IN THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA THIRD DISTRICT

BASSEM EL MALLAKH,

Appellant,

Case No.: **3D21-1295**

LT Case No.: 18-028145-CA

vs.

BELGIUM INVESTMENTS 960 BAY DR, a California limited liability company,

Appellee. /

APPENDIX TO APPELLANT'S MOTION FOR LEAVE TO FILE AMENDED INITIAL BRIEF

Index To Appendix

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 12, 2021, a true and correct copy of the foregoing was served via the Florida e-Portal to: **Andrew J. Bernhard, Esq.**, Bernhard Law Firm, PLLC, 333 S.E. 2nd Avenue, Suite 2000, Miami, Florida, 33131, via email: abernhard@bernhardlawfirm.com per Fla. R. Gen. Prac. & Jud. Admin. 2.515, 2.516, and Fla. R. App. P. 9.220.

Respectfully submitted,

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Case No. 3D21-1295

IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT, STATE OF FLORIDA

BASSEM ESSAM EL MALLAKH,

Appellant,

vs.

BELGIUM INVESTMENTS 960 BAY DR,

Appellee.

ON APPEAL OF THE ORDER DENYING APPELLANT'S MOTION TO VACATE FINAL JUDGMENT AND QUASH SERVICE OF PROCESS FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY

APPELLANT'S AMENDED INITIAL BRIEF

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INTRODUCTION

This is an appeal of an order denying Defendant/Appellant Bassem Essam El Mallakh's motion to quash service of process and vacate final judgment entered in favor of Plaintiff/Appellee Belgium Investments 960 Bay Dr. ("BI").[1] (App. 1354).[2] This case illustrates why plaintiffs must strictly comply with and enforce statutes governing service of process, *Shurman v. Atlantic Mortg. & Inv. Corp.*, 795 So. 2d 952, 954 (Fla. 2001), and why "[a] trial court may not rely on argument by counsel to make factual determinations," *Sosataquechel v. State*, 307 So. 3d 147, 153 (Fla. 3d DCA 2020). Reversal is required here because the unrefuted record evidence shows:

- The return of service is statutorily deficient, ambiguous, confusing, and imprecise rendering it facially defective as a matter of law. (App. 28–29, 30–31, 1078–79).
- The process server, Brittany Johnson, never testified in this case to explain the deficiencies in the facially defective return of service.
- BI presented no competent, substantial evidence that, at the requisite time, Mr. El Mallakh lived at the address

[1] *See* Fla. R. App. P. 9.130(a)(3)(C)(i) (authorizing appeal of non-final order determining personal jurisdiction).
[2] References to the Appendix and applicable page number will appear as (App. ____).

where substituted service was purportedly made. In fact, a process server informed BI that Mr. El Mallakh did not live at the address service was attempted as early as December 20, 2018. (App. 25).

- BI performed only one skip trace to attempt locating Mr. El Mallakh before resorting to substituted service of process.

- Even assuming *arguendo* Mr. El Mallakh lived at the address substituted service was purportedly made, no affirmative evidence shows the physical presence of a statutorily authorized resident residing therein when substituted service was supposedly left at the door.

- BI failed to act diligently and expeditiously at every stage of this case.

Because "it is axiomatic that a judgment entered without due service of process is void," the trial court reversibly erred by not quashing service of process and vacating the default final judgment. *Castro v. Charter Club, Inc.*, 114 So. 3d 1055, 1059 (Fla. 3d DCA 2013) (cleaned up). And, since BI did not confess error but instead led the trial court astray, this Court should reverse the trial court's order.

The facts that are relevant to the issues on appeal are detailed next.

STATEMENT OF THE CASE AND FACTS

I. The Underlying Lawsuit

Mr. El Mallakh is a California citizen—a fact acknowledged by BI in the Complaint. (App. 6). He emigrated from Egypt in 2006. It is customary in the Egyptian culture for a child to be given a first name followed by the given names of their father and grandfather. (App. 1090). It is also common for immigrants to adopt an Anglo sounding name upon moving to the United States due to a perceived oppression. (App. 1090–91). To that end, Mr. El Mallakh has been known as "Bassem Victor," (App. 120), "Bassem Essam," (App. 110, 112, 722), or by other iterations of his full legal name: "Bassem Essam 'Victor' El Mallakh." (App. 840, 1090).

On October 19, 2017, Mr. El Mallakh was issued a California driver's license (No. D7973370) bearing an expiration date of August 26, 2021. (App. 840). His driver's license provided his address as 525 Broadway, Apt. 5037, Santa Monica, CA 90401 (the "Broadway Address"). (App. 840). Mr. El Mallakh owns a Mercedes-Benz C-Class sedan. (App. 1126). Mr. El Mallakh has a younger sister named Reem Hanna ("Sister Hanna") who is a California citizen. (App. 1212, 1262). Since January 1, 2017, Sister Hanna with her teenage son has

resided at 116 Rockefeller, Irvine, CA 92612 (the "Rockefeller Address"). (App. 766, 1261–62). It is undisputed that Mr. El Mallakh owns the Rockefeller Address rented to Sister Hanna. (App. 1117, 1383, 1406).

On August 17, 2018, BI filed the initial, operative Complaint against Mr. El Mallakh and four other individual and corporate defendants. (App. 5). BI asserted six causes of action against Mr. El Mallakh, *to wit*: Count VI – Breach of Fiduciary Duty; Count VII – Conversion/Theft; Count VIII – Unjust Enrichment; Count IX – Conspiracy for Breach of Fiduciary Duty; Count X – Conspiracy for Conversion/Theft; and Count VIII – Conspiracy for Unjust Enrichment. (App. 11–19). BI alleged damages totaling "over $703,912.00." (App. 9). On August 12, 2020, the trial court entered an Agreed Order Approving Stipulation and Settlement Agreement, Dismissing Certain Claims with Prejudice, and Releasing and Discharging Lis Pendens as to certain parties except Mr. El Mallakh. (App. 708, 712).

II. BI's Failed and Improper Attempts to Effectuate Service of Process

The Initial Service Attempt

The clerk of court issued the first summons for Mr. El Mallakh on August 29, 2018 (the "First Summons"). (App. 23). The First Summons directed service of process on Mr. El Mallakh at 405 Rockefeller, Irving, CA 92612. *Id.* Service on Mr. El Mallakh was attempted one time — on December 17, 2018, at 1:30 p.m. — over 120 days after filing the Complaint in contravention of Fla. R. Civ. P. 1.070(j). (App. 25). In an affidavit of non-service dated December 20, 2018, process server Tyler Marzett of Direct Legal Support, Inc. informed BI of the following:

> That attempts were made to serve Bassem Essam El Mallakh, individually, with Summons 20-Day Corporate Service (A) General Forms; Verified Complaint at:
>
> Attempted at 405 Rock[e]feller, Irvine, CA 92612 on 12/17/2018 at 1:30 PM.
>
> Results: bad address hoa/community center stated that ***Bassem OWNS the property of 116 Rock[e]feller AND RENTS IT OUT***. She stated that 405 Rock[e]feller is the incorrect address but try 116 Rock[e]feller in Irvine.

(App. 25) (emphasis added; alterations made) ("Marzett's Affidavit"). BI filed Marzett's Affidavit 22 days later, on January 8, 2019. (App. 25).

On January 8, 2019, BI *first* filed and sought issuance of an Alias Summons ("Alias Summons"), (App. 26), and *secondarily* filed its Motion for Extension of Time to Serve Non-Resident Mr. El Mallakh ("Motion for Extension"), (App. 24).

The Alias Summons listed three potential addresses for service on Mr. El Mallakh: (1) 116 Rockefeller, Irvine, CA 92612; (2) 606 Rockefeller, Irvine, CA 92612; and (3) 1528 6th Street, Santa Monica, CA 90401. (App. 30). The 116 Rockefeller Address and the 606 Rockefeller address is a current and former address, respectively, of Sister Hanna. (App. 923, 973, 1319).

In the Motion for Extension, BI claimed that Mr. El Mallakh "provided inaccurate addresses." (App. 24). Aside from Marzett's Affidavit, BI offered no supporting documentation or reason for why it supplied the three addresses in the Alias Summons as potential places of Mr. El Mallakh's usual place of abode. (App. 24). The clerk issued the Alias Summons on January 25, 2019. (App. 26).

The Second Service of Process Attempt

BI directed California process server Brittany Johnson ("Investigator Johnson") to effectuate substituted service of process on Sister Hanna. (App. 30). On March 3, 2019, Investigator Johnson

received the Alias Summons from BI. (App. 28, 30, 1078–79). Upon receipt of the Alias Summons, and in accordance with Florida Statutes § 48.21(1), Investigator Johnson noted on the first page of the Alias Summons the following:

Substitute Service
Reem Hanna
3.3.19 @ 12:20 pm
RPS #918, PI #26242[3]

(App. 30). Investigator Johnson's Return of Service, dated May 6, 2019 and filed July 1, 2019 ("Return of Service"), corroborated her receipt of the Alias Summons specifically stating:

Received this writ [Alias Summons]
on the 3rd Day of March, 2019

(App. 28) (emphasis added; alterations made).

In the Return of Service, Investigator Johnson claimed to have effectuated substitute service on a "Reem Hanna" at an undisclosed address in Miami-Dade County on April 17, 2019, at 12:20 p.m. (App. 28). Specifically, the Return of Service states in full:

Received this writ on the 3rd Day of March, 2019 and served the same at 12:20 O'clock p.m. on the 17th Day of April, 2019, in Miami-Dade County, Florida, as follows:

[3] "RPS" references her Registered Process Server number; "PI" references her Private Investigator number. (App. 1078).

_X_ Substitute. By leaving a true copy of this writ, together with a copy of the pleading with the date and hour of service endorsed thereon by me at the within named __Reem Hanna__

(App. 28) (emphasis added; alterations made). The Return of Service is devoid of the specific documents purportedly served, as prescribed by §§ 48.21(1) and 48.031(1)(a), Fla. Stat.

Investigator Johnson also provided a California All-Purpose Acknowledgment dated May 27, 2019 (the "Acknowledgment"). (App. 29). The Acknowledgment specifically states in pertinent part:

> **Description of Attached Document**
> **Title or Type of Document: Alias Corporate Summons**
> **Document Date: 1-25-19**
> **Number of Pages: 3**

(App. 29) (emphasis added). The Acknowledgment plainly states that only the Alias Summons, and not the 18-page Complaint, was purportedly served. (App. 29). Moreover, the Acknowledgment plainly states at the top that the "notary public or other officer completing this certificate ***verifies only the identity of the individual who signed the document*** to which this certificate is

attached, ***and not the truthfulness, accuracy, or validity of that document***." *Id.* (emphasis added).

III. BI Moves for a Default and the Entry of a $4 Million Final Judgment against Mr. El Mallakh

On July 1, 2019, BI filed the Return of Service and Acknowledgment — 75 days after Investigator Johnson purportedly effectuated substitute service on Sister Hanna. (App. 28–31). BI also contemporaneously filed a Motion for Judicial Default against Mr. El Mallakh asserting that he was served "on **April 17, 2019**" (the "First Default Motion"). (App. 32). The trial court never ruled on BI's First Default Motion.

On October 23, 2019, BI filed a second Motion for Judicial Default against Mr. El Mallakh (the "Second Default Motion"). (App. 37). The Second Default Motion is nearly identical to the First Default Motion with one exception: BI changed the date Mr. El Mallakh was served to "**March 3, 2019**"[4] making "his response [] due on March 23, 2019." (App. 37). BI certified that he delivered or mailed

[4] This fact raises a question as to when BI received a copy of Investigator Johnson's Affidavit of Service, dated April 17, 2019, and first filed on March 24, 2021, (App. 1078–79), as detailed in Section V below.

a copy of the Second Default Motion to Mr. El Mallakh at his last known address "in accordance with Fla. R. Jud. Admin. 2.516[b][2]." (App. 37). The record evidence is devoid of any proof that BI mailed or delivered the Second Default Motion to Mr. El Mallakh or Sister Hanna.

On October 23, 2019, BI's attorney, Andrew Bernhard, Esq., filed a Nonmilitary Affidavit on behalf of Mr. El Mallakh (the "Nonmilitary Affidavit"). (App. 42). The Nonmilitary Affidavit specifically states the following:

> On this day personally appeared before me, the undersigned authority, Andrew Bernhard, who, ***after being first duly sworn***, says: ***Based on the*** attached search and ***process server communication with the Defendant***, Bassem Essam El Mallakh is believed by Affiant not to be in the military service or any governmental agency or branch subject to the provisions of the Soldiers' and Sailors' Civil Relief Act. . . . .
>
> **Under penalties of perjury, I declare that I have read the foregoing and that the facts stated in it are true to the best of my knowledge and belief**.

(App. 42) (emphasis added).

BI scheduled the hearing of its Second Default Motion for November 18, 2019. (App. 48). BI certified that he delivered or mailed

a copy of the Notice of Hearing to Mr. El Mallakh at his last known address "in accordance with Fla. R. Jud. Admin. 2.516[b][2]." *Id.*

On November 18, 2019, the trial court entered a Judicial Default against Mr. El Mallakh. (App. 49). On January 10, 2020, BI filed its Motion for Final Judgment against Mr. El Mallakh. (App. 50). BI claimed that Mr. El Mallakh "admitted *pro confesso*" to the allegations and causes of action raised in the Complaint, *to wit*: Count VI – Breach of Fiduciary Duty; Count VII – Conversion/Theft; and Count VIII – Unjust Enrichment. *Id.* As such, BI requested an award of **"$4,255,000.00 in damages,** plus interest, attorney's fees and costs" against Mr. El Mallakh. *Id.*

On February 25, 2020, the trial court entered the Final Judgment against Mr. El Mallakh, adopting verbatim the proposed final judgment submitted by BI. (App. 701–07). The trial court entered Final Judgment in the amount of $4,255,000.00 including post-judgment interest against Mr. El Mallakh. *Id.* Mr. El Mallakh never received notice of the hearing on the Second Default Motion or the Final Judgment. (App. 725).

IV. Mr. El Mallakh Learns of the Adverse Final Judgment when BI Began Domestication of the Final Judgment in California

After BI obtained the Final Judgment against Mr. El Mallakh, BI started proceedings to domesticate the Final Judgment against Mr. El Mallakh in California (the "California Proceedings") where he resides. (App. 790). In the California Proceedings, BI froze and garnished Mr. El Mallakh's bank account and put a Lis Pendens on his Rockefeller Address attempting to immediately foreclosure on the townhouse. (App. 820, 1113, 1132, 1194, 1407). The California Proceedings notified Mr. El Mallakh of the underlying action and Final Judgment. (App. 1131–32, 1148, 1194).

On February 19, 2021, Mr. El Mallakh filed his Motion to Set Aside Entry of Judicial Default and Vacate Final Judgment and seeking to quash service of process (the "Motion to Vacate"). (App. 715). Aside from his own affidavit ("Bassem's Affidavit"), (App. 725), Mr. El Mallakh produced an affidavit from Sister Hanna ("Hanna's Affidavit"), (App. 727), and a lease agreement for the Broadway Address (the "Lease Agreement"), (App. 722).

Mr. El Mallakh's Affidavit provided the following in pertinent part:

> On March 3, 2019, Process Server claimed Substitute Service was made to my sister, Reem

> Hanna ("Hanna") at 116 Rockefeller, Irvine, CA 92612.
>
> I never received notice of this lawsuit or the judgment against me in this case.
>
> I am unaware of any service attempted to be made to me or my sister.
>
> I only became aware of a judgment against me on November 16, 2020 when the County of Orange Clerk of Records sent a Courtesy Notice regarding a lien that was placed on my property.
>
> Mailing Address: 525 Broadway, Santa Monica
> Telephone: ***-413-7074[5]
>
> Driver's License No. CA D7973370

(App. 725–26).

Hanna's Affidavit provided the following in pertinent part:

> I am the Defendant [Mr. El Mallakh's] sister in this case[.]
>
> On March 3, 2019, Process Server claimed Substitute Service was made to me, on behalf of my brother, Bassem Essam El Mallkah, at 116 Rockefeller, Irvine, CA 92612.
>
> I was never served and was unaware of any attempts made by Process Server.

---

[5] BI always had Mr. El Mallakh's telephone number during this case. (App. 148, 164–65, 168, 175). And, the skip trace, dated January 8, 2019, provided this exact telephone number for Mr. El Mallakh. (App. 920). BI indisputably never attempted to call Mr. El Mallakh.

> I never received notice of this lawsuit or the judgment against my brother in this case.
>
> I am unaware of any service attempted to be made to me or my brother.
>
> Mailing Address: 116 Rockefeller, Irvine, CA

(App. 727).

Corroborating both affidavits was Mr. El Mallakh's Lease Agreement for the Broadway Address which provided in pertinent part:

CALIFORNIA LEASE AGREEMENT

LANDLORD NAME:	PRIII/Broadstone Trino, LLC
LANDLORD'S AGENT:	Alliance Communities Inc.
LANDLORD ADDRESS:	525 Broadway, Santa Monica, CA 90401
PHONE/E-MAIL:	(310) 393-9696 / sway@allresco.com

RESIDENT NAME:	Mohamed Rostom and Bassem Essam
OTHER OCCUPANTS:	
RESIDENT ADDRESS:	525 Broadway, Santa Monica, CA 90401
	UNIT: #5037 PARKING SPACE: #P2 84, P2 86 MAILBOX: #5037

LEASE TERM:	1 year	Lease Renewal:
	START DATE: November 1, 2018	END DATE: October 31, 2019
	MOVE-IN DATE: November 1, 2016	

MONTHLY CHARGES	
Base Rent	$6,250.00
TOTAL	$6,250.00

5.

DEPOSITS	
Deposit	$3,000.00
TOTAL	$3,000.00

(App. 722) (emphasis added). Mr. El Mallakh renewed the Lease Agreement on November 8, 2018. (App. 723).

V. Mr. El Mallakh and Sister Hanna Unequivocally Testify that Mr. El Mallakh Does Not Reside at the Rockefeller Address

BI sought to depose Mr. El Mallakh and Sister Hanna to oppose the Motion to Vacate. (App. 736). In its Emergency Motion, BI

contended that it "served El Mallakh on ***March 3, 2019***[6] at his Irvine California real estate by **hand-delivering a summons to El Mallakh's sister Reem Hanna**" and "**El Mallakh owns the property where summons was hand-delivered to his sister**." *Id.* (emphasis in original).

In support of its Emergency Motion, BI attached a Chase financial statement, (App. 780), and a Lease with Option to Purchase entered between Mr. El Mallakh, as landlord, and Sister Hanna, as tenant, dated January 1, 2017 ("Hanna's Lease"), (App. 766). According to the Chase financial statement, Mr. El Mallakh lived at the Broadway Address. (App. 780). According to Hanna's Lease, Mr. El Mallakh lived at the Broadway Address. (App. 766).

Mr. El Mallakh filed a Response in Opposition to BI's Emergency Motion on March 10, 2021, (App. 794), and BI filed a Reply the next day on March 11th, (App. 798). Despite the burden being on BI to prove valid service, the trial court granted BI's Motion to Compel depositions. (App. 817).

[6] Interestingly, BI still maintained substituted service was perfected on March 3, 2019, not April 17, 2019.

The depositions of Sister Hanna, (App. 1227–1326), and Mr. El Mallakh, (App. 1084–1150), were taken on March 18, 2021.

Sister Hanna's Deposition Testimony

Sister Hanna is a senior health care growth strategy manager at Ernst & Young. (App. 1265–66). Sister Hanna unequivocally testified in deposition that Mr. El Mallakh does not live at the Rockefeller Address — only her and her 15-year-old son live there.[7] (App. 1271–72). Sister Hanna unequivocally testified that, around 10:00 a.m. on April 17, 2019, she left her Rockefeller Address home to attend a friend's birthday party; she did not return until the next day. (App. 1247–48, 1254).

During the deposition, counsel for BI and Mr. El Mallakh attempted to determine the correct date — March 3, 2019 or April 17, 2019 — Investigator Johnson effectuated substituted service in this case. (App. 1250–53). When Mr. El Mallakh's counsel attempted to ascertain the correct date of service, BI's counsel stated, "Let's do it on the record" because "I think you're just reading [the Return of Service] wrong" as "I'm looking at the affidavit of service." (App. 1250–

[7] Sister Hanna and her former husband divorced in 2014. (App. 1054, 1232, 1396).

53). But, when further probed by Mr. El Mallakh's counsel, BI's counsel stated, "Please don't [show something for the record] because it's my deposition" and "when you go beyond at speaking onto Rule 1.310, you're prohibited from doing so because you're coaxing testimony out of the witness." (App. 1252–53).

Mr. El Mallakh's Deposition Testimony

Mr. El Mallakh unequivocally testified in deposition that his primary residence was the Broadway Address at the time of service on April 17, 2019. (App. 1111–12). Mr. El Mallakh testified that he lived at the Broadway Address since November 2016. (App. 1113).

BI's Response in Opposition to Motion to Vacate

On March 24, 2021, less than 20 minutes before the evidentiary hearing, BI filed its 462-page Response in Opposition to Mr. El Mallakh's Motion to Vacate. (App. 882–1344). In its Response, BI contended that Mr. El Mallakh "knowingly and intentionally squandered" his opportunity to be heard by "evad[ing] this case." (App. 882). In support of its Response, BI ***for the first time*** provided: (1) one skip trace **dated January 8, 2019**; and (2) a Declaration of Investigator Brittany Johnson **dated April 17, 2019** (the "Affidavit of Service"). BI also provided numerous affidavits of

California process servers who ***confirmed*** Mr. El Mallakh resided at the Broadway Address. (App. 1218–26). These after-the-fact affidavits also evince the statutory requirements for a return of service form and due diligence search. (App. 1165–67).

In her Affidavit of Service, which was filed over 700 days after the purported service, Investigator Johnson averred the following in pertinent part:

> I, Brittany Johnson ***was informed*** Bassem Essam El Mallakh ***resided*** at 116 Rockefeller, Irvine, CA 92612.
>
> In fact, California DMV search supported that Mr. El Mallakh has his vehicle, a 2016 Mercedes Benz, C Class registered at the listed location.
>
> After numerous attempts at ***various addresses*** (***3-9-19***, ***3-10-19***,[8] ***3-13-19***), ***on 3-19-19*** I attempted service at the above listed residence.
>
> I knocked and rang the doorbell. A female opened the door and identified herself as "***Reem***" and claimed ***she did not know*** Mr. El Mallakh.
>
> I informed our client, **Andrew Bernhard**, Attorney at Law what occurred and ***he***

[8] Sunday, March 10, 2019. Had service been made on anyone on March 10th, it would have been void. § 48.20, Fla. Stat. ("Service . . . on Sunday of any . . . process . . . is void and the person serving . . . or causing it to be served . . . is liable to the party aggrieved for damages for so doing").

> ***informed*** us that "***Reem***" was the ***girlfriend*** of Mr. El Mallakh.
>
> I checked the public database sources and identified "***Reem***" as ***Reem Hanna*** (DOB 12/1982) who resides at 116 Rockefeller, Irvine, CA 92612.
>
> I returned on **3-28-19**, **3-31-19**,[9] **4-6-19** and attempted to serve Mr. El Mallakh and/or sub-serve Ms. Hanna to no avail.
>
> On **4-17-19**, at 12:20 PM, I knocked on the door and rang the doorbell. ***A female*** answered the ***intercom*** and identified herself as Reem Hanna and ***her voice was the same person from my 3-19-19 visit***.
>
> I informed Ms. Hanna that I had legal documents for Mr. El Mallakh and that she was being sub-served. ***She denied knowing him and refused to accept service over the intercom***.
>
> However, ***knowing that she was present and resides at the listed address, I placed the legal documents at her door and completed service of process of an; Alias Summons***, Case #18-28145 CA, Belgium Investments 960 Bay Dr., LLC v. Spencer Bank et al. in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida.

(App. 1078–79) (emphasis added). The Affidavit of Service confirmed that Sister Hanna refused service on Mr. El Mallakh's behalf, and

[9] Sunday, March 31, 2019. *See*, *supra*, fn. 8.

that Investigator Johnson only left the 3-page Alias Summons — she did not deliver a copy of the 18-page Complaint as required by Fla. R. Civ. P. 1.070(e).

The March 24, 2021 Evidentiary Hearing

The evidentiary hearing was held on March 24, 2021. (App. 1368). Mr. El Mallakh presented evidence first despite the burden being on BI to show valid service due to the facially defective Return of Service. (App. 1370–71). Sister Hanna and Mr. El Mallakh presented uncontradicted testimony that Mr. El Mallakh's usual place of abode was the Broadway Address and that Sister Hanna never received service of process. (App. 1372–1413).

In turn, BI produced ***no*** evidence or testimony refuting or contradicting Mr. El Mallakh's or Sister Hanna's submission that Mr. El Mallakh's usual place of abode was the Broadway Address, not the Rockefeller Address, at the time of service on April 17, 2019. BI attempted to refute this uncontradicted evidence by after-the-fact process servers. BI's process server, Michael Danley, testified that he "***may have***" seen the Broadway Address "***in [his] standard database search***" but that he "***didn't focus on it***" because his

"***client told [him]***" that Mr. El Mallakh "***lived at [the Rockefeller Address]***." (App. 1448–50).

The trial court nevertheless denied Mr. El Mallakh's Motion to Vacate, essentially adopting verbatim BI's Response, (*compare* App. 1345 ("Exhibit 1 (1/8/19 skip trace)") *with* App. 884 ("Exhibit 1 (1/8/19 skip trace)")), and holding that strict compliance with the service of process statutes is not required since Mr. El Mallakh had some notice of the underlying lawsuit and, even if the facts alleged in support of Mr. El Mallakh's Motion to Vacate were true, they did not establish a basis for relief under Florida Rule of Civil Procedure 1.540(b). (App. 1349). This appeal timely followed. (App. 1351).

SUMMARY OF THE ARGUMENT

There can be no dispute that the proofs for substituted service of process are defective, flawed, ambiguous, conflicting and imprecise. The proofs for substituted service consists of the Alias Summons, Return of Service, and Affidavit of Service. According to the Alias Summons, Investigator Johnson received the Alias Summons on March 3, 2019 at 12:20 p.m. with directions to effectuate substituted service on Reem Hanna without any proof of due diligence in attempting to locate Mr. El Mallakh's whereabouts.

According to the Return of Service, Investigator Johnson effectuated substituted service on Reem Hanna in Miami-Dade County, Florida on April 17, 2019 at 12:20 p.m. by serving a 3-page Alias Summons, dated January 25, 2019. According to the Affidavit of Service, Investigator Johnson effectuated substituted service on Reem Hanna at the Rockefeller Address on April 17, 2019 at 12:20 p.m. by leaving only an "Alias Summons" at the door despite not knowing whether Sister Hanna was inside the townhome and expressly being told that she "refused to accept service" on Mr. El Mallakh's behalf who she does not know. Florida law is clear that a return of service form not providing all statutory requirements, as prescribed by Fla. Stat. §§ 48.21(1) and 48.031(1)(a), is facially defective rendering service of process invalid. In such a scenario, BI had the burden to show by clear and convincing evidence that substituted service is valid. BI cannot rebut that burden. BI's failure to have Investigator Johnson, the alleged process server who purportedly substitute-served Sister Hanna on April 17, 2019 at 12:20 p.m., testify at the evidentiary hearing is fatal. *See Carone v. Millennium Settlements, Inc.*, 84 So. 3d 1141, 1143 (Fla. 4th DCA 2012) ("the process server had to testify credibly that the [substitute-served family member resident] stated

he resided at the defendant's home). The return of service forms in this case are so confusing, imprecise, ambiguous, and flawed that service of process must be quashed. Mr. El Mallakh was deprived of due process of law because service of process was never validly perfected upon him personally or through substituted service at his usual place of abode.

And, even if the return of service forms had been regular on their face sufficient to create a presumption of valid service, Mr. El Mallakh presented clear and convincing evidence that he did not live at the Rockefeller Address on the date of service. In addition to his own affidavit, Mr. El Mallakh presented Sister Hanna's affidavit, his valid California driver's license, bank statements, two lease agreements, dated emails, and even BI's after-the-fact process servers' affidavits — all of which support Mr. El Mallakh's contention that his usual place of abode was the Broadway Address. On the other hand, BI offered no evidence that any of the aforementioned documents and sworn statements were untrue. Instead, BI attacked the credibility of Mr. El Mallakh and Sister Hanna with irrelevant, prejudicial evidence. Moreover, BI relied on one skip trace report which cannot establish personal jurisdiction or a truthful fact as it

does not contain any sworn testimony. BI simply did not offer any evidence to contradict the sworn testimony in this case. Accordingly, the Court should reverse the trial court's order.

STANDARD OF REVIEW

This Court reviews the denial of a motion to vacate a final judgment for an abuse of discretion; however, where the final judgment is void, the lower court has no discretion and is obligated to vacate the judgment. *Emami v. Progressive Brands, Inc.*, 225 So. 3d 983, 987 (Fla. 3d DCA 2017) (*citing Vercosa v. Fields*, 174 So. 3d 550, 552 (Fla. 4th DCA 2015)). Whether a judgment is void is a question of law reviewed *de novo*. *Emami*, 225 So. 3d at 987 (*citing Infante v. Vantage Plus Corp.*, 27 So. 3d 678, 680 (Fla. 3d DCA 2009) ("The standard of review of an order that vacates a final judgment by default as void for a complaint's failure to state a cause of action is de novo.")); *Romeo v. U.S. Bank Nat. Ass'n*, 144 So. 3d 585, 586 (Fla. 4th DCA 2014).

Where there is no factual dispute upon which the trial court based its determination, and the court's ruling was as a matter of law, the standard of review is *de novo*. *Fla. Eurocars, Inc. v. Pecorak*, 110 So. 3d 513, 515 (Fla. 4th DCA 2013); *Segalis v. Roof Depot USA,*

LLC, 178 So. 3d 83, 85 (Fla. 4th DCA 2015) ("The judgment against [defendant] is clearly void for lack of personal jurisdiction and denial of due process, and counsel's notice of appearance did not waive those claims").

"When it comes to vacating defaults, Florida has a long and proud tradition of favoring adjudicating cases on the merits and setting aside defaults." *M.W. v. SPCP Grp. V, LLC*, 163 So. 3d 518, 519 (Fla. 3d DCA 2015); *accord North Shore Hosp., Inc. v. Barber*, 143 So. 2d 849, 852–53 (Fla. 1962); *Nationsbank, N.A. v. Regency Charters, Inc.*, 725 So. 2d 439, 440 (Fla. 4th DCA 1999); *Gibson Tr., Inc. v. Office of the AG*, 883 So. 2d 379, 382 (Fla. 4th DCA 2004). "[I]f there is 'any reasonable doubt in the matter [of vacating a default], it should be resolved in favor of granting the application and allowing a trial upon the merits of the case.'" *M.W.*, 163 So. 3d at 519 (*quoting Barber*, 143 So. 2d at 853).

ARGUMENT

The trial court erred when it failed to vacate the final judgment because it lacked personal jurisdiction over Mr. El Mallakh.

Rule 1.540(b), which governs vacating final judgments, provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: . . . **(4) that the judgment, decree, or order is void**[.]

Fla. R. Civ. P. 1.540(b) (2021) (emphasis added). The appropriate procedure for attacking a void judgment is by motion for relief from judgment pursuant to Rule 1.540(b). *Great Am. Ins. Co. v. Bevis*, 652 So. 2d 382 (Fla. 2d DCA 1995); *Tucker v. Dianne Electric, Inc.*, 389 So. 2d 684 (Fla. 5th DCA 1980). On motion, a court may, at any time, relieve a party from a void final judgment. *See Sams Food Store, Inc. v. Alvarez*, 443 So. 2d 211 (Fla. 3d DCA 1983); *Gelkop v. Gelkop*, 384 So. 2d 195 (Fla. 3d DCA 1980); *McAlice v. Kirsch*, 368 So. 2d 401 (Fla. 3d DCA 1979); *Grahn v. Dade Home Service, Inc.*, 277 So. 2d 544 (Fla. 3d DCA 1973); *see also Tucker*, 389 So. 2d at 683; *Ramagli Realty Co. v. Craver*, 121 So. 2d 648 (Fla. 1960) (the passage of time cannot make valid that which has been void). As detailed below, it is undisputed that BI did not serve Mr. El Mallakh personally, nor can BI present any affirmative evidence that the Rockefeller Address was Mr. El Mallakh's usual place of abode at the time of substituted service.

ISSUE I — THE RETURN OF PROCESS IS SO FACIALLY DEFECTIVE IT RENDERS FINAL JUDGMENT VOID

The trial court erred when it denied Mr. El Mallakh's Motion to Vacate because the Return of Service was facially defective and because BI failed to present clear and convincing evidence that substituted service was properly effectuated, thereby extinguishing any claim of personal jurisdiction over Mr. El Mallakh.

First, the Return of Service is facially defective because it expressly states that only the 3-page Alias Summons was served, not the 18-page Complaint, in contravention of §§ 48.21(1) and 48.031(1)(a), Fla. Stat. **Second**, the Return of Service is facially defective because it fails to state all the statutory requirements, such as: (1) the individual served was over the age of 15; (2) the individual served resided with the defendant; (3) the individual served had authority to accept substituted service; and (4) the process server informed the individual served of the contents of the papers. **Third**, the Return of Service and Affidavit of Service are defective due to BI's failure to promptly file same with the trial court, as prescribed by Florida Rule of Civil Procedure 1.070(b).

The failure to effectuate personal service of process upon a defendant prevents a court from obtaining jurisdiction over his person. To satisfy the notice requirement of due process the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). A judgment entered without due service of process is void and can be attacked on motion at any time. *See Gelkop*, 384 So. 2d at 200; *McAlice v. Kirsch*, 368 So. 2d 401 (Fla. 3d DCA 1979); *Grahn v. Dade Home Service, Inc.*, 277 So. 2d 544 (Fla. 3d DCA 1973); *Linn-Well Dev. Corp. v. Preston & Farley, Inc.*, 710 So. 2d 544 (Fla. 2d DCA 1998).

The due process afforded under Florida's Constitution goes further than the United States Constitution. To receive due process in Florida, strict compliance with the statutory provisions governing service of process is required to obtain jurisdiction over a party. *Shurman*, 795 So. 2d at 954; *Vives v. Wells Fargo Bank, N.A.*, 128 So. 3d 9, 14 (Fla. 3d DCA 2012); *Vidal v. Suntrust Bank*, 41 So. 3d 401, 402 (Fla. 4th DCA 2010). In many cases, even where a defendant receives notice that would comply with United States Constitutional

Due Process, in Florida the lack of proper delivery will still render service defective warranting an order quashing service of process. As the Court in *Vidal* noted:

> Where other requirements for service of process, which do not directly implicate due process, have been violated, courts still have determined that service is defective, and no jurisdiction has been obtained over the defendant.

Vidal, 41 So. 3d at 403. Failure to strictly comply with the statutory requirements will render a judgment against a defendant null and void, as demonstrated in *Wyatt v. Haese* where the Fourth District stated:

> A judgment may be attacked at any time when the face of the record reveals that no jurisdiction was obtained over the defendant because service of process was not perfected. ***When there is a lack of jurisdiction over the defendant, the judgment is absolutely null and void on its face***.

Wyatt, 649 So. 2d 905, 907 (Fla. 4th DCA 1995) (emphasis added; cleaned up); *Del Conte Enterprises, Inc. v. Thomas Pub. Co.*, 711 So. 2d 1268, 1269 (Fla. 3d DCA 1998) ("the fact the appellant moved to vacate over one year after the entry of judgment is irrelevant" since "a judgment entered without due service of process is void"). Service

of process on persons outside of Florida must be made in the same manner as service being effectuated within Florida. *Berne v. Beznos*, 819 So. 2d 235, 238 (Fla. 3d DCA 2002) (quashing service attempted in New York as concierge cannot accept substituted service of process); *Henzel v. Noel*, 598 So. 2d 220, 221 (Fla. 5th DCA 1992).

In Florida, substituted service of process can only be utilized after undertaking sufficient due diligence to attempt personal service and as strictly prescribed by statute. *Carone*, 84 So. 3d at 1143. Demonstrating proper substitute service requires strict compliance with the statutory service requirements because such service is an exception to personal service. *Avael v. Sechrist*, 305 So. 3d 593, 596–97 (Fla. 3d DCA 2020), *reh'g denied*, (June 1, 2020), *rev. denied*, SC20-864, 2020 WL 6336056 (Fla. Oct. 29, 2020); *Societe Hellin, S.A. v. Valley Commercial Capital, LLC*, 254 So. 3d 1018 (Fla. 4th DCA 2018); *Alvarado-Fernandez v. Mazoff*, 151 So. 3d 8, 17 (Fla. 4th DCA 2014). As "strict compliance with all of the statutory requirements for service is required," the failure to comply with the statutory terms means that service is defective. *Schupak v. Sutton Hill Associates*, 710 So. 2d 707, 708 (Fla. 4th DCA 1998). When a process server fails to strictly comply with these rules, service must be quashed. *Alvarez v.*

State Farm Mut. Auto. Ins. Co., 635 So. 2d 131, 132 (Fla. 3d DCA 1994); *Romeo*, 144 So. 3d at 586.

A. The Return of Service is not in Strict Compliance with the Service of Process Statutes.

BI cannot overcome its burden to establish that Mr. El Mallakh has been validly substitute served as the Return of Service fails to comply with § 48.21, Fla. Stat.

Section 48.21(1), Fla. Stat., which governs the requirements of a Return of Service form, requires the following:

> Each person who effects service of process ***shall note*** on a return-of-service form attached thereto the date and time when it comes to hand, the date and time when it is served, the manner of service, the name of the person on whom it was served, **and**, if the person is served in a representative capacity, the position occupied by the person. The return-of-service form **must** list all pleadings and documents served and be signed by the person who effects the service of process.

§ 48.21(1), Fla. Stat. (emphasis added). "Service of process" consists of delivering "a copy of the complaint, petition, or other initial pleading or paper" to a named defendant in a civil action. § 48.031(1)(a), Fla. Stat.; Fla. R. Civ. P. 1.070(e). Section 48.21(2) prescribes the consequences for failing to comply with subsection (1):

> ***A failure to state the facts* or *to include the signature required by subsection (1) invalidates the service***, but the return is amendable to state the facts or to include the signature at any time on application to the court from which the process issued. On amendment, service is as effective as if the return had originally stated the omitted facts or included the signature. ***A failure to state all the facts in or to include the signature on the return shall subject the person effecting service to a fine not exceeding $10, in the court's discretion***.

§ 48.21(2), Fla. Stat. (emphasis added). Florida law has long held that if a return of service is "regular on its face, it serves 'as a virtual basis for the Court to assume that it has lawfully obtained jurisdiction over the person of the defendant.'" *Klosenski v. Flaherty*, 116 So. 2d 767, 768 (Fla. 1960) (*quoting Rorick v. Stilwell*, 133 So. 609, 610 (Fla. 1931)). If it is not regular on its face, however, it cannot be relied upon as evidence to establish personal jurisdiction. *Id.* (*citing Gibbens v. Pickett*, 12 So. 17, 18 (Fla. 1893)); *Avael*, 305 So. 3d at 596–97; *Re–Emp't Servs., Ltd. v. Nat'l Loan Acquisitions Co.*, 969 So. 2d 467, 471–72 (Fla. 5th DCA 2007) (finding return of service which failed to accurately note on its face date and time process came to hand defective on its face). Thus, the presumption that a return of service is valid arises only when the return of service is regular on

its face. *Gonzalez v. Totalbank*, 472 So. 2d 861, 864 (Fla. 3d DCA 1985).

Here, the Return of Service and the Affidavit of Service are not regular on their face for six reasons. **First**, the Return of Service and Affidavit of Service are facially defective because they expressly state that only the 3-page Alias Summons was served, not the 18-page Complaint, in contravention of §§ 48.21(1) and 48.031(1)(a), Fla. Stat. Without the complaint, a defendant has no way of knowing what claims are being lodged against him as the summons offers no details regarding same.

Second, the Return of Service and Affidavit of Service fail to state that Sister Hanna confirmed Mr. El Mallakh resided at the Rockefeller Address. Notably, it is undisputed that Mr. El Mallakh was never observed entering and exiting the Rockefeller Address, nor is there any evidence refuting Mr. El Mallakh's claim that the Rockefeller Address is not his usual place of abode. *See Cullimore v. Barnett Bank of Jacksonville*, 386 So. 2d 894 (Fla. 1st DCA 1980) (quashing service since no affirmative evidence server saw or spoke to defendant while he was in the residence being served at); *Henzel v. Noel*, 598 So. 2d 220 (Fla. 5th DCA 1992). In fact, BI knew Mr. El

Mallakh did not reside at the Rockefeller Address via the Marzett Affidavit. *See Torres v. Arnco Const., Inc.*, 867 So. 2d 583, 586–87 (Fla. 5th DCA 2004) (plaintiff "apparently aware" defendant did not reside where it "tried unsuccessfully to serve" defendant). Simply because Sister Hanna is Mr. El Mallakh's sister who lives at a townhouse owned by Mr. El Mallakh does not authorize substituted service on her where it is indisputable that Mr. El Mallakh does not reside with her. *See Green v. Jorgensen*, 56 So. 3d 794 (Fla. 1st DCA 2011) (quashing substituted service since leaving suit papers with defendant's sister did not give rise to a presumption that defendant lived with sister who disclaimed defendant's residence therein). Moreover, BI could not effectuate service of process merely at a residence Mr. El Mallakh owns as it is not conclusive evidence that he is actually living there at the time service is made. *See Robles-Martinez v. Diaz, Reus & Targ, LLP*, 88 So. 3d 177 (Fla. 3d DCA 2011); *Green*, 56 So. 3d 794.

Third, the Return of Service and Affidavit of Service fail to state that Sister Hanna had authority to accept substituted service on behalf of Mr. El Mallakh. Even if Mr. El Mallakh lived at the Rockefeller Address (which he did not), substituted service would be

impermissible there given Sister Hanna's express refusal to accept service on behalf of Mr. El Mallakh. In fact, leaving process with Sister Hanna is akin to impermissibly leaving service with a tenant or a doorman. *See Grosheim v. Greenpoint Mortg. Funding, Inc.*, 819 So. 2d 906 (Fla. 4th DCA 2002) (reversing denial to quash service since landlord did not reside at the address, nor was tenant authorized to accept service on landlord's behalf); *Schupak v. Sutton Hill Associates*, 710 So. 2d 707 (Fla. 4th DCA 1998) (leaving process with an apartment doorman in apartment lobby was insufficient service); *S.H. v. Dep't of Children & Families*, 837 So. 2d 1117 (Fla. 4th DCA 2003); *Alvarez v. State Farm Mut. Auto Ins. Co.*, 635 So. 2d 131 (Fla. 3d DCA 1994).

Fourth, the Return of Service fails to state whether Sister Hanna was over the age of 15. *See Johnston v. Halliday*, 516 So. 2d 84, 85 (Fla. 3d DCA 1987) (service invalid where return failed to state defendant's son who was served was over age 15, resided with defendant). Interestingly, despite not being a voice/linguistics identification expert, Investigator Johnson averred that the "female [who] answered the intercom [on April 17, 2019] . . . her voice was the same [as the] person from my 3-19-19 visit." (App. 1079).

Investigator Johnson made this averment after allegedly hearing Sister Hanna's voice **one time 29 days earlier**. This voice identification is inherently unreliable, *see Carter v. State*, 366 So. 2d 54, 58 (Fla. 2d DCA 1978) (finding inadmissible as unreliable testimony regarding telephone caller identification), and does not give Investigator Johnson affirmative evidence that anyone at that time is located within the Rockefeller Address. *See Henzel v. Noel*, 598 So. 2d 220, 221 (Fla. 5th DCA 1992) (there was no "affirmative evidence" server "knew" "anyone was inside the apartment").

Fifth, the Return of Service fails to state that Investigator Johnson informed Sister Hanna of the contents of the papers. Instead, the Affidavit of Service merely stated that she "informed Ms. Hanna that [she] had legal documents for Mr. El Mallakh." This is insufficient as Investigator Johnson did not read aloud the Complaint likely because she did not have the Complaint to serve. *Johnston*, 516 So. 2d at 85; *Cullimore*, 386 So. 2d at 895. **Lastly**, Investigator Johnson had no affirmative evidence that Sister Hanna was even present within the Rockefeller Address. Investigator Johnson merely purportedly spoke to Sister Hanna via an "intercom" Ring smart doorbell. While a contested fact as to when it was installed, (App.

1387), a Ring smart doorbell is known to be accessible anywhere in the world via a smartphone. Thus, Investigator Johnson had no way of affirmatively knowing that Sister Hanna was located within the Rockefeller Address at the time of service. *See Henzel v. Noel*, 598 So. 2d 220, 221 (Fla. 5th DCA 1992).

Because the Return of Service and Affidavit of Service in this case fail to strictly comply with the statutory requirements for substituted service, the trial court erred by not requiring BI to establish proper service of process in the first instance. Therefore, the Court should find that the Return of Service is facially defective requiring reversal of the trial court's order.

B. No Competent, Substantial Evidence Exists Supporting the Validity of the Return of Service.

BI cannot dispute that the Return of Service and Affidavit of Service are ambiguous and contradicting on their face. (App. 32, 37, 736, 1250–52). Throughout this case, BI vacillated between service being effectuated on March 3, 2019 and April 17, 2019. *Id.* And, because there is confusion as to when Investigator Johnson effectuated service, BI needed to call Investigator Johnson as a witness at the evidentiary hearing to clarify the confusion she

created. But confusion persists since BI failed to have Investigator Johnson testify.[10]

While he did not have the burden to prove defective service in the first instance, Mr. El Mallakh presented clear, convincing and uncontradicted evidence that the Rockefeller Address was not his usual place of abode. Mr. El Mallakh produced affidavits, two lease agreements, timestamped emails, bank statements, and his California driver's license which all indisputably corroborated his claim that his usual place of abode was at the Broadway Address. *See Busman v. State Dep't of Revenue*, 905 So. 2d 956 (Fla. 3d DCA 2005) (finding lease agreement corroborated defendant's claim of defective service of process).

Moreover, the trial court erred when it accepted the late Return of Service and Affidavit of Service at face value. BI ignored deadlines to file the Return of Service and Affidavit of Service and failed to

[10] It is noteworthy that, from July 1, 2019 to March 5, 2021, BI vacillated between March 3, 2019 and April 17, 2019 as the date of service. (App. 32, 736). As of March 5, 2021, did BI have a copy of Investigator Johnson's Affidavit of Service dated April 17, 2019? If not, does that mean BI corresponded with Investigator Johnson to obtain a copy of the Affidavit of Service between March 5, 2021 and March 24, 2021? And, if so, why was Investigator Johnson not able to testify at the evidentiary hearing?

demonstrate good cause or that it followed the proper procedure to excuse its late filing. *See, e.g., Crystal Springs Partners, Ltd. v. Michael R. Band, P.A.*, 132 So. 3d 1230 (Fla. 3d DCA 2014) (42-days delay too long); *Arison v. Offer*, 626 So. 2d 1039 (Fla. 4th DCA 1993) (when delay is too long, defendant need not show prejudice resulting from delay). As such, because BI cannot satisfy its burden of showing by clear and convincing evidence that substituted service was proper, the Court should find that Mr. El Mallakh had no duty to present any evidence in the first instance. *See Robles-Martinez v. Diaz, Reus & Targ, LLP*, 88 So. 3d 177, 181 fn.3 (Fla. 3d DCA 2011) (defining "clear and convincing evidence" as "evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue").

BI failed to strictly comply with all the statutory requirements for filing a return of service. And, "[w]hen a process server fails to strictly comply with these rules, service must be quashed." *Romeo*, 144 So. 3d at 586. Accordingly, because Mr. El Mallakh has made a prima facie showing that the Return of Service is facially defective, the trial court should have never shifted the burden to Mr. El Mallakh

to prove insufficient service of process. The Court should therefore reverse the trial court's order.

ISSUE II — BI'S ATTEMPTED SUBSTITUTED SERVICE FAILS FOR LACK OF DILIGENCE BEFORE RESORTING TO SUBSTITUTED SERVICE

A. Before Resorting to Substituted Service, a Plaintiff Must Show Diligence in Attempting to Serve the Complaint Personally.

BI should have never been authorized to utilize substituted service considering its utter lack of due diligence. BI's diligence consisted of: (1) one skip trace and (2) surveillance at the wrong addresses. This wholly fails to meet the requisite due diligence threshold required before resorting to substituted service. *See Coastal Capital Venture, LLC v. Integrity Staffing Sols., Inc.*, 153 So. 3d 283, 285 (Fla. 2d DCA 2014) ("Substitute service is unauthorized if personal service could be obtained through reasonable diligence."); *Societe Hellin, S.A.*, 254 So. 3d at 1021 ("Repeated attempts at service on the wrong location do not amount to due diligence.").

Florida law holds that substituted service statutes are an exception to the rule requiring personal service and must be strictly construed. *See Clauro Enters., Inc. v. Aragon Galiano Holdings, LLC*,

16 So. 3d 1009 (Fla. 3d DCA 2009). Before attempting substitute service, a plaintiff must "demonstrate the exercise of due diligence in attempting to locate the defendant." *Alvarado-Fernandez v. Mazoff*, 151 So. 3d 8, 17 (Fla. 4th DCA 2014) (*quoting Wiggam v. Bamford*, 562 So. 2d 389, 391 (Fla. 4th DCA 1990)). *Wiggam* compels reversal in this case.

In *Wiggam*, the Fourth District explained that to "overcome the primary requirement of personal service, the plaintiff must demonstrate the exercise of due diligence in attempting to locate the defendant." *Id.* at 391. The test of diligence is whether the plaintiff "reasonably employed knowledge at his command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances, to acquire the information necessary to enable him to effect personal service on the defendant." *Id.* The *Wiggam* Court found that the plaintiffs failed to exercise diligence in locating the defendant because they "failed to follow an obvious lead" by failing "to make inquiry of [the defendant's] attorney" as to her whereabouts. *Id.*; *see also Societe Hellin, S.A. v. Valley Commercial Capital, LLC*, 254 So. 3d 1018 (Fla. 4th DCA 2018); *Dubois v. Butler ex rel. Butler*, 901 So. 2d 1029, 1031 (Fla. 4th DCA 2005) (lack of

diligence where the plaintiff attempted "to serve the defendant at the address listed on a nearly three-year-old accident report" and tried a directory assistance service in Canada as the only showings of diligence).

Here, the one skip trace conducted by BI is insufficient diligence and deserves no weight to be afforded to the stale findings therein. Contrary to BI's assertions below, the skip trace does not say Mr. El Mallakh "resides" or "lives" at the Rockefeller Address. (App. 918–1053). Instead, the skip trace provided "possible" yet stale personal information with a "reported" date of "04/12/2018" for Mr. El Mallakh. (App. 987, 919). The skip trace, however, provided a current telephone number for Mr. El Mallakh. *Id.* There is no record evidence showing that BI ever attempted to contact Mr. El Mallakh via telephone. BI also failed to conduct a California driver's license search which would have revealed Mr. El Mallakh's Broadway Address. (App. 1450); *see also Baker v. Stearns Bank, N.A.*, 84 So. 3d 1122, 1126 (Fla. 2d DCA 2012) (affidavit and current driver's license established person's usual place of abode). BI's failure to conduct even basic person locator searches is even more inexplicable given the fact that Marzett's Affidavit stated that Mr. El Mallakh rents out

the Rockefeller Address. (App. 25, 1449–50). Noticeably absent from the record evidence is the fact that not one process server ***ever*** observed Mr. El Mallakh entering or exiting the Rockefeller Address. *Id.* Apparently, BI simply did not want to perform valid personal service. And BI's failures to follow obvious leads, such as making a simple phone call, are even more apparent than in *Wiggam*.

BI tries to rely on its five efforts at the Rockefeller Address, such as trying to serve the Complaint there repeatedly and surveilling the Rockefeller Address, as well as its after-the-fact surveillance at the Broadway Address, as diligent inquiry. Florida law, however, rejects these types of minimal efforts as insufficient to satisfy the due diligence standard expressly stating that "[r]epeated attempts at service on the wrong location do not amount to due diligence." *Societe Hellin, S.A. v. Valley Commercial Capital, LLC*, 254 So. 3d 1018 (Fla. 4th DCA 2018); *Coastal Capital Venture, LLC v. Integrity Staffing Sols., Inc.*, 153 So. 3d 283, 285 (Fla. 2d DCA 2014); *Robinson v. Cornelius*, 377 So. 2d 776, 778 (Fla. 4th DCA 1979) (concluding that diligent search was not performed, and substituted service was not justified, when the serving party knew that the opposing party did

not reside at a particular address but attempted service at that address on multiple occasions).

BI cannot even claim it attempted to locate Mr. El Mallakh at different addresses given its singular focus on the Rockefeller Address. Importantly, BI only learned of the Rockefeller Address from its initial attempt to serve Mr. El Mallakh. (App. 25). And the process servers who attempted to serve Mr. El Mallakh at the Broadway Address — occurring nearly two years after the purported substitute service — confirmed Mr. El Mallakh resided at the Broadway Address. (App. 1218–19; 1449–50). The record is devoid of any indication that BI made any attempts to obtain a proper address in California for personal service on Mr. El Mallakh. BI never attempted to run a California driver's license search, (App. 840), contact Mr. El Mallakh via telephone, or conduct the basic methods of locating a person, including searching utility records or contacting the post office. BI also undertook no efforts to serve the Complaint on Mr. El Mallakh for over 120 days after commencing this action. (App. 5, 23). In the face of this complete lack of diligence on BI's part, substituted service was plainly improper.

B. BI Failed to Comply with the Requirements of the Substituted Service Statute.

The procedural requirements for substituted service are found in § 48.031(1)(a), Fla. Stat., which requires the following:

> ***Service of original process is made*** by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or ***by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents***. Minors who are or have been married shall be served as provided in this section.

§ 48.031(1)(a), Fla. Stat. (emphasis added).

Here, BI failed to strictly comply with the substituted service statute. **First**, BI did not leave process at Mr. El Mallakh's usual place of abode. (App. 840, 722, 780). The unrefuted evidence — multiple affidavits, a current driver's license, lease agreements, bank statements, and dated emails — establishes that Mr. El Mallakh's usual place of abode was at the Broadway Address, not the Rockefeller Address. *Id.*; *see also Alvarez*, 635 So. 2d at 132 (affidavits and "a telephone bill and marriage license" supported defendant's claim of not usual place of abode). **Second**, BI cannot produce a scintilla of evidence that Mr. El Mallakh, Sister Hanna, or

anyone else was presently residing within the Rockefeller Address at the time Investigator Johnson purportedly effectuated substituted service. *See Cullimore*, 386 So. 2d at 895 (quashing service since no affirmative evidence server saw or spoke to defendant while he was in the residence being served and distinguishing *Dowd Shipping, Inc. v. Lee*, 354 So. 2d 1252 (Fla. 4th DCA 1978) where server called "house telephone" landline and defendant answered landline). And, as a corollary, there is absolutely no evidence that Mr. El Mallakh, Sister Hanna, or anyone else was informed of the contents of the legal papers purportedly left at the door.

Third, the record evidence indisputably shows that Investigator Johnson only left the 3-page Alias Summons at the Rockefeller Address, and not "a copy of the complaint." (App. 29, 1079). Moreover, BI failed to timely file either the Return of Service, 75 days after purported service, and the Affidavit of Service, 707 days after purported service, which warrants quashing service of process. *See Patasnik v. Mermelstein*, 379 So. 2d 411, 412 (Fla. 3d DCA 1980) ("The late filing of an affidavit after the service of process and the final judgment cannot give life to an invalid process."); *Jupiter House, LLC v. Deutsche Bank Nat'l Tr. Co.*, 198 So. 3d 1122, 1123 (Fla. 4th DCA

2016) (quashing service for failure to file an affidavit and noting that acceptance of late affidavit in *Alvarado-Fernandez* was because "counsel explained the reason for delay and had moved to extend time for filing"); *Monaco v. Nealon*, 810 So. 2d 1084, 1086 (Fla. 4th DCA 2002) ("Failure to timely file an affidavit of compliance alone warrants quashing of the substituted service.").

Accordingly, BI failed to comply with all the statutory requirements for effectuating substituted service of process.

C. BI's Attempts to Justify Service After-the-Fact are Impermissible.

Mr. El Mallakh anticipates BI justifying its improper substituted service for four reasons — all of which are unavailing and legally flawed. **First**, BI may argue that perfection of substituted service may be by serving a defendant's family member. But Florida law is clear that serving a defendant's family member, unless expressly authorized or a named party-defendant in the same proceeding, is not lawful service of process. *See Carone*, 84 So. 3d at 1143 ("the process server had to testify credibly that the [substitute-served family member resident] stated he resided at the defendant's home); *Green*, 56 So. 3d 794; *Torres v. Arnco Const., Inc.*, 867 So. 2d 583,

586–87 (Fla. 5th DCA 2004) (plaintiff "apparently aware" defendant did not reside where it "tried unsuccessfully to serve" defendant). Here, the unrefuted record evidence shows Sister Hanna never consented to accept service of process on Mr. El Mallakh's behalf. (App. 1079). In fact, the Return of Service is devoid of any facts showing such authorization to accept substituted service. (App. 28). The Affidavit of Service clearly reflects Sister Hanna's lack of consent and authority to accept substituted service. (App. 1079). Both affidavits submitted by Mr. El Mallakh and Sister Hanna stated that Sister Hanna had no authority to accept substituted service. (App. 1212, 1215). The deposition testimony of Mr. El Mallakh and Sister Hanna corroborate Sister Hanna's lack of authority to accept substituted service. (App. 1280–81). Lastly, Sister Hanna was not a named party-defendant in this case. Therefore, the Court should find that merely effectuating substituted service upon a defendant's family member is not in strict compliance with the substituted service of process statutes.

Second, BI may argue that Mr. El Mallakh's knowledge of the underlying action excuses BI's failure to strictly comply with the substitute service statutes. But a defendant's knowledge of a lawsuit

does not excuse a plaintiff's improper service. *See Portfolio Recovery Associates, LLC v. Gonzalez*, 951 So. 2d 1037, 1038 (Fla. 3d DCA 2007) ("the defendants actually received the complaint and summons does not affect the result"); *McDaniel v. FirstBank Puerto Rico*, 96 So. 3d 926, 929 (Fla. 2d DCA 2012) ("A number of Florida cases specifically hold that actual knowledge of a suit will not cure insufficient service of process"). Such a post-hoc rationalization for improper service of process would push defendants to risk a default in the trial court rather than challenging service of process initially because every challenge to service of process would be automatically defeated after the defendant filed a motion to quash and acknowledged it had knowledge of the suit. And, while the trial court acknowledged that BI had to strictly comply with the substituted service statutes, its inclusion of facts concerning Mr. El Mallakh's alleged knowledge suggests that Mr. El Mallakh's knowledge factored into its decision to deny the motion to quash substitute service. This was improper.

Third, BI may argue that the after-the-fact process servers' observations at the Broadway Address verify Mr. El Mallakh's absence therefrom. BI is wrong. Those after-the-fact observations

are irrelevant as to the purported substituted service of process occurring on or around April 17, 2019, when BI claims it perfected service on Mr. El Mallakh. If the Court were to accept BI's argument, then plaintiff's will effectively be permitted to effectuate service of process at a known invalid address only to later refute a defendant's testimony regarding his true residence at the time service was made with post-hoc evidence showing the defendant did not reside at the claimed address on a date after-the-fact. This would create precedent as it would directly undermine the "strict compliance" requirement for service of process. The Court should not accept BI's invitation.

Lastly, BI may argue that Mr. El Mallakh's general appearance below brought him within the trial court's personal jurisdiction. BI is, again, wrong. Florida Rule of Civil Procedure 1.140(b) has effectively eliminated the need to file a "special appearance" to challenge personal jurisdiction. *See Public Gas Co. v. Weatherhead Co.*, 409 So. 2d 1026 (Fla. 1982); *Ward v. Gibson*, 340 So. 2d 481 (Fla. 3d DCA 1976).

ISSUE III — THE DEFAULT FINAL JUDGMENT AWARD OF $4,255,000.00 IS SPECULATIVE, NOT SUPPORTED BY THE EVIDENCE, A SURPLUS RECOVERY FOR BI, WAS

UNAUTHORIZED BY LAW, AND AMOUNTED TO FUNDAMENTAL ERROR

A. Standard of Review

Whether a trial court applied the correct measure of damages is a question of law reviewed *de novo*. *Del Monte Fresh Produce Co. v. Net Results, Inc.*, 77 So. 3d 667, 673 (Fla. 3d DCA 2011); *R&B Holding Co. v. Christopher Advert. Grp., Inc.*, 994 So. 2d 329 (Fla. 3d DCA 2008) (involving conversion and providing, "The appropriate measure of damages, as compared with the amount of damages awarded, involves a legal question reviewable on appeal.").

B. The Default Final Judgment Is An Unmerited Windfall.

The trial court accepted without question the $4,255,000.00 damages espoused by BI. (App. 375, 701). Respectfully, the trial court erred in that damages calculation by ignoring the uncontradicted evidence on the element of damages. *Id.* The Final Judgment against Mr. El Mallakh for breach of fiduciary duty, conversion/theft, and unjust enrichment was based on speculation and guesswork, and represents a surplus recovery by BI and a deprivation of Mr. El Mallakh's property without due process. (App.

701). Accordingly, Mr. El Mallakh requests that this Court vacate the unsupported $4,255,000.00 judgment for damages.

First, there is no record evidence to support the trial court's award of $4,255,000.00 against Mr. El Mallakh. It is unclear where BI and the trial court got this figure. But the uncontradicted evidence, based on the very exhibits provided by BI and adopted by the trial court, is that Mr. El Mallakh is not at all responsible the $4,255,000.00 damages. (App. 375–691, 701). It is axiomatic that "damages cannot be based upon speculation or guesswork, but must have some reasonable basis in fact." *Del Monte Fresh Produce Co.*, 77 So. 3d at 675. A plaintiff must show by "reasonable certainty in the proof of those damages and the assumptions underlying them." *Id.*; *R.A. Jones & Sons, Inc. v. Holman*, 470 So. 2d 60 (Fla. 3d DCA 1985). The damages awarded cannot be ascertained or calculated based on the evidence submitted in support of the $4,255,000.00 amount. (App. 375–691). Thus, the trial court erred in awarding such an unfounded, speculative measure of damages.

Second, the general principles of tort damages precluded a surplus recovery in this case. "The purpose of compensatory damages is to compensate, not to punish defendants or bestow a

windfall on plaintiffs." *MCI Worldcom Network Services, Inc. v. Mastec, Inc.*, 995 So. 2d 221, 224 (Fla. 2008) (cleaned up). The Florida Supreme Court has held that

> The fundamental principle of the law of damages is that the person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendants act which give[s] rise to the action. In other words, the damages awarded should be equal to and precisely commensurate with the injury sustained.

Id. (*citing Hanna v. Martin*, 49 So. 2d 585, 587 (Fla. 1950)).

Here, the damages that were "commensurate with the injury sustained" have yet to be determined and cannot be quantified based on the evidence submitted by BI. *See id.*; (App. 375–691, 701). The record evidence is devoid of competent substantial evidence showing entitlement to a $4,255,000.00 judgment for damages against Mr. El Mallakh. *Id.* BI is not entitled to "a windfall" beyond compensatory or remedial damages. *See Mastec, Inc.*, 995 So. 2d at 224. Thus, the trial court erred in awarding such a meritless windfall.

Lastly, the trial court committed fundamental error in awarding surplus damages to BI because it was the grant of "relief that [was] not authorized by law." *I.A. v. H.H.*, 710 So. 2d 162, 165 (Fla. 2d DCA

1998). Fundamental error occurs when a trial court awards "damages which are not authorized by law and which are contrary to law," because such an award is "a taking of property from the defendant without due process of law." *Keyes Co. v. Sens*, 382 So. 2d 1273, 1276 (Fla. 3d DCA 1980); *Stevens v. Allegro Leasing, Inc.*, 562 So. 2d 380, 381–82 (Fla. 4th DCA 1990) (ruling that "imposing penalties against [a defendant] when the applicable statute [does not] allow such imposition [goes] to the heart of the case and constitutes fundamental error"); *Marks v. Delcastillo*, 386 So. 2d 1259, 1267 (Fla. 3d DCA 1980) (ruling that fundamental error occurs when plaintiffs are awarded "damages to which they have no right under the law").

Here, because BI was awarded damages that were not supported by any controlling law, were based on speculation and guesswork, and represented a surplus recovery, the award was "a taking of property from [Mr. El Mallakh] without due process of law." *See Keyes Co.*, 382 So. 2d at 1276; *Mastec, Inc.*, 995 So. 2d at 224. Therefore, the award amounted to fundamental error. Accordingly, Mr. El Mallakh requests that this Court vacate the trial court's unsupported, surplus damages award of $4,255,000.00.

CONCLUSION

For the foregoing reasons, Appellant Bassem Essam El Mallakh respectfully requests the Court to reverse the trial court's order, quash service of process, vacate the final judgment, and remand with directions in accordance herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished and served via the Florida E-Portal on October 12, 2021 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief has been prepared with 14-point Bookman Old Style font and complies with the word count requirement by having 10,636 words in accordance with the Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B).

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