testified that Debtor stands ready to cure, promptly, all outstanding rent arrears should the Court deny the Motion.

Discussion

Landlord seeks relief from the automatic stay to complete its state court eviction action. Landlord takes the position that the Lease expired, prepetition, at the end of the initial term on August 31, 2021. Landlord therefore argues that Debtor is unable to assume the Lease and treat it under a proposed plan of reorganization and that, in turn, its motion to lift the stay must be granted.

Preliminarily, Landlord moved for relief from the stay pursuant only to § 362(d)(2).[31] Assuming without deciding that Landlord proved Debtor lacked equity in the Property, the Court finds that Debtor more than demonstrated that the Property was necessary to its reorganization.[32] For that matter, Mr. Jaffan's testimony that remaining at the Property was vital to Debtor as it could not simply relocate and start the restaurant anew was unrebutted.[33] Were the Court to take the Motion at face value, the Motion would need to be denied.[34]

But through the course of these proceedings, it is clear that the Landlord also seeks relief from the stay pursuant to § 362(d)(1) for "cause." "[A] party seeking

relief from the automatic stay must establish a prima facie case of cause for relief."[35] If established, the burden shifts to the debtor to show cause does not exist and that it is "entitled to protection of the automatic stay."[36]

As it is oft said, "cause" is undefined in the Bankruptcy Code.[37] Certainly, if the Lease expired such that Debtor could not assume it and remain at the Property, cause would exist to lift the stay. On that point, the parties agree. However, if the Lease were renewed pursuant to its terms or if there are circumstances that militate against the forfeiture of Debtor's leasehold interest in the Property, relief from the stay would not be appropriate.[38]

Landlord's Prima Facie Case

Section 24 is the Lease's operative provision as to Debtor's option to renew the Lease beyond the initial five-year term ("Section 24"). The Lease does not require Landlord to approve nor authorizes it to reject an exercise of the option to renew.[39] To exercise its option, Debtor was required to provide written notice of its intent to renew no later than six months prior to end of the initial term. Though not expressly incorporated by Section 24, Section 23 of the Lease required that the written notice of the exercise of the option to renew be provided to Landlord by either certified mail, personal delivery, "nationally recognized overnight delivery service," or facsimile with additional "hard copy" delivery.[40] But, Debtor's right to exercise its option arose only if Debtor "[was] not in default, and ha[d] not been in default, of any provision[ ]" of the Lease.[41]

Notice of Intent to Renew

Pursuant to Section 24, Debtor was required to give written notice, by an authorized means, of its intent to renew the Lease by no later than February 28, 2021.

Debtor proffers the Renewal Notice dated October 28, 2020. While undoubtedly a timely "written notice," the Renewal Notice was not sent by means authorized by Section 23.

The Court finds Mr. Jaffan's testimony that he sent the Renewal Notice by first class mail to be credible. The Court is less certain as to Mr. Sutaria's testimony that the Renewal Notice was not received. Even then, the Court finds that under the totality of the circumstances, Landlord either knew or should have known that it was Debtor's intention to renew the Lease beyond the initial term.

But it is indisputable, in fact it is conceded, that the Renewal Notice was not sent by a means authorized by Section 23. Thus, this point goes to the Landlord.

Debtor's Defaults Under the Lease

Pursuant to Section 24, Debtor's option to renew was available only if Debtor "[was] not in default, and ha[d] not been in default, of any provision[ ]" of the Lease. The provision does not distinguish between monetary and non-monetary defaults, both of which Landlord had asserted in the notices dated April 16, 2021.

Though Mr. Edwards' letter of May 10, 2021, did not concede the validity of Landlord's prior notice of non-monetary default, the absence of similar allegations in his letter of August 13, 2021, and the failure to present any evidence at trial of any such non-monetary default is telling. The Court concludes therefore that Landlord accepted Mr. Bagge's explanations offered in his letter of May 3, 2021, and that Debtor was not in default of any non-monetary requirement under the Lease and

Addendum.

As it happens, Landlord relies on Debtor's non-payment and/or history of untimely payment of rent. The parties stipulated to Debtor's payment history since execution of the Addendum, and Debtor does not dispute that rent payments were made untimely or that at the time of the Renewal Notice, Debtor was two months in arrears on payment of rent. For that matter, the stipulated payment history reflects that it was not until August 20, 2021, that Debtor fully cured the rent arrears.

Recognizing the payment history for what it is, Debtor argues Landlord waived these payment related defaults. Debtor's argument, however, is not compelling for two primary reasons. First, Section 17.3 of the Lease contains a "no waiver" clause and that particular reservation of rights to the Landlord is repeated in several other instances in the Lease and Addendum. Second, although matters may have been "cooperated," Debtor conceded that Landlord never expressly waived the payment defaults and that the communications between the parties in the record do not evidence a waiver. Rather, Landlord's insistence on the timely payment of rent never waivered (pun intended). Debtor's best argument is the alleged oral agreement between Messrs. Jaffan and Kotecha that Debtor could "catch up" by timely paying double rent beginning in April 2021; however, the stipulated payment history shows that Debtor breached that agreement from day one.

Thus, here too, the point goes to the Landlord. And, accordingly, the Court finds that Landlord has stated a prima facie case for cause to lift the stay.

Debtor's Rebuttal Case

In rebuttal, Debtor raises two primary arguments: first,

waiver, which is addressed above, and second, Florida's anti-forfeiture doctrine. The Court finds that on the facts of this case, Debtor's second argument is persuasive.

In the context of landlord-tenant disputes, Florida law provides the equitable remedy of anti-forfeiture "whenever it is just and equitable to do so; the only condition precedent ... being the tender of the arrears of rent with accrued interest."[42] As the Florida Supreme Court stated long ago, "courts of equity always mitigate forfeitures when it can be done without doing violence to the contract of the parties."[43]

Here, it is undisputed that Debtor had cured or substantially cured the rent arrears before the expiration of the initial term, rent arrears that the Court notes were brought about by the extraordinary circumstance of a worldwide pandemic. Further, notwithstanding the technical defect in the means of delivery of the Renewal Notice, Landlord knew, or should have known, of Debtor's intent to exercise its option to renew the Lease based upon its awareness of Debtor's efforts to update and improve the Property gained either through Mr. Jaffan's communications with Mr. Kotecha or through the observations of Mr. Choksi.

Although the Landlord is technically correct and the Lease could not be renewed pursuant to its terms, Debtor has demonstrated to the Court's satisfaction that equity must intervene to prevent the forfeiture of Debtor's leasehold interest.[44]

Though the Court finds that Debtor has satisfied its burden to demonstrate an equitable exception to the termination of the Lease, going forward, Debtor must not only learn from, as Mr. Jaffan testified, but correct the mistakes of the past to maintain the protections of

the automatic stay. One point clear to the Court is that the relationship between the parties has suffered numerous miscommunications seemingly brought about by language difficulties and differences both as between the parties and as between the parties and the Lease itself.[45]

For these reasons, it is **ORDERED**:

1. The Motion (Doc. 23) is **DENIED, without prejudice**, conditioned upon the provision of additional adequate protection to the Landlord as provided below.

2. As additional adequate protection due Landlord, Debtor shall, **by no later than May 23, 2022**, become current on its monetary obligations under the Lease. This necessarily includes unpaid rent at the monthly rate as defined in the Lease but also includes, as provided in the lease, all accrued late fees/charges, interest, attorney's fees and costs. Debtor shall, as provided below, remit all amounts due by payment care of Landlord's counsel.

3. Landlord shall, within ten (10) days of entry of this Order, provide to Debtor and file with the Court, an itemized statement setting forth all unpaid amounts claimed due to date under the terms of the Lease. As part of said filing, counsel for Landlord shall file an attorney's fee affidavit setting forth, with appropriate time records, its fees and costs incurred to date.

4. Debtor may object to the Landlord's itemized statement or to the reasonableness of the claimed attorney's fees and costs by appropriate filing made within ten (10) days after the itemized statement is filed with the Court; however, an objection shall not serve to relieve Debtor from the timely payment of all amounts claimed due and owing by Landlord.

If Debtor timely files an objection to the Landlord's itemized statement or to the reasonableness of the claimed attorney's fees and costs, Landlord shall have ten (10) days to file any response. Upon the filing of a response, the Court will take the matter under advisement but reserves the right to set a hearing if, upon review, it is deemed appropriate.

Upon the payment by Debtor of the amounts claimed due in the itemized statement, counsel for Landlord shall remit to Landlord an amount sufficient to cure the monthly rent obligations at the regular, *i.e.*, non-holdover, rate as set forth in the Lease. Counsel shall hold the balance of Debtor's payment in its trust account pending the filing of an objection pursuant to paragraph 4 above. If Debtor files an objection, counsel may, without further order, remit any undisputed amounts to Landlord; however, counsel shall hold any disputed amounts in its trust account pending further order of the Court.

Should Debtor fail to make the additional adequate protection payment as ordered above, Landlord may file an affidavit of default, and the Court will grant immediate relief from the automatic stay without further hearing.

Consistent with the Court's prior order (Doc. 52), rent at the regular rate as set forth in the Lease shall continue to be paid to Landlord by the tenth (10th) of each month as adequate protection. Upon any default in the timely payment of the monthly rent and the failure to cure said default within twenty-four (24) hours of notice being provided to Debtor by email to Debtor's counsel, Mr. Jonathan A. Semach (all@tampaesq.com), Landlord may file an affidavit of default, and the Court will grant immediate relief from stay without further

hearing.

The Court will defer ruling on the Debtor's Motion to Assume the Lease (Doc. 60) until consideration of any plan of reorganization for confirmation.

ORDERED.

Footnotes

1 Docs. 42 & 47.

2 Doc. 55.

3 *See* Docs. 92 & 93 (annotated exhibit lists). The Landlord's exhibits may be found in the record at Doc. 81 ("LL's Ex. __) while the Debtor's exhibits may be found at Doc. 82 ("D's Ex. __).

4 Docs. 94 & 95.

5 LL's Ex. 1; D's Ex. 1.

6 LL's Ex. 2; D's Ex. 2.

7 The Lease Year, as defined in Section 2.91 of the Lease, runs from Sept. 1 through Aug. 31.

8 Debtor paid the April 2020 rent on May 13, 2021, and the May 2020 rent on June 23, 2021. The November and December 2020 rents were cured on August 20, 2021. LL's Ex. 7; Doc. 80 Ex. A.

[9] D's Ex. 21.

[10] In a text exchange on Dec. 15, 2020, between Messrs. Jaffan and Sutaria, Mr. Jaffan noted that Debtor had upgraded the bathrooms and had been closed the month prior. Mr. Jaffan's comment may have been overlooked by Mr. Sutaria as Mr. Jaffan was responding to a plea that Debtor "catch up" on past due rent and not with the answer Mr. Sutaria wanted to hear. At the time, Debtor was four months in arrears. D's Ex. 11 pp. 3–4.

[11] As examples, Debtor upgraded outdoor seating options, relandscaped, installed hurricane doors at the main entrance, installed several televisions and other entertainment technologies in the dining room, and opened the kitchen to the dining room. He also purchased and installed a large brick pizza oven. D's Exs. 44–47.

[12] LL's Ex. 12.

[13] D's Ex. 11 pp. 9–10.

[14] The amendment to the payment due date was prompted by Debtor's consistently late payments.

[15] *See* LL's Ex. 7; D's Ex. 16.

[16] D's Exs. 33, 34, 36, & 38.

[17] *See, e.g.*, LL's Ex. 6 pp. 4–6 (text conversation dated March 6, 2021, between Messrs. Jaffan and Kotecha).

[18] Mr. Sutaria indicated that on one occasion, he authorized Mr. Choksi to execute a time sensitive

lease agreement.

19 LL's Exs. 8 & 9.

20 LL Ex. 8. The fifth month was April 2021, for which rent had just come due and was then unpaid.

21 D's Ex. 28.

22 Just before the May 3, 2021 letter was sent, Debtor paid the April 2021 rent. Debtor timely paid the May 2021 rent a few days later. *See* LL's Ex. 7.

23 Although not part of the trial record, statements made by the Subchapter V Trustee at hearings on Debtor's use of cash collateral support Mr. Jaffan's testimony regarding its improving operations.

24 LL's Ex. 10.

25 LL's Ex. 11; D's Ex. 29.

26 LL's Ex. 12 p. 5.

27 LL's Ex. 14; *see also* Doc. 20 (Aff. of Nilesh Sutaria sworn Feb. 16, 2022).

28 LL's Ex. 15.

29 The Court takes judicial notice of the docket in the state court eviction action. A copy of the docket, as of March 1, 2022, was filed by Landlord as part of its Notice of Filing State Court Documents (Doc. 42).

30 *See* Doc. 52.

[31] All references are to 11 U.S.C. §§ 101–1532 ("Code" or "Bankruptcy Code") unless otherwise stated.

[32] *See* §§ 362(d)(2), (g).

[33] *Cf. In re 412 Boardwalk, Inc.*, 520 B.R. 126, 134 (Bankr. M.D. Fla. 2014).

[34] The Motion confuses the issues. Whether the Lease is assumable is a separate question from whether the Property would be necessary to an effective reorganization by the Debtor.

[35] *In re 412 Boardwalk, Inc.*, 520 B.R. at 132.

[36] *In re Brumlik*, 185 B.R. 887, 889 (Bankr. M.D. Fla. 1995).

[37] *See Lord v. True Funding, LLC*, 618 B.R. 588, 592 (S.D. Fla. 2020) (" 'Cause' is not defined under § 362(d) and therefore is assessed on a case-by-case basis, with courts being afforded wide latitude in deciding whether to grant relief."); *see, e.g., In re 412 Boardwalk, Inc.*, 520 B.R. at 132; *In re White*, No. 3:14-bk-00151-JAF, 2014 WL 4443422, at *2 (Bankr. M.D. Fla. Sept. 3, 2014); *In re Aloisi*, 261 B.R. 504, 508 (Bankr. M.D. Fla. 2001).

[38] *See, e.g., In re Jerusalem Rest., Inc.*, No. 6:18-bk-01065-CCJ, 2018 WL 11206148, at *1 (Bankr. M.D. Fla. July 12, 2018); *In re PetitUSA, LLC*, No. 16-10305-BKC-LMI, 2016 WL 8504995, at *1 (Bankr. S.D. Fla. Apr. 5, 2016); *In re 2408 W. Kennedy LLC*, 512 B.R. 708 (Bank. M.D. Fla. 2014).

39 LL's Ex. 1 ¶¶ 2.3 B, 24.

40 LL's Ex. 1 ¶¶ 23–24.

41 LL's Ex. 1 ¶ 24.

42 *Ross v. Metro. Dade Cty.*, 142 B.R. 1013, 1016 (S.D. Fla. 1992) (quoting *Rader v. Prather*, 100 Fla. 591, 595, 130 So. 15, 17 (1930)), *aff'd*, 987 F.2d 774 (11th Cir. 1993); *see also In re PetitUSA, LLC*, 2016 WL 8504995, at *3–*4; *In re 2408 W. Kennedy*, LLC, 512 B.R. at 713.

43 *Rader v. Prather*, 100 Fla. 591, 595, 130 So. 15, 17 (1930).

44 *See, e.g., In re PetitUSA, LLC*, 2016 WL 8504995, at *4.

45 The Lease and Addendum are written in English, and neither party's representatives nor Mr. Choksi appear to be native English speakers. Based upon his communications in the record, neither is Mr. Kotecha.

ORDERED.

Dated: August 09, 2023

/s /Roberta A. Colton

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

www.flmb.uscourts.gov

In re: Case No. 8:22-bk-00459-RCT

Chapter 11

Jaffan International, LLC, Subchapter V

Debtor.

_____/

ORDER GRANTING MOTION TO DISMISS OR CONVERT CASE TO CHAPTER 7 (DOC. 272)

THIS CASE came before the Court on August 4, 2023 upon the United States Trustee Motion to Dismiss or Convert Case to Chapter 7 (Doc. 272) (the "Motion"). The Court determined that dismissal was appropriate under the circumstances of the case. Therefore, for the reasons stated orally and recorded in open court, constituting this Court's findings and conclusions, good cause is found that this case should be dismissed. Accordingly, **IT IS ORDERED** that:

1. The United State Trustee's Motion is **GRANTED**.

2. The Debtor's case is **DISMISSED**.

3. The automatic stay is terminated. No debts, liabilities, or obligations were discharged.

4. The Court will retain jurisdiction to

determine the reasonableness of any profession/nal fees (including those of the Subchapter V trustee) incurred during this chapter 11 case. Any professional seeking a determination of such fees shall file a fee application within 14 days.

5. The Subchapter V Trustee is discharged from any further duties in this case.

6. Upon either the expiration of the time to file applications for approval of administrative expense claims or the final adjudication of any such applications that are timely filed, whichever is later, the Clerk shall proceed to close this case.

7. All hearings, if any, are cancelled. All other pending motions, applications, or request for relief, not previously ruled upon are moot, and all hearings are canceled.

8. The Court reserves jurisdiction to enforce the provisions of this Order.

Clerk's Office to serve a copy of this Order upon all parties.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

----------x

IN RE

Case No. 8:22-000459-RCT

.Chapter 11 JAFFAN INTERNATIONAL, LLC,.
dba CRAVE RESTAURANT AND BAR .

.

Debtor. .

.....x

U.S. Courthouse
801 North Florida Avenue Tampa, Florida 33602
Held August 4, 2023
9:30 A.M.

TRANSCRIPT OF HEARING AND COURT'S ORAL RULING

(1) Motion to Dismiss Case or Convert under 1112(b) by United States Trustee (Doc. 272);

[NATURE OF PROCEEDINGS CONTINUED ON NEXT PAGE]

BEFORE THE HONORABLE ROBERTA A. COLTON
UNITED STATES BANKRUPTCY JUDGE

PROCEEDINGS RECORDED BY COURT PERSONNEL VIA IN-PERSON, ZOOM AND/OR TELEPHONE.
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE APPROVED BY ADMINISTRATIVE OFFICE OF U.S. COURTS.

SCHULTZ REPORTING OF PASCO, INC.
3350 Chickadee Dr.
Holiday, Florida 34690
(727) 808-1484

[NATURE OF PROCEEDINGS CONTINUED FROM PREVIOUS PAGE]

(2) Continued Motion to Use Cash Collateral Retroactive to the Petition Date and Providing Adequate Protection by Debtor (Doc. #18);

(3) Continued Application to Set Officers' Salary of Manager Member Retroactive to the Petition Date by Debtor (Doc. #70).

APPEARANCES
VIA IN-PERSON, ZOOM, AND/OR TELEPHONE:

For the Debtor:

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Subchapter V Trustee
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jr@johanson.lawb
Also present: Ahmad
Maher Aljaffan

PROCEEDINGS

COURT CLERK: Case Number 22-459, Jaffan International, LLC.

THE COURT: All right. Let's take appearances, please.

MS. DORR: Good morning, Your Honor. Teresa Dorr on behalf of the United States Trustee. And with me today is my co-counsel, Nicole Peair.

THE COURT: Good morning.

MR. ARESTY: Good morning, Judge. Joel Aresty for the Debtor. And Mr. Jaffan, principal of the Debtor is here, and also Mariana, his assistant.

THE COURT: Very good. Good morning.

MR. MUELLER: Good morning, Your Honor. Rudy Mueller, the Sub V Trustee.

THE COURT: Good morning.

MR. BOYD: Good morning, Your Honor. J.R. Boyd on behalf of the Tamm Corporation, Inc.

THE COURT: Mr. Boyd. All right. Any other appearances?

(No response.)

THE COURT: Very good. Then this morning we are here for a trial on the United States Trustee's Motion to Dismiss or Convert.

I believe, Mr. Aresty, that all other motions

11 case. In addition, as the evidence came out this morning, the Debtor has made substantial payments for attorney's fees to these creditors, as additional adequate protection was required by the Court.

Five, the Debtor has accepted and partially repaid an unauthorized loan from Dr. Schwaiki. The Court accepts that the loans from Dr. Schwaiki were intended to be personal loans to Mr. Jaffan and then be put in the business, but nonetheless the repayments of those loans came from the business and not from him, personally. This is a breach of Mr. Jaffan's duty as a fiduciary.

Six, I find that the business has a going-concern value of some sort. It has a good location, it has a valuable lease, and the Debtor has invested in improvements and equipment to make the business -- make a go

of the
16 business.
17 And seven, the Debtor has accrued significant
18 post-petition attorney's fees and other professional
19 administrative costs that remain unpaid and will make
20 confirmation of the Plan more difficult than it would be
21 under ordinary circumstances.
22 And for my conclusions of law. First, this Court
23 has jurisdiction over this action pursuant to 28 U.S.C.
24 Section 157 and 1334 and the standing order of reference.
25 Venue of this action in this District and Division are

In addition, Section 1112(b)(2) provides that the Court may not convert or dismiss a case if it finds specifically and identifies unusual circumstances establishing that converting or dismissing the case is not in the best interest of creditors and the estate and the debtor or any other party in interest establishes: (a) that there's reasonable likelihood that a plan will be confirmed within a reasonable time; and (b) grounds for converting or dismissing the case include an act or omission other than under (4)(a) for which there is reasonable justification for the act or omission and that will be cured within a reasonable period of time as fixed by the Court.

11 U.S.C. Section 1185 also applies because this is a Subchapter V case and it requires the removal of the debtor as debtor-in-possession for cause, including

fraud,

dishonesty, incompetence, or gross mismanagement of the

affairs of the debtor.

The evidence that has been presented in this

contested matter supports a finding of cause to dismiss,

convert, or remove the Debtor as Debtor-in-Possession.

Indeed, the Debtor has virtually conceded as much.

Although I do not find fraud or dishonesty, I do find

incompetence and gross mismanagement in the affairs of the

Debtor up to this point. So with that finding, I'm left

with three options: One, dismissal; two, conversion; and

three, removal of the Debtor-in-Possession.

The United States Trustee urges conversion principally because there is an asset available and there are significant unpaid administrative claims. The number of unsecured claims is relatively small here and there's not a lot of unsecured creditors. It's mostly secured creditors and very small creditors. But in considering conversion, it's going to also incur other unpaid administrative expenses that will have to arise necessarily in the administrate of the estate. But more importantly, it will most certainly result in the loss of the lease, notwithstanding the Debtor's significant efforts to pay the landlord's attorney's fees in his effort to assume the lease down the road in a confirmed plan.

It will also, of course, result in the loss of

any going-concern value of the business, and as noted by

counsel it would result in the loss of employment for the

workers who work in the restaurant.

So then the Court considers removal of the

Debtor-in-Possession and perhaps putting something like --

someone like Dr. Mueller in charge of running the business

for a time to see if the case can be turned around with

some financial discipline and good management. But Dr.

Mueller has indicated that really he has not been very

involved in this case up to this point and he has not been

So, I just want to say that at the initial hearings of this case I was impressed with Mr. Jaffan, and I was persuaded that if he could overcome the pandemic's impact on his business, that the money that he invested in this property would ultimately bear some fruit. I was also hopeful that Dr. Mueller could help and hopefully resolve some of the Debtor's disputes with the landlord. Obviously, this has not occurred.

I applaud the current business plan and Mr. Aresty's efforts to attempt to save the case, but it's just too little too late. And I say this not because the business plan is ill advised, but at this point it's just speculative and it would be too difficult to consummate in this Chapter 11 case.

I also find credible Mr. Jaffan's statement that he has learned from this experience, and I expect him one

day to be a very successful businessman. I admire his entrepreneurial spirit, but unfortunately I find that this bankruptcy case is not salvageable.

I will, therefore, grant the United States Trustee's motion to dismiss, and Ms. Dorr you can give me an order on that. And I thank you all.

COURT CLERK: All rise.

(Whereupon, at 1:44 p.m., the proceedings concluded.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Art. IV, Sec. 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Art. VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S.C. § 349(b)

(b)Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1)reinstates—

(A)any proceeding or custodianship superseded under section 543 of this title;

(B)any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C)any lien voided under section 506(d) of this title;

(2)vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3)revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 365(a)

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

Fla. Stat. § 83.232

(1) In an action by the landlord which includes a claim for possession of real property, the tenant shall pay into the court registry the amount alleged in the complaint as unpaid, or if such amount is contested, such amount as is determined by the court, and any rent accruing during the pendency of the action, when due, unless the tenant has interposed the defense of payment or satisfaction of the rent in the amount the complaint alleges as unpaid. Unless the tenant disputes the amount of accrued rent, the tenant must pay the amount alleged in the complaint into the court registry on or before the date on which his or her answer to the claim for possession is due. If the tenant contests the amount of accrued rent, the tenant must pay the amount determined by the court into the court registry on the day that the court makes its determination. The court may, however, extend these time periods to allow for later payment, upon good cause shown. Even though the defense of payment or satisfaction has been asserted, the court, in its discretion, may order the tenant to pay into the court registry the rent that accrues during the pendency of the action, the time of accrual being as set forth in the lease. If the landlord is in actual danger of loss of the premises or other hardship resulting from the loss of rental income from the premises, the landlord may apply to the court for disbursement of all or part of the funds so held in the court registry.

(2) If the tenant contests the amount of money to be placed into the court registry, any hearing regarding such dispute shall be limited to only the factual or legal issues concerning:

(a) Whether the tenant has been properly credited by the landlord with any and all rental payments made; and

(b) What properly constitutes rent under the provisions of the lease.

(3) The court, on its own motion, shall notify the tenant of the requirement that rent be paid into the court registry by order, which shall be issued immediately upon filing of the tenant's initial pleading, motion, or other paper.

(4) The filing of a counterclaim for money damages does not relieve the tenant from depositing rent due into the registry of the court.

(5) Failure of the tenant to pay the rent into the court registry pursuant to court order shall be deemed an absolute waiver of the tenant's defenses. In such case, the landlord is entitled to an immediate default for possession without further notice or hearing thereon.

APPENDIX B

IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

RADHE KRISHNA PROPERTIES, LLC,
Plaintiff,
Case No: 21-CC-092536
v.

JAFFAN INTERNATIONAL, LLC,
Defendant,

_____/

DEFENDANT'S OPPOSITION TO PLAINTIFF RADHE KRISHNA PROPERTIES, LLC'S MOTION FOR ENTRY OF FINAL JUDGMENT AND CROSS-MOTION FOR ENTRY OF VOLUNTARY DISMISSAL

Defendant, Jaffan International, LLC ("Tenant"), by its undersigned attorney, hereby responds to Landlord Radhe Krishna Properties, LLC's Motion for Entry of Final Judgment (the "Motion") and cross-moves for entry of voluntary dismissal and states as follows:

INTRODUCTION

Landlord's Motion ostensibly asks this Court to undertake the simple ministerial act of entering a default final judgment because Tenant failed to deposit rent into the Court registry earlier in this litigation. In so doing, Landlord does not inform the Court that the relief requested would be contrary to a final order entered in federal bankruptcy court litigation between the parties. The federal bankruptcy court already adjudicated the merits of the complaint in this case. Granting a default final judgment here would nullify the bankruptcy order.

The bankruptcy order is binding on this Court under res judicata and collateral estoppel principles.
Even more fundamentally, the United States Constitution, under Article III, the Full Faith and Credit Clause, and the Supremacy Clause, forbids a state court from disregarding a federal court order. Effectively circumventing a federal court order is contrary to principles of federalism embodied in the Constitution and cannot occur.

Relatedly, allowing Landlord to circumvent the order is also contrary to federal law concerning bankruptcy orders. Generally under bankruptcy law, under the mootness doctrine, a party loses the right to appeal or subsequently challenge certain orders on the basis of mootness if the order sought to be challenged or appealed is not stayed. The reason is that in bankruptcy parties will make financial commitments in reliance on court orders, and it is unfair and creates uncertainty if certain orders can be reversed. Those circumstances are present with respect to the final order entered by the bankruptcy court.

Additionally, this case is moot under state law, and should be dismissed for that independent reason. The premise of this case is that Tenant's lease expired August 31, 2021 and that Tenant was a holdover without a lease, as Tenant either failed to renew its lease or its renewal efforts were invalid. Notwithstanding the foregoing, Tenant had paid, and Landlord has accepted, rent from Tenant from September 2021 to present. Landlord continued to accept rent without comment or protest even after the bankruptcy case was dismissed. The central premise of this case was no lease existed or was in effect. Landlord's ongoing acknowledgement of the validity of the lease (even after the bankruptcy case was dismissed) is contrary to its complaint and demonstrates that there no longer is an active case or controversy. Consequently, the Motion should be denied and the case should be dismissed

for that independent reason.

Finally, Landlord is simply incorrect that Tenant was in violation of the order requiring payment of rent into the registry. Consistent with the order, Tenant paid the then accrued rent, and filed a motion requesting determination of the rent. Tenant's obligation to pay rent could not accrue until the Court decided the motion, which it never did. Th at a predecessor judge was prepared decide this issue in Landlord's favor is not binding before this Court as no final order was ever entered in this case.

Procedural Background

In this proceeding, the Landlord had sought to evict the Tenant from the subject premises on the purported basis that Tenant no longer had a valid lease, as its lease had expired, and Tenant had purportedly either had failed to renew the lease or its efforts to renew the lease were ineffective because Tenant had been in default under the lease. Tenant's original lease expired on August 31, 2021. Landlord filed suit on September 1, 2021, claiming that Tenant was a holdover and owed double rent to Landlord as it no longer had a valid lease. Tenant timely deposited the September rent into the Court registry, timely moved the Court to determine the rent, and timely answered the complaint. The basis of Tenant's motion to determine rent was that Landlord had asserted in its complaint that Tenant was a holdover, which would require payment of double rent under Florida law. Tenant asserted that payment of "regular" rent was required.

Thereafter, Landlord moved to have a default judgment entere d on the basis that Tenant had failed to deposit rent into the Court registry in the months after September 2021. Prior to the Court entering final judgment on Landlord's motion, the Tenant filed for bankruptcy under Chapter 11 of the Bankruptcy Code.

On February 17, 2022, Landlord filed its Amended Motion for Relief from the Automatic Stay seeking relief from the automatic stay pursuant to 11 U.S.C. § 362(d) (the "Stay Relief Motion"). The filing of a bankruptcy case automatically stays litigation against a debtor. To obtain permission to proceed with litigation against a debtor, a creditor must file a motion for relief from the stay.

At issue in the Stay Relief Motion was whether cause existed to lift the automatic stay such that Landlord could prosecute its state court eviction case. Landlord contended, as it did in its complaint here, that the lease was expired and could not have been renewed in light of prior alleged defaults and because Tenant had failed to properly renew the lease.

Following a nearly full day trial, the bankruptcy court found in favor of Tenant, based on the application of Florida state law principles. (Bankruptcy Court Order, filed December 14, 2023). The bankruptcy court framed the issue as follows: "whether the term of the lease between the parties had been properly extended." (*Id.* at 1.) The bankruptcy court explained: "if the Lease expired such that [Tenant] could not assume it and remain at the Property, cause would exist to lift the stay. On that point, the parties agree. However, if the Lease were renewed pursuant to its terms or if there are circumstances that militate against the forfeiture of [Tenant's] leasehold interest in the Property, relief from the stay would not be appropriate." (*Id.* at 12).

The bankruptcy court ultimately found that such circumstances existed. Specifically, the bankruptcy court found that Florida's anti-forfeiture doctrine operated to preclude Tenant from forfeiting its interest in the lease. The bankruptcy court explained that "[i]n the context of landlord-tenant disputes, Florida law provides the equitable remedy of anti-forfeiture 'whenever it is just and equitable to do so; the only condition precedent . . . being the tender of the arrears of rent with accrued

interest.' As the Florida Supreme Court stated long ago, 'courts of equity always mitigate forfeitures when it can be done without doing violence to the contract of the parties.'" *Id.* at 15 (citing *Rader v. Prather*, 100 Fla. 591, 595, 130 So. 15, 17 (1930)).

The bankruptcy court found that Tenant had cured any rent default, and that under the specific circumstances between the parties, Tenant's interest in the property should not be forfeited. Consequently, Landlord did not receive permission to prosecute its state court case. To obtain the benefit of the Stay Order, it required that Tenant pay to Landlord as adequate protection payments any amounts that were due under the lease, including post-renewal rent payments, late fees/charges, interest, attorney's fees and costs. (*Id.*)

Landlord moved to reconsider the Stay Order, which the bankruptcy court denied. After the Stay Order was entered, Landlord never sought a stay of the Stay Order or the denial of the motion for reconsideration, although it appealed the Stay Order. The amount in adequate protection payments due to be paid the Landlord was $91,686 which included $55,037 of Landlord's attorney fees incurred in litigation. (Bankruptcy Case, D.E. 111 at 1); (D.E. 142); (D.E. 153). To fund the adequate protection payments, Tenant obtained a high interest post bankruptcy petition $65,000 secured loan. (Bankruptcy Case D.E. 120; D.E. 122). The bankruptcy court approved Tenant's loan it obtained to pay Landlord the adequate protection payments. (Bankruptcy Case D.E. 134). Throughout the bankruptcy case, Tenant continued to pay and Landlord continued to accept Tenant's monthly rent payments. Nothing required Landlord to accept Tenant's rent payments, and the payments were not accepted under protest.

On August 9, 2023, the bankruptcy court involuntarily dismissed the main bankruptcy case on motion from the United States Trustee. (D.E. 332). The

basis for the dismissal was unrelated to the lease issue. On September 29, 2023, the United States District Court dismissed Landlord's
appeal sua sponte without disturbing the Stay Order. (D.E. 346).

In September 2023, the owner of Tenant (Maher Jaffan) attempted to deposit the September rent into the bank account of Landlord via in-person direct deposit at Landlord's bank. That is how Landlord had historically paid the rent. Mr. Jaffan was advised by Landlord's bank that the deposit was impermissible. Mr. Jaffan reached out to Tushar Choksi, a representative of Landlord who operates a business in the same plaza as Tenant, regarding his inability to deposit rent. Mr. Choksi advised Mr. Jaffan to try again. Mr. Jaffan returned to the bank and was able to deposit the rent as he had historically done, presumably as Landlord advised the bank that the deposit was permissible. Neither Landlord nor Mr. Choksi advised Tenant that its position was that the lease was terminated or that it could not accept rent.
In November 2023, Landlord filed the instant Motion, seeking entry of a default final judgment in its favor on the basis that Tenant had failed to deposit rent into the court registry in 2021.

LEGAL ARGUMENT

I. The Relief Sought By Landlord is Barred by the Constitution and is Precluded by Res Judicata and Collateral Estoppel.

The Motion should be denied first and foremost because it is contrary to the United States Constitution for which this Court is bound to follow. Entry of final judgment in the complaint in this case would be directly contrary to the Stay Order, which was the equivalent of a final
judgment in federal court. Entering final judgment would

disregard the express findings and conclusions of the bankruptcy court. Doing so would violate Article III, the Full Faith and Credit Clause, and the Supremacy Clause of the Constitution. For the same reasons, federal law requires application of federal principles of collateral estoppel and res judicata. Federal principles of collateral estoppel and res judicata dictate that the Motion be denied as well.

It is a fundamental principle of the Constitution that state courts give effect to decrees and judgments entered by federal courts. Article III gives to the Supreme Court and to congressionally created "inferior courts" the "judicial power" to decide certain "cases" and "controversies." U.S. Const. art. III, §§ 1, 2. Since 1792, finality of judgments has been recognized as an essential attribute of this federal judicial power to render decisions. *See Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410, 413, 1 L.Ed. 436 (1792). The ultimate source for binding state courts to federal decrees is the supremacy clause, part of Article VI, as it operates through article III. *See* 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4468 (1981).

State courts are "destitute of all power" to interfere with the proceedings or decisions of the national courts. *Central National Bank v. Stevens*, 169 U.S. 432, 460–61, 18 S.Ct. 403, 413–14, 42 L.Ed. 807 (1898) (exemption from interference by state judicial action is "essential" to the "independence and efficiency of United States courts); *see also Riggs v. Johnson*, 73 U.S. (6 Wall.) 166, 194–96, 18 L.Ed. 768 (1867) ("the Constitution itself becomes a mockery ... if ... the nation is deprived of the means of enforcing its own laws by the instrumentalities of its own tribunals"); *McKim v. Voorhies*, 11 U.S. (7 Cranch) 279, 280, 3 L.Ed. 342 (the state court has no jurisdiction to enjoin a judgment of the circuit court of the United States).

Florida courts have accordingly recognized they cannot enter judgments contrary to final federal orders under the United States Constitution. *Pettijohn v. Dade Cnty.*, 446 So. 2d 1143, 1145 (Fla. 3d DCA 1984). As a result, under constitutional principles, "it has long been held that federal court orders and judgments must be given res judicata effect in state court proceedings." *Id.*

The same is true for bankruptcy court orders. The Supreme Court has long held that bankruptcy court orders are required to have res judicata effect in state court. *Stoll v. Gottlieb*, 305 U.S. 165, 170–71 (1938). Under the Full Faith and Credit Clause of the Constitution, "judgments and decrees of the Federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances." *Id.* A state court errs if fails to give res judicata effect to an order made pursuant to the Bankruptcy Code, and a state court must treat a final bankruptcy order "as an effective judgment." *Id.*

As a general rule, under Supremacy Clause principles, state courts are bound to follow federal law on federal law issues litigated in state court. *Philadelphia Fin. Mgmt. of San Francisco, LLC v. DJSP Enterprises, Inc.*, 227 So. 3d 612, 616 (Fla. 4th DCA 2017). As the Supreme Court has stated in no uncertain terms, "[s]tates cannot give [federal] judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes." *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001). Indeed, the Florida Supreme Court has not surprisingly acknowledged "that state courts are bound by federal court determinations of federal law questions." *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 375 (Fla. 1977). Where state law is contrary to federal law, federal law governs. *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949)

(A "federal right cannot be defeated by the forms of local practice."). State law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of a federal law is pre-empted. *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011).

In the instant case, the bankruptcy court adjudicated in favor of Tenant all of the issues that Landlord sought to litigate by way of the complaint. The complaint here was filed on the basis that Tenant's lease had expired, Tenant had not renewed the lease or the renewal attempt was ineffective, and Tenant was therefore a holdover tenant with no right to remain at the Property. The same exact issues were presented to the bankruptcy court, as Landlord specifically sought permission to proceed with this very case. The bankruptcy court determined that Florida's anti-forfeiture doctrine defeated Landlord's claims and that Tenant had an equitable interest in the Property notwithstanding Landlord's assertions that Tenant had failed to properly renew the lease or had been in default.

The bankruptcy court's decision easily meets the requirements of both res judicata and collateral estoppel. Under federal law, res judicata bars a claims when "(1) there is a final judgment on the merits, (2) the decision was rendered by a court of competent jurisdiction; (3) the same cause of action is involved in both cases; and (4) the parties, or those in privity with them, are identical in both suits." *Baloco v. Drummond Co., Inc.*, 767 F.3d 1229, 1246–47 (11th Cir. 2014).

Each element has been met here: the Stay Order was a final judgment, it was rendered by a court of competent jurisdiction (the bankruptcy court), the parties are identical, and the exact same cause of action at issue was "involved" in both cases, namely the eviction of Tenant on the purported it failed to renew the lease and because it purportedly could not extend the lease.

While the Stay Order did not end the entire

bankruptcy proceeding, in the context of bankruptcy, orders granting or denying relief from the automatic stay are considered final judgments, and thus the Stay Order was a final judgment. *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1309 (11th Cir. 1982). Stay orders are not "subject to collateral attack" and the only avenue to challenge them is through appeal. *Old W. Annuity & Life Ins. Co. v. Apollo Group*, 605 F.3d 856, 862 (11th Cir. 2010). Thus, orders denying relief from the automatic stay are immediately appealable. Landlord recognized this itself, as it sought to appeal the Stay Order after it was entered.

Consequently, courts have routinely found that stay orders entered in bankruptcy cases constitute res judicata, as they are the equivalent of a final judgment. *Ray v. Leatherman*, 688 So. 2d 1133, 1139 (La. Ct. App. 1996); *Mitchell v. Fort Davis State Bank*, 243 S.W.3d 117, 125 (Tex. App. 2007); *Abdallah v. United Sav. Bank*, 51 Cal. Rptr. 2d 286, 290 (Ct. App. 1996), *as modified on denial of reh'g* (Mar. 22, 1996); *Reynolds v. First NLC Fin. Services, LLC*, 81 A.3d 1111, 1119 (R.I. 2014).

Likewise, Supreme Court has acknowledged that a "judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest." *Arizona v. California*, 460 U.S. 605, 617 n.7 (1983). The Supreme Court has explained that "res judicata ensures the finality of decisions." *Brown v. Felsen*, 442 U.S. 127, 131–32 (1979). The doctrine "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Id.* Furthermore, res judicata and collateral estoppel "promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 96 (1980)

Likewise, collateral estoppel applies. Federal law governs when a federal court has rendered a prior

decision. *CSX Transp., Inc. v. Bhd. of Maint. of Way Employees*, 327 F.3d 1309, 1317 (11th Cir. 2003). Collateral estoppel "forecloses relitigation of an issue of fact or law that has been litigated and decided in a prior suit." *Id.* The elements are "(1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding." *Id.*

Each element is easily met: whether the eviction of Tenant was appropriate given its alleged default under the lease and alleged failure to renew was identically litigated in the bankruptcy court and here; the issue were actually litigated, e.g. the bankruptcy court considered Landlord's arguments on the merits; the bankruptcy court's termination that Landlord could not evict Tenant notwithstanding Landlord's rationale was a critical component to the court's decision; and the parties had the full an fair opportunity to litigate this issue.

That the main bankruptcy case was later involuntarily dismissed is of no moment. A dismissal for cause of a bankruptcy case vacates only certain orders under the Bankruptcy Code, none of which apply here. 11 U.S.C. § 349(b)(2). Treating the Order as vacated would disregard the plain language of 11 U.S.C. § 349(b)(2). Consequently, courts have had no problem finding that final orders in bankruptcy proceedings have res judicata/collateral estoppel effect even when a main bankruptcy case has later been dismissed. *E.g. Mackall v. JPMorgan Chase Bank, N.A.*, 356 P.3d 946, 952 (Colo. App. 2014); *In re Ramirez*, 283 B.R. 156, 161 (Bankr. S.D.N.Y. 2002).

The dismissed appeal is of no consequence either.

An appeal has no bearing on whether a final order is binding in subsequent litigation. *Andreu v. HP Inc.*, 272 F. Supp. 3d 1329, 1333 (S.D. Fla. 2017). The Stay Order was never vacated and remains binding notwithstanding the dismissal of the appeal as Landlord made no efforts to challenge the dismissal of the appeal or the lack of vacatur. *In re Belmont Realty Corp.*, 11 F.3d 1092, 1099 (1st Cir. 1993).

Finally, this Court should reject any argument by Landlord that the foregoing arguments have somehow been waived or cannot be presented. The issues addressed here arise from constitutional principles of federalism and jurisdictional principles, which cannot be waived. Issues involving federal supremacy over state law are jurisdictional. *Jacobs Wind Elec. Co., Inc. v. Dep't of Transp.*, 626 So. 2d 1333, 1335 (Fla. 1993). Thus, under Florida law, matters of federal preemption and the Supremacy Clause (which is at issue here) cannot be waived because federal preemption is a subject matter jurisdiction question and subject matter jurisdiction can never be waived. *Am. Mar. Officers Union v. Merriken*, 981 So. 2d 544, 547 (Fla. 4th DCA 2008); *Dep't of Revenue v. Vanamburg*, 174 So. 3d 640, 642 (Fla. 1st DCA 2015). Indeed, subject matter jurisdiction can be raised even for the first time on appeal. *Id.* Courts cannot exercise subject matter jurisdiction even if the parties stipulate to it. *Polk County v. Sofka*, 702 So.2d 1243, 1245 (Fla. 1997). In fact, the Florida Supreme Court has held "[c]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any state of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order."

In sum, Landlord, by way of the Motion, seeks to circumvent the Stay Order. It is vexatious and nothing more than Landlord's third attempt to challenge the Stay Order, having failed in two prior efforts (its denied motion for reconsideration and its dismissed appeal). Permitting

entry of the final judgment would wrongfully interfere with the "independence and efficiency of United States courts," *Central National* 169 U.S. at 460–61, and make a "mockery" of the Constitution. *Riggs,* 73 U.S. (6 Wall.) at 194–96. It would ignore principles of res judicata and collateral estoppel, and thereby disrupt the comity between state and federal courts required by the Constitution. *Allen,* 449 U.S. at 96. The Court must deny the Motion and has no discretion in the matter.

II. The Stay Order Must Be Denied Under Mootness Principles.

The Motion must be denied for the independent reason that it is barred by the equitable mootness doctrine, which is a federal bankruptcy doctrine.

"Equitable mootness is a discretionary doctrine that permits courts sitting in bankruptcy appeals to dismiss challenges (typically to confirmation plans) when effective relief would be impossible." *In re Bayou Shores SNF, LLC*, 828 F.3d 1297, 1328 (11th Cir. 2016) (citation omitted). Generally, the doctrine does not invoke the traditional concepts of mootness. Rather, the doctrine "is a pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable." *In re Fontainebleau Las Vegas Holdings*, LLC, 434 B.R. 716, 741 (S.D. Fla. 2010) (citation omitted). While the doctrine is typically applied to appeals from plans of reorganization, "the doctrine is not a stranger to appeals from other kinds of orders." *Id.* at 742.

The underlying purpose behind the doctrine is "to avoid uncertainty and instability in bankruptcy proceedings." *In re Fisherman's Pier, Inc.*, 460 F. Supp. 3d 1345, 1358 (S.D. Fla. 2020). Courts consider "the effects of a reversal on third parties who have relied on a bankruptcy court's order" and whether third parties have

altered their position on a bankruptcy court order. *In re Stanford*, 17 F.4th 116, 121 (11th Cir. 2021). The "doctrine ... applies when appellants have failed and neglected diligently to pursue their available remedies to obtain a stay and circumstances have changed so as to render it inequitable to consider the merits of the appeal." *Darby v. Zimmerman*, 323 B.R. 260, 270–71 (9th Cir. BAP 2005). Courts have applied the doctrine of equitable mootness when the appellant has failed to obtain a stay and the ensuing transactions are too "complex and difficult to unwind." *Lowenschuss v. Selnick*, 170 F.3d 923, 933 (9th Cir. 1999). Moreover, "[u]nder this widely recognized and accepted doctrine, the courts have held that [an action] should be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *In re Innovative Clinical Sols., Ltd.*, 302 B.R. 136, 141 (Bankr. D. Del. 2003).

Essentially, "[t]he test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him." *In re VOIP, Inc.*, 461 B.R. 899, 902 (S.D. Fla. 2011) (citation omitted). In bankruptcy, parties will make financial commitments (i.e loans) in reliance on court orders, and it is deemed unfair as uncertainty if orders relating to such commitments can be reversed. *In re Westport Holdings Tampa, Ltd. P'ship*, 607 B.R. 715, 726 (M.D. Fla. 2019) (explaining "those eggs cannot be unscrambled" when a lender has disbursed a post bankruptcy petition loan pursuant to an order which has not been stayed). Bankruptcy law provides that it is "most inequitable" to allow a party who has received adequate protection payments to keep those payments while simultaneously challenging the order by which it obtained the payments. *In re E.-W. Associates*, 110 B.R.

675, 681 (Bankr. S.D.N.Y. 1990).

Landlord never sought a stay of the Stay Order. Instead, it accepted the benefits of the Stay Order, which imposed considerable hardship and difficulty on Debtor as it had to obtain a high interest loan on short notice to make the adequate protection payment. Put simply, Tenant paid Landlord $90,000 confirm that it had a valid lease and obtained financing from a third party to make the payment. Landlord gladly accepted the money it was paid and did not seek to stay the order by which it received $90,000. Had it stayed the order, it would not have been paid. It also continuously accepted all of Tenant's rent payments, all the way through September 2023.

Landlord could have sought a stay had it wished to later challenge Tenant's entitlement to the lease, but it did not do so, presumably because it didn't want to defer being paid. That was its choice, and it must accept the consequences of its decision. Federal law governing bankruptcy orders does not permit parties to have their cake and eat it too, and this is precisely what Landlord is seeking to do in this case. While equitable mootness normally applies in the context of appeals, in applies which equal force in this context in which Landlord is attempting to circumvent or collaterally challenge a bankruptcy court order in this proceeding. For that independent reason, the Motion must be denied.

III. The Case is Moot and Should be Dismissed.

The Motion should be denied for the independent reason that the case is moot and there is no live case or controversy before the Court.

A case is moot "when the issues presented are no longer live." *Montgomery v. Dep't of Health & Rehab. Services*, 468 So. 2d 1014, 1016–17 (Fla. 1st DCA 1985). A case can become moot through "a change of circumstances." *Id.* Mootness can be raised by "court on its own motion." *Id.* "The rule discouraging review of moot cases is derived from the requirement of the United States Constitution, Article III, under which the existence of judicial power depends upon the existence of a case or controversy." *Id.*

Taking voluntary action inconsistent with a party's litigation position moots a case. *Frank Silvestri Investments, Inc. v. Sullivan*, 486 So. 2d 20, 21 (Fla. 5th DCA 1986). For instance, in *Frank Silvestri*, a party voluntarily made payment on a judgment while an appeal was pending. The final judgment was stayed, so the party had no obligation make payment until the appeal was concluded. The appellate court dismissed the appeal as being moot given the voluntary nature of the party's actions.

Here, Landlord voluntarily accepted Tenant's rent payments, under no obligation to do so, for over two years after the case was filed. It did so even after the bankruptcy case was dismissed. Indeed, while Landlord is now taking the position that the bankruptcy dismissal somehow invalidated the Stay Order, its own action in voluntarily accepting rent after the dismissal took place shows that it was treating the lease as being in place. The central premise of this case is that there is no valid lease, but Landlord's actions in accepting rent for an extended period of time is wholly inconsistent with that. To the extent Landlord claims this issue was "waived," mootness

can be independently determined on the court's own motion and is a doctrine based on the judicial branch's authority to "decide actual controversies." *Montgomery*, 468 So. 2d at 1016–17. Thus, it is a non-waivable jurisdictional issue.

IV. Tenant Filed a Motion to Determine the Rent, Which Was Never Adjudicated.

The Motion should be denied on the merits.

On September 3, 2021, the Court entered an order requiring the Tenant to pay into the Court Registry the amount alleged in the Complaint as unpaid rent "[i]f the Tenant/Defendant does not the contest the amount alleged in the Complaint as unpaid rent."

The Order further stated, "[i]f The Tenant contests the amount, the Tenant shall file a Verified Motion to Determine Rent, along with documentation in support of the allegation that the rent as alleged in the Complaint is in error. The Tenant shall immediately pay in the registry of the Court any undisputed amount of rent and shall thereafter, pay the amount determined by the Court into the Court Registry on the day that the Court makes its determination."

Fla. Stat. § 83.232 similarly provides as follows:

Unless the tenant disputes the amount of accrued rent, the tenant must pay the amount alleged in the complaint into the court registry on or before the date on which his or her answer to the claim for possession is due. If the tenant contests the amount of accrued rent, the tenant must pay the amount determined by the court into the court registry on the day that the court makes its determination.

In the Complaint, the Plaintiff alleged it was entitled to double rent.

On September 14, 2021, Tenant timely filed its motion to determine rent (the "Motion"), asserting it was entitled to pay the rent at the applicable renewal rate. made a determination regarding the correct amount of rent. Consequently, Tenant's obligation to pay rent into the registry never accrued.

In *Axen v. POAH Cutler Manor, LLC*, 323 So. 3d 800 (Fla. 3d DCA 2021), the Third District construed the similarly worded residential eviction statute, Fla. Stat. § 83.60(2). As here, the landlord argued "the failure to continue to deposit rent timely during the pendency of an eviction voids any defense to the eviction other than payment." *Axen v. POAH Cutler Manor*, LLC, 323 So. 3d 800, 801 (Fla. 3d DCA 2021) The *Axen* court squarely held that when a tenant files a motion to determine rent, "the undisposed of motion precludes entry of final judgment based on nonpayment." *Id.*

Notably, Fla. Stat. § 83.60(2), like Fla. Stat. § 83.232, requires that a tenant either pay accrued rent into the court registry or file a motion to determine rent, and a failure to pay the rent constitutes an absolute waiver of the tenant's defenses. Fla. Stat. § 83.60(2) also requires that a tenant pay rent "that accrues during the pendency of the proceeding," just like the Order issued here and just like the nonresidential eviction statute.

The only meaningful distinction between the residential and nonresidential statute is that under the residential statute, the clerk's summons gives notice to the rent payment obligation or option to file a motion to the tenant, and under the nonresidential statute, the court does the same via court order.

In *Axen*, the tenant had failed to pay rent during the pendency of the case. The *Axen* court explained that it was irrelevant that the tenant in that case was late in

depositing rent during the pendency of the action and stated the landlord's argument which relied on that "misconstrue[d] the statute" and "fail[ed] to give meaning to each provision." *Axen*, 323 So. 3d at 802 n.2. That is because the tenant has the option of either contesting rent or paying rent into the registry, and there is no obligation to pay rent until the motion is decided, just as with the nonresidential statute.

None of the cases cited by Landlord involve a tenant that timely filed a motion to determine rent – they involve situations in which the amount of rent was not subject to determination by the court. Consequently, under *Axen* which controls and is right on point, and under the plain language of Fla. Stat. § 83.232, Tenant's timely motion to determine rent precludes this Court from entering final judgment.

If Plaintiff's position was correct, a tenant would be forced to pay the rent demanded by Plaintiff even though it was contested. To the extent Tenant may have misapprehended its obligations under the order or Fla. Stat. § 83.232, the order itself and the statute both vest the Court with the authority to extend the "time periods to allow for later payment upon good cause shown." Good cause exists because the court order specifically stated that tenant's obligation to pay rent would begin "on the day that the Court makes its determination" and because Tenant relied on *Axen* in determining its course of action.

V. The Court Has The Authority To Resolve All of These Issues

Landlord has suggested that the Court cannot reconsider the predecessor judge's informal e-mail that the Court was going to enter final judgment. That is simply incorrect and misreads case law. No final judgment was entered. A successor judge can revisit any issue prior to entry of final judgment. *Jain v. Buchanan Ingersoll &*

Rooney PC, 322 So. 3d 1201, 1204 (Fla. 3d DCA 2021).

The cases cited by Landlord stand for the proposition that a successor *must* revisit hearings or trials where facts are at issue, and no final judgment has been entered. However, one exception to that rule is that a successor *may* (but not *must*) accept a predecessor judge's ruling when no evidence must be weighed. Even when a final judgment is actually entered, a successor judge is entitled to address issues which were never presented to the predecessor judge since in that instance the successor judge is not being asked to reconsider a decision made the predecessor judge. *Samoilova v. Loginov*, 330 So. 3d 1041, 1043 (Fla. 3d DCA 2021).

Here, with the exception of the argument regarding the actual merits of the motion for entry of final judgment, none of these issues were ever presented to the trial court. They couldn't have been, as they all arose afterwards. This court clearly is entitled to hear the issues. In all events, as the issues arise out of non-waivable federal constitutional and jurisdictional issues, the Court is duty bound to consider them.

VI. Court Should Dismiss the Lawsuit

If the Court determines that Landlord's claims are precluded for the reasons set forth herein, the Court should dismiss this lawsuit as those issues are determinative.

CONCLUSION

Tenant Jaffan International, LLC respectfully requests that the Court deny the Motion, dismiss the lawsuit in Tenant's favor, and grant any other appropriate relief. Tenant further requests that the Court award it fees incurred in litigating the Motion as prevailing party.

No_____

Respectfully Submitted,
CAREY, O'MALLEY, WHITAKER,
MUELLER, ROBERTS & SMITH, P.A.

/s/ Stephen J. Bagge

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed and served via ePortal to Ronald D. Edwards, Jr., Lowndes, Drosdick, Doster, Kantor & Reed, P.A., 215 North Eola Drive, P.O. Box 2809, Orlando, Florida 32802 (ronald.edwards@lowndes-law.com, lit.control@lowndes-law.com, tracy.kennison@lowndes-law.com) this December 15, 2023.

/s/ Stephen J. Bagge

Stephen J. Bagge, Esq.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

CASE NO. 2D24-0016
Lower Tribunal Case No: 21-CC-092536

JAFFAN INTERNATIONAL, LLC
Appellant

v.

RADHE KRISHNA PROPERTIES, LLC
Appellee

INITIAL BRIEF OF APPELLANT JAFFAN INTERNATIONAL, LLC

On Appeal from a Final Judgment of the Thirteenth Judicial Circuit In and For Hillsborough County, Florida

Stephen J. Bagge,
Florida Bar No. 97788
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Counsel for Appellant Jaffan International, LLC

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PRELIMINARY STATEMENT

Appellant Jaffan International, LLC is referred to as "Tenant." Appellee Radhe Krishna Properties, LLC is referred to as "Landlord." The court presiding over a related bankruptcy matter is referred to as the Bankruptcy Court. The bankruptcy matter was appealed to the Middle District of Florida, which has jurisdiction over bankruptcy appeals. The Middle District of Florida is referred to as the Federal District Court. The final judgment entered below is the Final Judgment.

Citations to the Record are referenced as "(R. x)," with "x" representing the page(s) as they appear in the Record. There are two transcripts within the Record that will be cited: the transcript of the final hearing, and a transcript from a hearing before the Bankruptcy Court. The trial court transcript is within the Record at R. 472-544 and is referenced as ("T. x:y)," with "x" representing the appropriate page(s) as they appear in the transcript and "y" representing the appropriate line number(s). The Bankruptcy Court transcript is within the Record at R. 563-675, and is referenced as ("BT. x:y).

A handful of documents are included in the attached Appendix which were not in the Record as of the filing of this Brief. Citations to the Appendix are referenced as "(App. x)," with "x" representing the page(s) as they appear in the Appendix. Concurrently with this brief, Tenant filed two motions, one opposed and one unopposed, to supplement the record with the same documents. Tenant anticipates filing an amended brief for the sole purpose of replacing the references to the Appendix with Record references upon the Court's disposition of the motions to supplement the record.

All emphasis is supplied and internal quotations and citations are omitted unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case.

This is an appeal of the Final Judgment entered in a commercial eviction action. The action was filed on the basis that Tenant was a holdover tenant whose lease had expired. (R. 1-2). Primarily at issue is whether the trial court properly entered a default against Tenant for failing to pay rent into the court registry, whether the order to pay rent was properly entered, and whether the trial court had jurisdiction and authority to enter the judgment, given that Tenant prevailed in related proceedings in Bankruptcy Court.

B. Underlying Facts and Procedural History

Landlord sought to evict Tenant on the basis that Tenant no longer had a valid lease, as its lease had expired as of August 31, 2021 and Tenant had either failed to renew the lease or its efforts to renew the lease were ineffective due to prior alleged defaults. (R. 2) Landlord filed suit on September 1, 2021 (the day after the alleged expiration of the lease) claiming that Tenant was a holdover tenant. (R. 1) Tenant timely responded to the Complaint, asserting that it was not a holdover tenant and had a valid lease which had been validly renewed. (R. 47-51)

Prior to Tenant being served or filing any papers, the trial court issued an order requiring payment of rent into the court registry (the "Rent Order"). (R. 45-46; 47-51) (App. 9) Thereafter, Landlord moved for default on the basis that Tenant had failed to deposit rent into the Court registry after October 2021. (R. 124-130) Prior to the trial court entering final judgment, the Tenant filed for bankruptcy. (R. 150-151)

On February 17, 2022, in the Bankruptcy Court, Landlord filed its Amended Motion for Relief from the Automatic Stay (the "Stay Relief Motion"). (R. 383-386)

(To obtain permission to proceed with litigation against a debtor in bankruptcy, a creditor must file a motion for relief from the automatic stay. 11 U.S.C. § 362)

At issue in the Stay Relief Motion was whether cause existed to lift the automatic stay such that Landlord could prosecute its state court eviction case. Landlord contended, as it did in its complaint below, that the lease was expired and could not have been renewed in light of prior alleged defaults and because Tenant had failed to properly renew the lease. (R. 383-384)

Tenant filed a motion to assume the subject lease. (R. 250) (Under § 365(a) of the Bankruptcy Code, Chapter 11 debtors "may assume or reject … any unexpired lease... of the debtor." The "primary purpose of the statute is to allow for the assumption of contracts that are beneficial to the estate, and the rejection of contracts that are burdensome to the estate." *In re Summit II, LLC*, 651 B.R. 829, 838 (Bankr. M.D. Fla. 2023))

The Bankruptcy Court found in favor of Tenant on the Stay Relief Motion, based on the application of Florida law, entering the "Stay Order." (R. 233-250) The Bankruptcy Court framed the issue as follows: "whether the term of the lease between the parties had been properly extended." (R. 233) The Bankruptcy Court noted that Landlord had argued "that Debtor is unable to assume the Lease." (R. 243)

The Bankruptcy Court explained that the validity of the lease was a threshold determination to be determined in the context of Landlord's Motion for Relief from Stay: It noted "<u>if the Lease expired such that [Tenant] could not assume it and remain at the Property, cause would exist to lift the stay</u>. On that point, the parties agree. However, if the Lease were renewed pursuant to its terms or if there are circumstances that militate against the forfeiture of [Tenant's] leasehold interest in the Property, relief from the stay would not be

appropriate." (R. 244).

The Bankruptcy Court found that such circumstances existed. The Bankruptcy Court found that Florida's anti-forfeiture doctrine operated to preclude Tenant forfeiting its interest in the lease. (R. 247-248) The Bankruptcy Court explained that "[i]n the context of landlord-tenant disputes, Florida law provides the equitable remedy of anti-forfeiture 'whenever it is just and equitable to do so; the only condition precedent . . . being the tender of the arrears of rent with accrued interest.'" (R. 247)

The Bankruptcy Court found that Tenant had satisfied the requirements of the anti-forfeiture doctrine, such that Tenant had a continued interest in the property. (R. 247-248) The Bankruptcy Court's ultimate holding was that Tenant had "satisfied its burden to demonstrate an equitable exception to the termination of the Lease." (R. 248)

Consequently, Landlord did not receive permission to prosecute this case below. To obtain the benefit of the Stay Order, the Bankruptcy Court required that Tenant pay to Landlord as adequate protection payments any amounts that were due under the lease, including post-renewal rent payments, late fees/charges, interest, attorney's fees, and costs. (R. 249) The Bankruptcy Court did not hold that the Tenant had any continuing obligation to make payments into the state court registry.

The Bankruptcy Court ruled in favor of Tenant notwithstanding its observation that the state court had been on the verge of entering a judgment in favor of Landlord pre-bankruptcy. (R. 242) The Bankruptcy Court deferred consideration of Tenant's motion to assume the lease until it considered a plan of reorganization. (R. 250)

The amount in adequate protection payments due to be paid to the Landlord was $91,686 which included

$55,037 of Landlord's attorney fees incurred in litigation. (R. 277, 345, 349). To fund the adequate protection payments, Tenant obtained a high interest post bankruptcy petition $65,000 secured loan. (R. 353-375) The Bankruptcy Court approved Tenant's loan it obtained to pay Landlord the adequate protection payments. (R. 376-378)

The Landlord sought to reconsider the Stay Order, and also asked that the Court readjust the rent terms of the lease. The Bankruptcy Court denied reconsideration and found that the Landlord's request on the rent amount should be presented in consideration with the Tenant's motion to assume the Lease or confirmation of the proposed Subchapter V plan. (App. 16)

After the Stay Order was entered, Landlord never sought a stay of the Stay Order, although it appealed the Stay Order. (R. 253-254) Throughout the Bankruptcy Case, Tenant continued to pay and Landlord continued to accept Tenant's monthly rent payments. (T. 30:20-31:11) On August 9, 2023, the Bankruptcy Court involuntarily dismissed the main bankruptcy case. (R. 379-380).

The Bankruptcy Court dismissed the bankruptcy case on motion by the bankruptcy trustee due to "incompetence and gross mismanagement" in the Tenant's affairs, but it expressly found that Tenant had not engaged in fraud or dishonesty, and it made no findings that the Tenant was in violation of the lease or had otherwise forfeited the lease. (BT. 110:23-24) While the bankruptcy trustee sought to have the Tenant's bankruptcy estate liquidated by converting the case to a Chapter 7, the Bankruptcy Court refused to do so. (BT. 110:24-111:4; 113:20-22). Instead, it simply dismissed the Chapter 11 case. (*Id.*)

The Bankruptcy Court did not allow Tenant to proceed with a Chapter 11 case because its plan was "speculative" and "too difficult." (BT. 113:13). The

Bankruptcy Court spoke highly of Tenant's owner, noting during the initial hearings of the case the court "was impressed with Mr. Jaffan." (BT. 113:2). The Bankruptcy Court "applaud[ed] the current business plan," and stated, "I admire [Mr. Jaffan's] entrepreneurial spirit." (BT. 113:9, 18)

While simultaneously finding that the bankruptcy case should be dismissed, the Bankruptcy Court repeatedly referenced the Tenant's lease. It made a factual finding that the "Tenant has a valuable lease" and had a "going-concern value." (BT 108:12-16). In refusing to convert the case to a Chapter 7, the Bankruptcy Court explained that conversion would be improper as it would "most certainly result in the loss of the lease." (BT 111:10-11).

The Landlord's appeal of the Stay Order was briefed to the Federal District Court while the main bankruptcy case was still being litigated. During the bankruptcy appeal, the Landlord represented that the Stay Order was a "final order." (R. 685) The Landlord contended that the Bankruptcy Court committed error in "extending the Lease term outside of the Lease" (R. 696) It argued that "equity (even if it were otherwise available) will not and cannot come to Debtor's rescue by way of the Bankruptcy Court extending the term of the Lease." (R. 722)

On September 29, 2023, the Federal District Court dismissed Landlord's appeal sua sponte *without disturbing* the Stay Order and without otherwise adjudicating the appeal. (R. 381-82)

In September 2023, the owner of Tenant (Mr. Jaffan) paid September rent to the Landlord, (T. 31:12-17), after the bankruptcy case had been dismissed, but prior to Landlord taking any renewed formal action in the state case. But in October, Mr. Jaffan was unable to deposit the October rent, as Landlord's bank blocked it

(presumably at the direction of Landlord). (*Id.*) In the state case, Landlord filed its renewed motion for entry of final judgment on November 2, 2023. (R. 161-164) The basis for the motion was that Tenant had failed to pay rent money into the court registry prior to the bankruptcy and that Landlord was entitled to an immediate possession. (*Id.*)

The trial court conducted a 90-minute final hearing on December 15. (R. 474) The final hearing was sua sponte set on two days' advance notice, (App. 5-7) over Tenant's objection (stated in its emergency motion for continuance) that it lacked adequate time to prepare for the hearing due to conflicting scheduling obligations and that Tenant's counsel was travelling to a family wedding the day before the hearing. (R. 218-225) Consideration of the motion for continuance was deferred until the hearing itself, effectively denying it. (T. 18:24-25).

Tenant submitted a memorandum in opposition to Landlord's motion for final judgment, and cross motion for dismissal on the day of the hearing. (R. 255-274)

At the hearing, the trial court formally denied the continuance because "this case has been pending too long, two years." (T. 18:24-25).

The trial court heard testimony from Tenant's representative and briefly from Tenant's counsel, who sought to testify about aspects of the bankruptcy case. The trial court did not permit the submission of written evidence because the hearing was set via Zoom and since the trial court found that Tenant should have submitted the evidence in advance of the hearing (T. 38:18-25, 45:6-9). The trial court required the parties to rely on unsworn representations of counsel regarding the bankruptcy proceeding in lieu of sworn testimony, (T. 45:24-46:1), and cut off Tenant's counsel from making some of Tenant's arguments due to lack of hearing time. (T. 64:16-65:4).

Landlord contended at trial that since the Bankruptcy Court never ruled on the motion to assume the lease, the court never had made a "determination of the validity of the lease." (T. 49:6-7) Landlord characterized the Stay Order as an "interim order" and argued that since the motion to assume the lease was never heard, the underlying issue of the lease's validity was not decided. (T. 51:15-21) Landlord contended that Fla. Stat. 83.232 mandated entry of a default since Tenant had failed to make payments into the court registry. (T: 11:4-8)

The trial court ruled in favor of Landlord. The trial court stated that Landlord "is correct that Statute 83.232 is clear that in order to assert, in order to preserve any of the affirmative defenses, you have to place the funds into the court registry." (T. 69:8-12).

The trial court further found that "the bankruptcy order that was entered in April 2022 required that the defendant place and continue to place funds either in the court registry or to pay the plaintiff the outstanding rent." (T. 68:19-23).

The trial court concluded "that based upon the dismissal of the bankruptcy case and the dismissal of the District Court of Appeal[1] (sic), that the Court is not precluded from entering the final judgment in favor of the plaintiff for failing to comply with 83.232." (T. 69:22-70:1). The trial court thereafter entered the Final Judgment. (R: 447)

Following entry of the Final Judgment, the trial court stayed the issuance of a writ of possession, subject to Tenant making continued rent payments into the court registry. (R. 559-560) Tenant timely filed a motion for

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[1] The trial court was referring to the Federal District Court's dismissal of Landlord's appeal of the Stay Order.

rehearing, (R. 449-471) which the trial court denied on the authority of *Lawyers Title Ins. Corp. v. Reitzes*, 631 So. 2d 1100, 1100 (Fla. 4th DCA 1993), a case involving the legal standards applied to appellate motions for rehearing under the Florida Rules of Appellate Procedure. (App. 4)

SUMMARY OF ARGUMENT

The trial court utterly misunderstood the Bankruptcy Court proceedings, leading the trial court to erroneously conclude that it could enter the Final Judgment. Furthermore, the trial court erred in mechanically applying Fla. Stat. § 83.232 without considering whether it first had jurisdiction and whether applying Fla. Stat. § 83.232 under these unique facts was constitutionally permissible.

Well settled precedent required the trial court to give res judicata effect to the Stay Order as a mandatory, constitutional matter. Further, federal law provided that the Stay Order was binding and not vacated, with res judicata effect, notwithstanding the dismissal of the main bankruptcy case or the dismissal of Landlord's appeal of the Stay Order. Likewise, Florida law considers matters of federal supremacy to be non-waivable issues of subject matter jurisdiction. In elevating Fla. Stat. § 83.232 over the Constitution, the trial court ignored that a state statute cannot authorize which is precluded by the Constitution.

The trial court gave effect to the Rent Order, although it was not entered in compliance with Fla. Stat. § 83.232 and was entered prior to the trial court first obtaining jurisdiction over Tenant. Fla. Stat. § 83.232 expressly required that rent orders be entered only after a tenant has filed a pleading, motion, or paper. Under controlling precedent, the Rent Order was void (and therefore challengeable at any time) as (1) being statutorily unauthorized, and (2) separately because it was entered prior to the trial court obtaining personal jurisdiction over Tenant. Further, all proceedings stemming from the Rent Order were void since the Rent Order itself was void.

Further, the trial court failed to consider that it had lost jurisdiction on the grounds of mootness, due to

Landlord's voluntary acceptance of rent and other benefits accruing from the Stay Order and separately by its voluntary acceptance of rent even after the bankruptcy case was dismissed. Landlord abandoned the central premises of its lawsuit through its voluntary actions.

Finally, the trial court violated Tenant's due process rights. Its setting the hearing on minimal notice over Tenant's objection, its refusal to allow the submission of written evidence at the hearing, its refusal to hear sworn testimony in lieu of unsworn representations of counsel, and its refusal to allow full argument because of time constraints all violated Tenant's due process rights.

Each of the foregoing arguments is dispositive and mandates reversal.

While the personal stakes are incredibly high for Tenant, as the eviction of Tenant will destroy its business, equally important are the weighty constitutional and jurisdictional issues presented here. The trial court's decision flouted fundamental principles of federalism. Our Supreme Court has repeatedly held that as a matter of constitutional law, state courts must, without exception, afford res judicata effect to final federal decisions regardless of state law to the contrary, and cannot interfere with the finality of federal court proceedings. The relevant case law on these issues goes back nearly to this nation's founding. The trial court's actions interfered with the finality of the Stay Order and wrongly disrupted the Bankruptcy Court's ability to adjudicate issues presented to it.

THE STANDARD OF REVIEW

Point I

Subject matter jurisdiction is reviewed de novo. *Sanchez v. Fernandez*, 915 So. 2d 192, 192 (Fla. 4th DCA 2005).

Point II:

Voidness of an order is reviewed de novo. *Toledano v. Garcia*, 338 So. 3d 1009, 1012 (Fla. 3d DCA 2022).

Point III:

Mootness is reviewed de novo. *Carlin v. State*, 939 So. 2d 245, 247 (Fla. 1st DCA 2006).

Point IV:

Denial of procedural due process is reviewed de novo. *Residential Mortg. Servicing Corp. v. Winterlakes Prop. Owners Ass'n, Inc.*, 169 So. 3d 253, 255 (Fla. 4th DCA 2015).

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO APPLY RES JUDICATA AND COLLATERAL ESTOPPEL.

The trial court erred in disregarding the Stay Order. The Final Judgment was inconsistent with the Constitution, along with Florida law governing subject matter jurisdiction. The trial court's error was compounded by the fact that it patently misunderstood the proceedings in the Bankruptcy Court.

A. Principles of Res Judicata and Collateral Estoppel.

The Constitution requires application of federal principles of collateral estoppel and res judicata in state court. Article III gives federal courts the "judicial power" to decide certain "cases" and "controversies." U.S. Const. art. III, §§ 1, 2. Since 1792, finality of judgments has been recognized as an essential attribute of this federal judicial power to render decisions. *See Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410, 413, 1 L.Ed. 436 (1792).

State courts are "destitute of all power" to interfere with the proceedings or decisions of the federal courts. *Central National Bank v. Stevens*, 169 U.S. 432, 460–61 (1898) (exemption from interference by state judicial action is "essential" to the "independence and efficiency of United States courts); *see also Riggs v. Johnson*, 73 U.S. (6 Wall.) 166, 194–96, 18 L.Ed. 768 (1867) ("the Constitution itself becomes a mockery ... if ... the nation is deprived of the means of enforcing its own laws by the instrumentalities of its own tribunals").

Failing to give res judicata effect to a final judgment entered in federal court "is a virtual abandonment of the final power of the Federal courts to protect all who come before them relying upon rights guaranteed by the Federal Constitution, and established by the judgments of the

Federal courts." *Deposit Bank of Frankfort v. Bd. of Councilmen of City of Frankfort*, 191 U.S. 499, 520–21 (1903).

Applying res judicata effect to federal final judgments in state court is mandatory as "[a]ny other conclusion strikes down the very foundation of the doctrine of res judicata, and permits the state court to deprive a party of the benefit of its most important principle is necessary for the protection of the right of parties as well as the interest of the public to end litigation by a final judgment, and to preserve inviolate the safeguards of the Federal Constitution...." *Id.*

The federal courts' authority to determine effect given to federal proceedings is "conferred...by the constitution." *Embry v. Palmer*, 107 U.S. 3, 9–10 (1883). Provisions of the Constitution which create this power include those "which authorize all legislation necessary and proper for executing the powers vested by the constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the constitution." *Id.*

A "federal judgment cannot be ignored in the state court ... [and] such judgment, until reversed by a proper proceeding ... is binding upon the parties, and must be given force...." *Chesapeake & O. Ry. Co. v. McCabe*, 213 U.S. 207, 220 (1909). A federal final judgment cannot "be collaterally attacked, or treated as a nullity." *Dowell v. Applegate*, 152 U.S. 327, 340 (1894).

Bankruptcy court orders are required to have res judicata effect in state court. *Stoll v. Gottlieb*, 305 U.S. 165, 170–71 (1938). A state court errs if fails to give res judicata effect to an order made pursuant to the Bankruptcy Code, and a state court must treat a final bankruptcy order "as an effective judgment." *Id.*

This requirement is mandatory. As the Supreme Court has more recently stated, "[s]tates cannot give [federal] judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes." *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001).

Florida courts have recognized that, under the Full Faith and Credit Clause of the Constitution, they cannot enter judgments contrary to final federal judgments. *Pettijohn v. Dade Cnty.*, 446 So. 2d 1143, 1145 (Fla. 3d DCA 1984). As a result, "it has long been held that federal court orders and judgments must be given res judicata effect in state court proceedings." *Id.* Likewise, Florida courts have long held that it is simply "not permissible" to disregard bankruptcy court proceedings in state court. *Hull v. Burr*, 59 So. 787, 788 (Fla. 1912).

B. Landlord's Claims Are Barred by Res Judicata and Collateral Estoppel.

The Bankruptcy Court adjudicated in favor of Tenant the issues that Landlord sought to litigate below. The complaint was filed on the sole basis that Tenant's lease had expired as of August 31, 2021, Tenant had not renewed the lease or the renewal attempt was ineffective, and Tenant was a holdover with no rights to remain at the property.

The same exact issues were presented to the Bankruptcy Court. The Bankruptcy Court determined that Florida's anti-forfeiture doctrine defeated Landlord's claims notwithstanding Landlord's assertions that Tenant had failed to properly renew the lease or had been in default.

The Bankruptcy Court's decision meets the requirements of res judicata (sometimes called claim preclusion) and collateral estoppel (sometimes called issue preclusion). Under federal law, res judicata bars a claims

when "(1) there is a final judgment on the merits, (2) the decision was rendered by a court of competent jurisdiction; (3) the same cause of action is involved in both cases; and (4) the parties, or those in privity with them, are identical in both suits." *Baloco v. Drummond Co., Inc.*, 767 F.3d 1229, 1246–47 (11th Cir. 2014).

Each element has been met: the Stay Order was a final judgment, it was rendered by a court of competent jurisdiction (the Bankruptcy Court), the parties are identical, and the exact same cause of action was "involved" in both cases, namely the eviction of Tenant on the purported basis it failed to renew the lease and because it purportedly could not extend the lease.

While the Stay Order did not end the bankruptcy proceeding, in the context of bankruptcy, orders granting or denying relief from the automatic stay are considered final judgments, and thus the Stay Order was a final judgment. *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1309 (11th Cir. 1982). Stay orders are not "subject to collateral attack" and the only avenue to challenge them is through appeal. *Old W. Annuity & Life Ins. Co. v. Apollo Group*, 605 F.3d 856, 862 (11th Cir. 2010). Thus, orders denying relief from the automatic stay are immediately appealable. *Id.* Landlord recognized this itself, as it sought to appeal the Stay Order after it was entered.

Consequently, stay orders entered during the middle of bankruptcy cases constitute res judicata, as they are the equivalent of a final judgment. *Ray v. Leatherman*, 688 So. 2d 1133, 1139 (La. Ct. App. 1996); *Mitchell v. Fort Davis State Bank*, 243 S.W.3d 117, 125 (Tex. App. 2007).

In a similar fashion, the Supreme Court has said that a "judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest." *Arizona v. California*, 460 U.S. 605, 617 n.7 (1983).

Likewise, collateral estoppel applies. *CSX Transp., Inc. v. Bhd. of Maint. of Way Employees*, 327 F.3d 1309, 1317 (11th Cir. 2003). Collateral estoppel "forecloses relitigation of an issue of fact or law that has been litigated and decided in a prior suit." *Id.* The elements are "(1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior suit; (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding." *Id.*

Collateral estoppel, sometimes called "issue preclusion," is squarely included within the doctrine of res judicata under federal law. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

Each element of collateral estoppel is met: whether the eviction of Tenant was appropriate given its alleged default under the lease and alleged failure to renew was identically litigated in the Bankruptcy Court and here; the issue were actually litigated, e.g. the Bankruptcy Court considered Landlord's arguments on the merits; the Bankruptcy Court's determination that Landlord could not evict Tenant notwithstanding Landlord's rationale was a critical component to the court's decision; and the parties had the full and fair opportunity to litigate this issue.

Any suggestion that the Bankruptcy Court did not decide the validity of the lease as the motion to assume the lease was undecided or that the Stay Order was otherwise merely "interim" is wrong. The Bankruptcy Court held that it would have granted Landlord's motion for stay relief if it found Tenant "could not assume [the lease] and remain at the Property." (R. 244) However, it found there was "something" to assume, and deferred consideration of the motion to assume the lease.

What's more is that all the parties understood that the Stay Order was final and its impact. Landlord represented to the Federal District Court that the Stay Order was a final order. Landlord even repeatedly complained on appeal that the Bankruptcy Court was wrongfully "extending the term of the Lease" and ignoring the lease terms.

Given the Bankruptcy Court's holding, the motion to assume the lease, had it ever been adjudicated, would not involve the threshold and fundamental issue of whether Tenant had an actual leasehold interest, as that issue was expressly decided in the Stay Order.

Indeed, if the motion to assume had ever been adjudicated, the issue presented would have been whether a decision to "assume or reject would benefit the estate or result in a successful reorganization." *In re Summit*, 651 B.R. at 838. That is the issue presented in motions to assume under the bankruptcy code. *Id.* A collateral issue would have been Landlord's request to have the rent amount equitably adjusted. There was nothing suggesting that the Bankruptcy Court would revisit the fundamental issue of whether there was a lease at all or if the lease had been extended.

The Bankruptcy Court understood that (1) it had made a decision regarding the existence of the lease, and (2) the dismissal of the bankruptcy case was not intended to disturb its prior decision. At the same time as dismissing the bankruptcy case, it expressly made the factual finding at the same time that Tenant had a valuable lease, and it expressly refused to convert the case to a Chapter 7 so that the lease would be preserved and not lost.

These findings and conclusions would make no sense if the Bankruptcy Court had some unspoken understanding that its factual findings and legal conclusions in the Stay Order were actually interim until the motion to assume was adjudicated, as the motion to assume was obviously

mooted by the bankruptcy dismissal.

That the bankruptcy case was later involuntarily dismissed is irrelevant. A dismissal for cause of a bankruptcy vacates only certain orders under the Bankruptcy Code, none of which apply here. 11 U.S.C. § 349(b)(2). Consequently, final orders in bankruptcy proceedings have res judicata/collateral estoppel effect even when a main bankruptcy case has later been dismissed. *E.g. Mackall v. JPMorgan Chase Bank, N.A.*, 356 P.3d 946, 952 (Colo. App. 2014); *In re Ramirez*, 283 B.R. 156, 161 (Bankr. S.D.N.Y. 2002). Thus, the Bankruptcy Court's correct understanding of the impact of the dismissal of the Stay Order was itself mandated by the Bankruptcy Code.

The dismissed appeal is of no consequence. That is because the Stay Order was never vacated and remains binding notwithstanding the dismissal of the appeal as Landlord made no efforts to challenge the dismissal of the appeal or the lack of vacatur. *In re Belmont Realty Corp.*, 11 F.3d 1092, 1099 (1st Cir. 1993).

The Supreme Court has long held that a final federal judgment at the trial level is afforded res judicata effect notwithstanding that an appeal has been dismissed as moot, when the underlying judgment was not vacated. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950) (refusing to create "exception" to res judicata rule that final judgments are afforded res res judicata effect when underlying judgment was not vacated). The Supreme Court has observed that this rule "illustrates not the hardship of res judicata, but the need for it in providing terminal points for litigation." *Id* at 41.

Finally, it must be noted that the trial court's understanding of the Stay Order and the bankruptcy proceedings was entirely without foundation.

The trial court's finding that "the bankruptcy order that was entered in April 2022 required that the

defendant place and continue to place funds either in the court registry or to pay the plaintiff the outstanding rent," (T. 68:19-23) is baffling as the Bankruptcy Court made no such finding. Landlord did not even make that argument.

Further, the trial court found that entry of the Final Judgment was proper as the bankruptcy case was dismissed, treating the Stay Order as being vacated or interim. (T. 69:22-70:1). However, the bankruptcy case was dismissed for reasons unrelated to the merits of the lease issue, the Stay Order was never vacated and was a final order, and the Bankruptcy Court clearly had an opposite understanding of its own order. Landlord itself correctly recognized the effect of Stay Order on appeal to the Federal District Court, candidly acknowledging that the Bankruptcy Court was "extending the term of the Lease."

In short, the Final Judgment disregarded important principles of federalism, supremacy, comity, and finality embedded in the Constitution. It also simply disregarded without explanation provisions of the Bankruptcy Code governing the vacatur of certain orders when a bankruptcy case is dismissed.

The Constitution requires applying res judicata and collateral estoppel effect to the Stay Order, and requires applying federal law on federal issues. The trial court erred in failing to do so.

C. Tenant's Preclusion Arguments Could Not Be Waived

The Bankruptcy Court erred in finding that Tenant's preclusion arguments were waived under Fla. Stat. § 83.232(5) which provides that "[f]ailure of the tenant to pay the rent into the court registry pursuant to court order shall be deemed an absolute waiver of the tenant's defenses."

None of the issues presented here were waivable

under both federal and state law. The Constitution required applying res judicata and collateral estoppel effect to the Stay Order and overrides state law to the contrary.

State law treats these issues as non-waivable matters of subject matter jurisdiction which can be raised at any time. Indeed, state law provides that once the trial court's subject matter jurisdiction was lost, all of its prior orders were void ab initio and the trial court's sole authority was to dismiss the lawsuit.

1. Fla. Stat. § 83.232 Does Not Override Federal Law

Both the trial court and Landlord placed much emphasis on the "absolute waiver" language in Fla. Stat. § 83.232(5). Such emphasis was wrongly placed, as federal law displaces state law when in conflict, no matter how strongly worded a state statute is.

Where state law is contrary to federal law, federal law governs. *Testa v. Katt*, 330 U.S. 386, 391 (1947). The assertion of federal rights "is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). Furthermore, state and federal governments cannot "intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority." *In re Tarble*, 80 U.S. 397, 407 (1871)

Florida courts have long recognized the supremacy of the United States Constitution, as "a state statute cannot authorize what the United Sates Constitution prohibits." *Welch v. State*, 741 So. 2d 1268, 1272 (Fla. 5th DCA 1999). Indeed, under Supremacy Clause principles, state courts are bound to follow federal law on federal law issues litigated in state court. *Philadelphia Fin. Mgmt. of San Francisco, LLC v. DJSP Enterprises, Inc.*, 227 So. 3d 612, 616 (Fla. 4th DCA 2017).

Furthermore, the Constitution overrides state statute no matter if a state statute purports to provide for no exceptions and even if the result is that the dictates of a state statute are expressly disregarded. The Florida Supreme Court's decision in *Trauger v. A.J. Spagnol Lumber Co., Inc.*, 442 So. 2d 182, 184 (Fla. 1983) illustrates that principle.

In *Trauger*, the court considered the enforceability of an out of state judgment obtained by confession of judgment, notwithstanding Fla. Stat. § 55.05 (1977). Section 55.05, then and now, provides that, without exception, that "[a]ll powers of attorney for confessing or suffering judgment … made or to be made hereafter by any person whatsoever within or without this state, before such action brought, shall be absolutely null and void."

The Florida Supreme Court affirmed the district court's finding that § 55.05 could not apply to the extent it precluded the enforcement of an out of state judgment, given the Full Faith and Credit Clause of the Constitution. *Trauger*, 442 So. 2d at 183. The court explained that a judgment from another state was not open to "inquiry" under the Full Faith and Credit Clause and that § 55.05 could not be permitted "to interfere with the laws of other states which allow the use of confessions of judgment." *Id.*

It concluded that as a constitutional matter, "courts of Florida cannot be empowered by the legislature to review the underlying cause of action when a person seeks to enforce a foreign judgment in this state." *Id.* at 183-184.

Florida courts have long understood the Full Faith and Credit Clause of the United States Constitution to require state courts to apply preclusive effect to federal final judgments. *Pettijohn*, 446 So. at 1145. Similar to § 55.05 construed in *Trauger*, which contained the unequivocal phrasing "absolutely null and void," the state statute at issue here contains the unequivocal language of "absolute waiver," seemingly constraining without

exception a court's ability to rule in any contrary fashion. The trial court indeed found it was so constrained.

However, as the *Trauger* court held, the Florida Legislature cannot empower or require courts to take some action which offends the Constitution. It does not matter how strongly worded or unequivocal a state statute is.

Indeed, if the opposite was true and a state statute controlled over federal law by virtue of unequivocal language, the Florida Legislature could simply neuter the Constitution at will by expressly providing that Florida law prevails over federal law when in conflict. That would turn our Constitution on its head.

The trial court gravely erred in finding that state statute governed over federal law. By precluding the res judicata and collateral estoppel defenses in deference to state statute, the trial court upended fundamental constitutional principles.

2. Florida Law Precluded Waiver and the Rent Order Was Voided.

Furthermore, Florida law does not permit waiver of subject matter jurisdiction, as issues involving federal supremacy over state law are jurisdictional under Florida law. Once the Stay Order was issued, any remaining jurisdiction the trial court could have had was lost, and all of the orders it had entered, including the Rent Order which was the basis of the entry of the final judgment, were rendered void ab initio.

This Court has long held that "the issue of federal preemption is a question of subject matter jurisdiction." *Hernandez v. Coopervision, Inc.,* 661 So. 2d 33, 35 (Fla. 2d DCA 1995). Thus, under Florida law, matters of federal preemption and the Supremacy Clause (which are at issue here) cannot be waived because federal preemption is a subject matter jurisdiction question and subject matter jurisdiction can never be waived. *Am. Mar. Officers Union*

v. Merriken, 981 So. 2d 544, 547 (Fla. 4th DCA 2008); *Dep't of Revenue v. Vanamburg*, 174 So. 3d 640, 642 (Fla. 1st DCA 2015).

Subject matter jurisdiction can be raised for the first time on appeal. *Id.* That is because subject matter jurisdiction "cannot be created by waiver." *Snider v. Snider*, 686 So. 2d 802, 804 (Fla. 4th DCA 1997).

Subject matter jurisdiction cannot be created "by error or inadvertence of the parties or their counsel." *Seven Hills, Inc. v. Bentley*, 848 So.2d 345, 350 (Fla. 1st DCA 2003). Courts cannot exercise subject matter jurisdiction even if the parties stipulate to it. *Polk County v. Sofka*, 702 So.2d 1243, 1245 (Fla. 1997). In fact, the Florida Supreme Court has held courts have an independent duty to evaluate jurisdiction: "[c]ourts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any state of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order." *Id.*

A trial court is "without jurisdiction to entertain the issues already disposed of in federal court." *Carnival Corp. v. Middleton*, 941 So. 2d 421, 424 (Fla. 3d DCA 2006). Thus, the issue of whether a federal judgment is binding in state court is a jurisdictional issue. *Id.*

The reason that subject matter jurisdiction cannot be waived is that it concerns the "power lawfully existing to hear and determine a cause." *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994).

Once a court loses jurisdiction, it has "lost jurisdiction to grant relief." *Griffith v. Florida Parole & Prob. Com'n*, 485 So. 2d 818, 821 (Fla. 1986). "When [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Trerice v. Trerice*, 250 So. 3d 695, 697 (Fla. 4th DCA 2018). The "lack of subject matter jurisdiction renders

a judgment or order of a court void ab initio." *Clarke v. Glob. Guaranteed Goods & Services, Inc.*, 364 So. 3d 1135, 1138 (Fla. 6th DCA 2023).

The trial court erred in holding that Tenant was precluded from raising defenses because it had failed to pay rent into the registry. Florida law is clear that issues of federal supremacy over state law are fundamental jurisdictional issues, which can never be waived. Application of federal res judicata in state court is of course a supremacy issue and therefore a jurisdictional issue under Florida law.

That was the precise issue below. Once the trial court lost jurisdiction, its sole power was announcing the fact and dismissing the cause. Every order (including the Rent Order) was void ab initio once the court lost jurisdiction. Thus, violation of the Rent Order should not have resulted in any penalty, as it was voided. And likewise, any alleged error or waiver of the Tenant, including the failure to pay rent into the court registry at any point in time, could not affect the fundamental issue of whether the court had subject matter jurisdiction.

II. THE TRIAL COURT ERRED IN GIVING EFFECT TO THE RENT ORDER, WHICH WAS VOID AND UNENFORCEABLE.

The trial court could not penalize Tenant for failing to comply with the Rent Order since it was void and unenforceable, as it was entered prior to Tenant being served. The Rent Order was non-compliant with Fla. Stat. § 83.232 which requires that an order directing a tenant to pay rent into the court be issued only after a tenant first makes an appearance. Additionally, the Rent Order was void because it was entered while the Court did not have personal jurisdiction over Tenant, since Tenant had yet to be served. Since the Rent Order was void, the Final

Judgment was rendered void as well.

Fla. Stat. § 83.232(3) provides that "[t]he court, on its own motion, shall notify the tenant of the requirement that rent be paid into the court registry by order, which shall be issued immediately upon filing of the tenant's initial pleading, motion, or other paper." Fla. Stat § 83.232 (5) in turn provides that "[f]ailure of the tenant to pay the rent into the court registry pursuant to court order shall be deemed an absolute waiver of the tenant's defenses."

The Rent Order was entered on September 3, 2021, two days after the case was filed. (R. 45-46) Tenant was not served until September 9 and did not file any documents until September 14. (R. 45-46; 47-51) (App. 9) The Rent Order was non-compliant with § 83.232(3), which provides that the order "shall" be issued after the Tenant files a pleading, motion or other paper. In turn, § 83.232(5) makes clear that defenses are waived only upon failure to pay rent into the court registry "pursuant to court order." However, the court was not authorized to enter the Rent Order, rendering it and the Final Judgment void.

While this may seem like a simple technicality, Florida law provides 1) a court lacks the fundamental power to order a party to do anything until such time as the court has personal jurisdiction over a party, 2) an order entered prior to the court obtaining personal jurisdiction is void even if the court later obtains personal jurisdiction, 3) a void order is void ab initio, can be challenged at any time, and voids any judgment or subsequent order entered premised on violation of the void order, and 4) any unauthorized order entered by a court is void.

These issues were addressed in *Synchron, Inc. v. Kogan*, 757 So. 2d 564, 566 (Fla. 2d DCA 2000). There, the trial court entered an order directing a corporation to provide records to a shareholder following a hearing. The

corporation had not been formally served with process as of the hearing, although the corporation had received notice of the hearing and its counsel attended. The corporation did not comply with the order, and was found to be in contempt. The corporation was then formally served with process.

On appeal, this Court found that the initial order was void because it was entered when the court lacked personal jurisdiction over the corporation as the corporation had yet to be served. The court explained "a court does not acquire jurisdiction over a defendant unless the defendant has been served with process as prescribed by law." *Id.* at 565. Since the initial order was void due to lack of personal jurisdiction, the subsequent contempt order was void as well. *Id.* at 566 ("Disobedience of a void order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt.").

The court rejected any argument that the order should bind the corporation since it had actual notice of it and the hearing because service of process is governed strictly and the corporation had not been served. *Id.*

This Court held similarly in *Fountainbleau, LLC v. Hire Us, Inc.*, 273 So. 3d 1152, 1156 (Fla. 2d DCA 2019). There, the defendant contested personal jurisdiction. The court deferred deciding the issue of personal jurisdiction and ordered the parties to arbitrate. The court held the order to arbitrate was error because the court explained that "in order to apply and enforce a statute of this state the court must first determine that it has jurisdiction, both subject matter and personal." *Id.* (emphasis added).

Likewise, in *Humphrey v. Deutsche Bank Nat'l Tr. Co.*, 113 So. 3d 1019, 1019 (Fla. 2d DCA 2013), the trial court ordered a party who had not yet been served to provide his address to the plaintiff. This Court held that was error as the "the court had no authority to direct

Humphrey to do anything" as "[w]ithout proper service, the court never secured personal jurisdiction over Humphrey."

Since an "order entered over a person without personal jurisdiction is…void," it "can be challenged at any time." *Sanchez v. Sanchez*, 285 So. 3d 969, 974 (Fla. 3d DCA 2019). "A void order has no force or effect and is a nullity." *Goolsby v. State*, 914 So. 2d 494, 496–97 (Fla. 5th DCA 2005). A court cannot "enforce violations of its orders if they are rendered without jurisdiction over the subject matter or the parties." *In re Elrod*, 455 So. 2d 1325, 1326 (Fla. 4th DCA 1984) (emphasis added).

The Rent Order was entered when the court lacked personal jurisdiction over Tenant, as Tenant had yet to be served. The law plainly provides that at the time of entry of the Rent Order, the trial court had yet to obtain jurisdiction over Tenant due to lack of service. As such, the trial court lacked the authority to order Tenant to take any action, and the Rent Order was void as a result.

Furthermore, an order is void when a court "attempts to enter a particular order that transcends its power or authority." *Id.* An order is void ab initio when "rendered in excess of the county judge's lawful authority and jurisdiction" and is void "even if entered upon the consent and stipulation of the parties" since "jurisdiction not possessed by a court may not be conferred by the consent of the parties." *Miller v. Eatmon*, 177 So. 2d 523, 526 (Fla. 1st DCA 1965). Thus, when a court attempts "to act beyond its power," the unauthorized order itself, along with any subsequent order attempting to enforce the unauthorized order is void. *State v. S. M. G.*, 313 So. 2d 761, 763 (Fla. 1975).

"Shall" means "mandatory." *Burton v. Oates*, 362 So. 3d 311, 315 (Fla. 5th DCA 2023). As a rule of statutory interpretation, a court "may not rewrite the statute or ignore the words chosen by the Legislature so as to expand

its terms." *Id.* at 315-16. A court is "not allowed to add language to or fill gaps in the statute." *Fitts v. Furst*, 283 So. 3d 833, 842 (Fla. 2d DCA 2019).

Fla. Stat. § 83.232(3) provides that the order regarding payment of rent into the court registry "shall be issued immediately upon filing of the tenant's initial pleading, motion, or other paper." The word "shall" means that the requirement of issuance of the order after a tenant makes its first filing is mandatory. Since the Rent Order that was entered was unauthorized as it transcended the court's statutory authority, it is void, and the Final Judgment is also void. Importantly, the application of Fla. Stat. § 83.232(5), which provides for absolute waiver of defenses, is contingent on the issuance of a rent order.

This result is required by the plain language of the statute and is common sense when considering the jurisdictional issues addressed above. It logically follows that the Legislature required that rent orders be issued only after a tenant made its first filing or otherwise following service of process to ensure that the order would be entered after the Court obtained jurisdiction over the tenant.

Otherwise, if a court entered a rent order prior to the court obtaining jurisdiction, such order would be legally deficient. Accordingly, the Final Judgment must be vacated because it was premised upon the void Rent Order.

III. THE TRIAL COURT SHOULD HAVE DISMISSED THE CASE AS MOOT.

The trial court should have dismissed the case as moot under both Florida law and equitable mootness principles.

A. Florida Law

Landlord voluntarily accepted Tenant's payment of

rent after the Stay Order was entered. A case is moot "when the issues presented are no longer live." *Montgomery v. Dep't of Health & Rehab. Services*, 468 So. 2d 1014, 1016–17 (Fla. 1st DCA 1985). A case can become moot through "a change of circumstances." *Id.* "The rule discouraging review of moot cases is derived from the requirement of the United States Constitution, Article III, under which the existence of judicial power depends upon the existence of a case or controversy." *Id.*

"Florida's courts, including its appellate courts, reserve the exercise of judicial power for cases involving actual controversies." *Casiano v. State*, 310 So. 3d 910, 913 (Fla. 2021). "This limitation on the exercise of judicial power to justiciable controversies is rooted in judicial adherence to the doctrine of separation of powers." *Id.*

The mootness doctrine is "a corollary to the limitation on the exercise of judicial power to the decision of justiciable controversies." *Id.* In general, a court should dismiss a case if the issues raised have become moot. *Id.* That is because a judicial tribunal's function is "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions…." *Id.*

Taking voluntary action inconsistent with a party's litigation position moots a case. *Frank Silvestri Investments, Inc. v. Sullivan*, 486 So. 2d 20, 21 (Fla. 5th DCA 1986). For instance, in *Frank Silvestri*, a party voluntarily made payment on a judgment while an appeal was pending. The final judgment was stayed, so the party had no obligation to pay until the appeal was concluded. The appellate court dismissed the appeal as being moot given the voluntary nature of the party's actions.

Likewise, the voluntary acceptance of benefits creates mootness. *Schuppener v. Bruno*, 395 So. 2d 1234, 1235 (Fla. 4th DCA 1981). To avoid application of this doctrine where a party benefits from a final judgment, a

party must seek to stay the final judgment rather than accept its benefits. *Chavez v. Bonnie Tile Corp.*, 959 So. 2d 1268, 1269 (Fla. 1st DCA 2007).

Here, Tenant presented uncontested testimony that Landlord accepted Tenat's rent payments and other funds throughout the bankruptcy case after the Stay Order was entered. Landlord did not seek a stay of the Stay Order. Then, even after the bankruptcy case was dismissed, Landlord still accepted a direct rent payment from Tenant before changing course and filing the motion for entry of final judgment, effectively collaterally attacking the Stay Order.

This was all contrary to the legal theories pled in the complaint. The fundamental premise of Landlord's lawsuit was that Tenant was a holdover tenant; and that as a result Tenant was required to pay double rent under the terms of the lease and under Florida statute, and ultimately that Tenant should be removed from the premises. Landlord's continual acceptance of the regular rent was fundamentally at odds with the basis of its lawsuit. And even on the more limited issue of the purported continuing obligation to pay rent into the court registry post-bankruptcy, Landlord voluntarily repudiated that position by accepting direct payment of regular rent from Tenant even after the bankruptcy was dismissed.

The fact that Tenant did not pay rent into the court registry does not preclude Tenant from raising mootness. As the Florida Supreme Court has explained, the mootness doctrine ultimately derives from limits imposed in the Florida Constitution on the "judicial power" and is rooted in fundamental and constitutional notions of the "doctrine of separation of powers." *Casiano*, 310 So. 3d at 913. Ultimately, it relates to the court's basic power to adjudicate cases or controversies. Once the case became moot through Landlord's voluntary conduct, the court

lacked the fundamental power to continue to decide the case as there was no case or controversy before it.

B. Equitable Mootness.

Certain decisions made in bankruptcy court are not subject to further review under the equitable mootness doctrine. The doctrine "is a pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective [review] becomes impractical, imprudent, and therefore inequitable." *In re Fontainebleau Las Vegas Holdings, LLC*, 434 B.R. 716, 741 (S.D. Fla. 2010).

The underlying purpose behind the doctrine is "to avoid uncertainty and instability in bankruptcy proceedings." *In re Fisherman's Pier, Inc.*, 460 F. Supp. 3d 1345, 1358 (S.D. Fla. 2020). Courts consider "the effects of a reversal on third parties who have relied on a bankruptcy court's order" and whether third parties have altered their position on a bankruptcy court order. *In re Stanford*, 17 F.4th 116, 121 (11th Cir. 2021). The "doctrine ... applies when appellants have failed and neglected diligently to pursue their available remedies to obtain a stay and circumstances have changed so as to render it inequitable to consider the merits of the appeal." *Darby v. Zimmerman*, 323 B.R. 260, 270–71 (9th Cir. BAP 2005). Courts have applied the doctrine of equitable mootness when a party has failed to obtain a stay and the ensuing transactions are too "complex and difficult to unwind." *Lowenschuss v. Selnick*, 170 F.3d 923, 933 (9th Cir. 1999).

Essentially, "[t]he test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him." *In re VOIP, Inc.*, 461 B.R. 899, 902 (S.D. Fla. 2011).

In bankruptcy, parties will make financial commitments (i.e loans) in reliance on court orders, and it is deemed unfair as creating uncertainty if orders relating to such commitments can be reversed. *In re Westport Holdings Tampa, Ltd. P'ship*, 607 B.R. 715, 726 (M.D. Fla. 2019) (explaining "those eggs cannot be unscrambled" when a lender has disbursed a post bankruptcy petition loan pursuant to an order which has not been stayed). Bankruptcy law provides that it is "most inequitable" to allow a party who has received adequate protection payments to keep those payments while simultaneously challenging the order by which it obtained the payments. *In re E.-W. Associates*, 110 B.R. 675, 681 (Bankr. S.D.N.Y. 1990).

While the instant case does not involve a bankruptcy appeal, the principles underlying the equitable mootness doctrine still apply as the case below effectively involved a collateral attack on the Stay Order. The Tenant and its lender relied on the Stay Order, as Tenant incurred additional debt to make the adequate protection payments required for the Stay Order to be in effect. The Landlord accepted the adequate protection payments, and did not obtain a stay of the Stay Order, which would have preserved its ability to challenge the Stay Order thereafter.

These circumstances warrant application of the equitable mootness doctrine, and preclude Landlord from collaterally attacking the Stay Order. Equitable mootness is properly applied in state court, as state courts are obligated to apply federal law as to federal issues. *Philadelphia Fin.*, 227 So. 3d at 616.

IV. THE FINAL HEARING VIOLATED TENANT'S DUE PROCESS RIGHTS.

The trial court erred in setting the final hearing and the final hearing violated Tenant's procedural due process rights.

On December 12, 2023, the trial court sua sponte set the December 15 hearing. (App. 5-7)

Tenant filed an emergency motion for continuance on December 14. (R. 218-226) In the motion, Tenant's counsel explained that simultaneously with the setting of the hearing, 1) he was lead counsel on an extremely time sensitive $20 million transaction being actively worked on, 2) he was working on closing other transactional matters, and 3) he was preparing and finalizing a 22 page response to a 25 page motion for summary judgment response in another matter, which had been due December 13, 2023. (*Id.*) He further indicated that he was scheduled to leave that same day with his wife and two young children to attend a family wedding. (*Id.*)

The motion for continuance outlined Tenant's defenses, noted that they involved complex issues, and that the stakes of the hearing were extremely high as Tenant's business would be effectively ruined if it lost the hearing. (*Id.*) The motion explained that given the time constraints, the presentation of these high stakes issues by Tenant would be impaired. (*Id.*)

The trial court de facto denied the motion for continuance upon its filing by deferring consideration of the motion until the hearing itself, when it was formally denied because the trial court was concerned as to the length of the time the case as a whole had been pending. (T. 18:24-25).

During the hearing, the trial court repeatedly advised the parties that the hearing was set on short notice in deference to Landlord's anxiety on having the hearing set. The trial court stated, "I know that the

plaintiff is very anxious and wanted this hearing heard by the end of the year." (T. 7:21-23) Later, following the conclusion of Landlord's opening argument, the trial court reiterated that "I wanted to make sure I gave you guys your opportunity prior to the end of the year." (T. 16:18-20)

After Tenant called Mr. Jaffan as a witness, Tenant's counsel attempted to call himself as a witness to introduce certain records from the bankruptcy case and to discuss the procedural aspects of the bankruptcy case. The Tenant asked how it could then enter the written documents into evidence. (*Id.* 45:4-5) The trial court refused the request, stating: "You may not." (*Id.* 45:6-8) The basis for the trial court's ruling was that the documents should have been in the court file already, and the hearing was via Zoom. (T. 38:18-25, 45:6-9).

Tenant's counsel then attempted to testify regarding the bankruptcy proceeding and read the bankruptcy case documents into the record. (*Id.* 45:10-12) The trial court indicated it did not want to hear testimony on those matters and instead required that all counsel present unsworn argument regarding the factual background of the bankruptcy proceedings. (*Id.* at 45:15-46:1)

During Tenant's closing argument, after presenting argument regarding equitable mootness, Tenant attempted to present argument on Florida law on mootness, which had not been presented yet. (*Id.* at 64:16-19) The court cut-off Tenant, incorrectly stating that Tenant had addressed that topic earlier (*Id.* at 64:20-21). Tenant asked for 30 seconds to present the Florida mootness argument, which the court denied. (*Id.* at 64:25-65:1)

The denial of the motion for continuance and the conduct of the hearing violated Tenant's due process rights.

While a continuance is normally within the trial court's discretion, "there are instances in which a trial court's denial of a motion for continuance may be an abuse of discretion." *Thompson v. Gen. Motors Corp., Inc.*, 439 So. 2d 1012, 1013 (Fla. 2d DCA 1983). Those instances generally involve circumstances that "prevent fair and adequate presentation of the party's case." *Baron v. Baron*, 941 So. 2d 1233, 1236 (Fla. 2d DCA 2006). Denial of a continuance is an abuse of discretion under certain circumstances given due process concerns. *Id.* Due process includes the "right to be heard." *Id.* The right to be heard includes the right to "introduce evidence at a meaningful time and in a meaningful manner." *Id.*

Courts have routinely found that it is an abuse of discretion to deny motions for continuances when the motion seeks to continue a hearing set on short notice for which a party is not adequately prepared due to circumstances outside the party's control. *Diedrick v. Diedrick*, 114 So. 3d 1006, 1007 (Fla. 5th DCA 2012) (denial of motion to continue hearing set on eight days notice was abuse of discretion when party repeatedly advised court it was not prepared to proceed with hearing).

Fla. R. Civ. P. 1.090(d) requires notice of a hearing "be served a reasonable time before the time specified for the hearing." "While there are no hard and fast rules about how many days constitute a 'reasonable time,' the party served with notice must have actual notice and time to prepare." *State Dep't. of Transp. v. Plunske*, 267 So.2d 337, 339 (Fla. 4th DCA 1972); *Harreld v. Harreld*, 682 So.2d 635 (Fla. 2d DCA 1996). Courts have not hesitated in finding notice violations when important interests were at stake. *See, e.g., Harreld*, 682 So.2d at 636 (two days' notice of hearing was not a "reasonable time" prior to hearing).

While this case had been pending since 2021, the

final hearing was not set until December 2023 because Tenant had filed for bankruptcy, interrupting the proceeding. Tenant had no reason to believe that the trial court would unilaterally set a hearing date without clearing it, and that the court would not consider Tenant's inability to prepare for the final hearing.

The court set a high stakes hearing squeezed within a very short time frame, apparently to assuage Landlord's anxiety about having the motion heard before the end of the year. The Court's denial of the motion for a continuance was an abuse of discretion and amounted to a violation of Tenant's due process rights.

Landlord will surely contend that Tenant was not prejudiced as it had notice that Landlord's motion for final judgment would be adjudicated, as the motion was first filed in early November, and the final hearing was not actually heard until mid-December.

Any such argument misses the mark as it ignores the realities of hearing and trial preparation, particularly as applied to the Tenant's defenses to this case. The final hearing was functionally a bench trial set on two days' notice. Preparation required review of many filings spanning the multi-year bankruptcy proceedings, legal research, development of argument, compilation and review of exhibits, and witness preparation. The trial court put Tenant's counsel in an impossible position given the scheduling conflicts laid out in the continuance motion.

Further, given the vagaries of legal practice and scheduling, it cannot be expected that attorneys as a matter of course commence and complete preparation in full for all hearings on any significant motions as soon as such motions are filed, regardless of when the motions are actually set for hearing, in order to anticipate that a hearing might be unilaterally set out on short notice at any time, as what occurred below. That is not a realistic

or efficient practice and attorneys are not held to that standard, nor should they be.

It is similarly unreasonable to expect that an attorney drop everything and turn on a dime to prepare for a high stakes hearing set on two days' notice, particularly as here, when an attorney has represented to the court he has an inability to prepare due to competing time demands.

And while Landlord will argue it was operating under the same time constraints, this ignores that the parties' positions involved significantly different levels of complexity. Landlord's position was and is simple: Florida statute provides that violating the Rent Order is an absolute waiver to all affirmative defenses. Tenant's position involved the application of complex constitutional and civil procedure doctrines and required a detailed review of and submission to the trial court of filings and other documents from a multi-year, convoluted bankruptcy proceeding. It is common sense that a party with the simpler case is going to be inherently advantaged in time pressured circumstances like this.

In all events, regardless of the facts regarding Landlord's counsel's ability to prepare, what is relevant is that Tenant's counsel indicated an inability to prepare in the short window between the setting of the hearing and hearing date. Unfortunately, the trial court was too preoccupied with getting the hearing set before the end of the year to mitigate Landlord's anxiety that it lost sight that it was prejudicing Tenant in the process.

The hearing itself further violated Tenant's due process. Due process requires that each litigant be given a "full and fair opportunity to be heard." *Vollmer v. Key Dev. Props., Inc.*, 966 So.2d 1022, 1027 (Fla. 2d DCA 2007). "The right to be heard at an evidentiary hearing includes more than simply being allowed to be present and to speak. Instead, the right to be heard includes the

right 'to introduce evidence at a meaningful time and in a meaningful manner.'" *Id.* Thus, "[d]ue process requires that a party be given the opportunity ... to testify and call witnesses on his behalf, and the denial of this right is fundamental error." *Pettry v. Pettry*, 706 So.2d 107, 108 (Fla. 5th DCA 1998).

A party's procedural due process rights are violated when a trial court refuses to allow evidence to be submitted and when a party is not permitted to present closing argument. *Dobson v. U.S. Bank Nat'l Ass'n*, 217 So. 3d 1173, 1174–75 (Fla. 5th DCA 2017). Likewise, a trial court commits clear error and denies due process when it refuses to allow a party sufficient time to defend against a motion. *Koll v. Koll*, 812 So. 2d 529, 532–33 (Fla. 4th DCA 2002). It is not enough that a party was able to partially argue its closing points – procedural due process is denied even when a party can make some of its arguments, but not all. *Selman v. State*, 160 So. 3d 102, 103–04 (Fla. 4th DCA 2015).

A refusal to allow argument in part to be made violates procedural due process because "argument may correct misperceptions in what would otherwise appear to be an open and shut bench trial..." *Id.* (citations omitted).

When Tenant sought 30 seconds to present the Florida mootness argument, the court incorrectly stated that it had been presented in the hearing. The court was not given the opportunity to hear argument on an issue which may have corrected its perceptions.

Likewise, the court did not permit Tenant to offer documents into evidence, because the hearing had been set for Zoom and because Tenant could have requested judicial notice of the documents or filed them sooner. However, Tenant had no meaningful notice of the actual hearing date until a few days before the hearing.

The Tenant had not been given notice that the

exclusive way to submit evidence would be to file it in advance of the final hearing or via request for judicial notice, no procedural rule or rule of evidence precluded Tenant from attempting to first introduce evidence at the final hearing, and there was no applicable rule or scheduling or pre-trial order in place controlling the pre-hearing disclosure or submission of evidence.

Most importantly, a refusal to allow the possibility of the submission of evidence violates a party's due process rights, and the convenience of the Zoom setting (which was unilaterally imposed by the trial court) could not justify the impairing of Tenant's ability to present evidence. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429–30 (2021) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.").

In addition, in lieu of the introduction of evidence and testimony regarding the bankruptcy case, the trial court wrongly mandated that the parties rely on unsworn representations of counsel. "It is fundamental that such representations by counsel not made under oath and not subject to cross-examination, absent a stipulation, are not evidence." *State v. T.A.*, 528 So. 2d 974, 975 (Fla. 2d DCA 1988). This irregular and unorthodox procedure only further tainted the hearing and surely contributed to the trial court's misunderstanding of the bankruptcy proceedings, as a streamlined, unsworn oral argument is no substitute for actual evidence.

The foregoing all constitutes reversible error and cannot be harmless error since it is not known how the affected testimony, evidence, or argument may have affected the outcome. *Selman*, 160 So. 3d at 104.

The forgoing circumstances all resulted in Tenant being deprived of procedural due process in connection with the final hearing. Reversal is warranted for that

independent reason.

Finally, it cannot be ignored that the trial court had an opportunity to rectify these due process violations when Tenant filed its motion for rehearing. Unfortunately, the trial court failed to do so, denying the motion on the authority of *Lawyers Title Ins. Corp. v. Reitzes*, 631 So. 2d 1100, 1100 (Fla. 4th DCA 1993). The gist of *Lawyers Title* is that a motion for rehearing should not simply reargue matters discussed before, when such matters were "necessarily considered by the court" and when such matters had "already received the careful attention of the judges." *Id.*

Lawyers Title was legally inapplicable, as it pertains to appellate motions for rehearing, whereas motions for rehearing at the trial court are governed by a much more liberal standard that allows for re-argument on issues already presented. *Balmoral Condo. Ass'n v. Grimaldi*, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013) (explaining that the "grounds for rehearing under rule 1.530 are broad," that "a party may move for rehearing of final orders in order to give the trial court an opportunity to consider matters which it overlooked or failed to consider," and "rehearing is a second consideration of a cause for the sole purpose of calling to the attention of the court any error, omission, or oversight that may have been committed in the first consideration").

Moreover, the principle stated in *Lawyers Title* presupposes that there has been an orderly process and fair opportunity for the parties to present argument which has received careful consideration. That did not occur here.

Accordingly, given the trial court's prior erroneous refusal to consider new argument on issues previously presented, along with the due process issues which infected the prior hearing, if the Court remands for a new hearing, the trial court should be instructed to give the

issues de novo review without regard to what may have been argued or presented before and should ensure that sufficient time is available for the issues to be presented.

REQUEST FOR JUDICIAL NOTICE

Tenant requests that the Court take judicial notice of the filings and records of the Bankruptcy Court and Federal District Court which are referenced herein. Fla. Stat. § 90.202(6); *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1062 (Fla. 3d DCA 2018).

CONCLUSION

Tenant requests that the Court grant the following relief:

(1) Reverse the Final Judgment;

(2) Take judicial notice of the Bankruptcy Court filings;

(3) Direct the trial court to enter a dismissal in favor of Tenant; and

(4) Grant all other appropriate relief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 11, 2024 a true and correct copy of the foregoing has been electronically filed and served via e-mail to Ronald D. Edwards, Jr., Esquire, Michael Provenzale, Esquire, and James Walson, Esquire, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., 215 North Eola Drive, P.O. Box 2809, Orlando, Florida32802(ronald.edwards@lowndes-law.com, michael.provenzale@lowndes-law.com, james.walson@lowndes-law.com, lit.control@lowndes-law.com, tracy.kennison@lowndes-law.com, susie.whitaker@lowndes-law.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the applicable font and word count limit requirements.

/s/ Stephen J. Bagge

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