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IN THE SUPREME COURT OF FLORIDA

Case No. SC21-1564
TFB File 2018-50,796 (15A)

THE FLORIDA BAR,

Complainants,

v.

CURTIS ALVA,

Respondent.

SECOND AMENDED INITIAL BRIEF OF RESPONDENT CURTIS ALVA

Curtis Alva
Law Office of Curtis Alva
Florida Bar No. 178993
200 E 13th Street
Riviera Beach, FL 33404
Phone: 561-225-1599
curtis@alvalaw.com

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PREFACE

This is the initial brief of Respondent, Curtis Alva. This brief is accompanied by an appendix containing each of the documents cited herein, including Report of Referee (the "Report"), the Florida Bar's complaint (the "Complaint"), the trial transcripts, and other documents.

ISSUES ON APPEAL

A preliminary note underlying all the Issues on Appeal, although there was a 5 day trial, there are no disputed facts in this case, and the Referee so found. Thus, the Issues on Appeal are framed for de novo review.

The Referee erred in adopting verbatim the draft report provided by the Bar, which states that the Clients had clearly paid the December Invoice timely, which statement is directly contrary to the legal rulings made by the Referee during, and at the conclusion, of the trial, where the Referee concluded that the Clients had not paid the December Invoice timely.

The Referee erred in his conclusion that the Clients clearly paid the December Invoice timely, which is contrary to all of the evidence admitted on the issue.

The Referee's conclusion that the February 26 Invoice was an

attempt to amend the Engagement Agreement ("EA") is contrary to all of the evidence admitted on the issue.

The Referee erred in not concluding that the Respondent, who was the victim of a willful, material breach of contract, had a reasonable, good faith belief that he could nullify the EA and pursue restitution in quantum meruit.

The Referee erred in not finding that the willful, material breach of the Engagement Agreement (EA"), constituted a "first breach" pursuant to Florida law that terminated Respondent's obligations, including the hourly rates in the EA.

The Referee's conclusion that the Respondent violated Rule 4-1.5, in that he charged a clearly excessive fee was error because no evidence nor expert opinion was offered by the Bar that the fee was either unreasonable or clearly excessive pursuant to the fee factors set forth in that Rule.

The Referee erred in concluding that a purported breach of the EA by Respondent, as to the hourly rates to be charged, by itself, establishes that the fee charged was clearly excessive.

The Referee erred in adopting certain opinions of Mr. Betensky, the

Bar's expert.

The Referee erred in concluding that the Respondent could not follow the safe harbor provided all attorneys in Rule 5-1.1(f) and keep the disputed retainer money in trust until the resolution of the dispute.

The Referee erred in applying Rule 4-1.4(b) to communications with a non-client.

The Referee erred in concluding that the Respondent had acted unlawfully, dishonestly or unjustly, in violation of Rule 3-4.3, because Respondent had a reasonable, good faith belief that he was the victim of willful, material breach and had the right to elect to nullify the EA and seek restitution for the fair value of his services.

The Referee erred in concluding that the Respondent had violated the Rules of Professional conduct, in which is proscribed by Rule 4-8.4(a), because Respondent had a reasonable, good faith belief that he was the victim of willful, material breach and had the right to elect to nullify the EA and seek restitution for the fair value of his services.

The Referee erred in failing to follow the Standards for Discipline, the precedent cases resolving similar violations, and regarding aggravating and mitigating factors.

The Referee erred in recommending punitive restitution amounting to double recovery.

STATEMENT OF THE CASE

This is an objection to the May 18, 2023, Report, which was docketed on June 1, 2023, of the Referee Dale C. Cohen, Appx. 4, on a complaint filed by the Florida Bar, Appx. 29. The Report recommends Respondent be found guilty of professional misconduct and suspended from the practice of law for 1 year. A Notice of Intent to Seek Review was filed on July 31, 2023. On August 28, 2023, and September 29, 2023, Orders granting briefing extensions were entered. This Court has jurisdiction pursuant to Art. V, §15, Fla. Const.

The underlying grievance is a fee dispute between an attorney, Curtis Alva, who is the Respondent and who represented two clients, Dr. Colorchip Corp., and Daniel McCool. The Clients failed to pay the Respondent's last bill--before he was discharged--in willful, material breach of the EA, and then, after the Respondent unsuccessfully attempted to collect from his then-former clients, Respondent nullified the contract with the former clients and demanded restitution for the fair value of his services. The Clients also failed to pay that amount.

The Respondent very successfully represented the clients in a year

of expedited, complex, corporate-life-or-death battling for exclusive control of 100% of the profits from a multi-million-dollar company. After that year, in November of 2017, the clients hired replacement counsel, Matthew Nelles. However, they did not disclose to Respondent that replacement was imminent, or even contemplated. Between the time that replacement counsel was hired and the day the clients disclosed the replacement, they ran up a $25,000 bill. The work was billed on January 9, 2018, and payment for the work was due on January 19, 2018. Unlike every previous invoice, it was not in 10 days paid, when it was due.

Between January 23, 2018, and February 13, 2018, the parties traded many emails. The clients paid nothing and then, on the 13th, finally disclosed to Respondent that he was being replaced. On February 15, 2018, the Court signed the Order substituting Mr. Nelles for Mr. Alva, and the clients became the former clients and the Respondent's professional responsibilities to them substantially diminished. None of the acts that the Referee condemns in the Report occurred during the time that the Respondent and the Clients were in the attorney-client relationship,

Between February 14, 2018, and February 26, 2018, Respondent and the former clients traded more emails, but the former clients still

paid nothing. On February 26, 2018, Respondent nullified the EA and demanded restitution and issued an invoice for an amount that Respondent believed represented the fair value of the services that his firm had rendered, starting from the first day of the representation (the "February 26 Invoice").

The February 26 Invoice was due in three days. The former clients paid nothing on either invoice within the 3 days. Finally, on March 7, 2018, the former clients paid the face amount of the December Invoice. This payment was 57 days after the Invoice—not the 10-days required by the EA.

The Bar's complaint in this matter (the "Complaint") alleges that Respondent upcharged from the hourly billing rate that McCool agreed to in the EA and that upcharge was applied retroactively, including to charges that McCool had already paid. Appx. 29, 32. The Complaint also alleges that Respondent failed to return a $25,000.00 retainer. Appx. 29, 33. The retainer had been applied to the February 26 Invoice, but then promptly returned to trust after the clients stated that Rule 5-1.1(f) applied and the money must be kept in trust until the dispute was resolved. Appx. 392, 488:7-14.

Based upon these acts, the Complaint alleges that Respondent

"violated R. Regulating Fla. Bar 3-4.3 (any act that is unlawful or contrary to honesty and justice; 4-1.4(b) (a lawyer shall explain a matter to the client); 4-1.5(a) (illegal, prohibited, or clearly excessive fees); and 4-8.4(a) (violations of Rules of Professional Conduct). Appx. 29, 34.

STATEMENT OF THE FACTS

I. No Disputed Facts

Although there were five trial days, they produced no disputed facts. Thus, there are no disputed findings of fact for the Supreme Court to resolve. Not only are all of the facts undisputed, but all of the facts are established by contemporaneous written documents. There is no point that depends on undocumented witness recollections.

II. Key Chronology Events

A. The Limited Duration of the Attorney-Client Relationship

The beginning and ending dates of the attorney-client relationship are important to reviewing certain of the Referee's legal conclusions. For example, the starting date of relationship, and, thus, the starting date for the Respondent's professional obligations to these clients, was August 27, 2016. Appx. 39. Critically, the omission violating Rule 4-1.4(b), according to the Report, occurred undisputedly before that date.

As another example, the attorney-client relationship terminated, as

did several of the ethical duties are at issue here, to these clients, on February 15, 2018. Appx. 43. The invoice violating Rules 4-1.5(a), 3-4.3 and 4-8.4(a), per the Report, undisputedly occurred after that date.

Specifically, on February 13, 2018, the clients notified the Respondent that he was being replaced as counsel beginning immediately. Appx. 46, 49. On February 15, 2018, the Judge signed a substitution order relieving Respondent of any further responsibilities as counsel of record. Appx. 52. A week later, on February 21, 2018, the Respondent notified the clients that if they continued to refuse to pay the invoice for the work done in December, (which invoice had been delivered on January 9, 2018, Appx. 54; and was due on January 19, 2018, Appx. 59,60) and if they did so in bad faith, then Respondent would claim "bad faith, misrepresentation and punitive damages …." Appx. 64, 73. This is the earliest date of any act violating, per the Report, Rules 3-4.3 or 4-8.4 and this is undisputedly after the termination of the attorney-client relationship.

On February 26, 2018, when the clients still had not paid the December invoice, nor any portion of it, Respondent sought restitution by issuing a notice of formal breach, nullifying the EA, and formally demanding payment for the fair value of the services provided during the

relationship. Appx. 81. This is the earliest date of any act violating, per the Report, Rule 4-1.5(a) and it also is undisputedly after the termination of the relationship.

B. The Clients' Refusal to Pay the December Invoice

In November 2017, the clients hired replacement counsel for the Respondent, although they did not notify Respondent until February 13, 2018, that that counsel would replace Respondent, rather than serve as co-counsel.[1] Appx. 46, 49. Between November 2017 and February 13, 2018, the clients ran up a bill of over $25,000 with Respondent.

The invoice for the work done in December was delivered on January 9, 2018, Appx. 54, and was due in ten days, on January 19, 2018, per the EA. Appx. 59, 60. For the prior month, November of 2017, an invoice of about $14,000 had been delivered on December 20, 2017, and timely paid within 10 days. Appx. 82.

On January 23, 2018, fourteen days after the December invoice was delivered and 4 days after the invoice was due to be paid, the clients wrote that the prior $14,000 payment, for the November Invoice, "is

[1] In discovery in this matter, Respondent sought documents and deposition testimony regarding the details of the hiring of Nelles and his as-yet-undisclosed role as replacement counsel, but the clients failed to produce the documents or testimony, despite an order from the Referee to produce discovery. Appx. 87,95.

enough" money for the Respondent for December. Appx. 86.

Between February 5, 2018, 17 days after payment was due, and February 13, 2018, 25 days after payment was due. The parties exchanged many emails but no payment of any kind was made, nor were any questions about the Invoice asked nor were any extensions of time requested. Appx. 46-51, Appx. 54, Appx. 86.

On February 13, 2018, after 2 more emails and still no payment, the Clients admitted that replacement counsel "will be filing a substitution of counsel and will be taking over the entire Dr. Colorchip case." Appx. 46, 49.

On February 15, 2018, Judge Garrison signs the Order for Substitution of Counsel, terminating the Respondent's "responsibilities as counsel of record …." Appx. 52,53.

On February 16, 2018, with payment now 28 days overdue, the former clients, for the first time, ask questions about $6,800 of the $25,040 charges on the Invoice. Appx. 64, 77-80.

Between February 16 and 21, 2018, the former clients and the Respondent trade more emails. Appx. 64, 72-80. On February 21, 2018, Respondent asks the former clients, for the second time, to at least pay the undisputed amount. If not, Respondent states he will send formal

notice of breach and demand payment, in three days of either (a) enforcement of the contract and damages of $25,040, or (b) "payment as if there was no contract" which would be about $125,000. And, "if there is no good faith on Dr. Colorchip's part, a claim for bad faith, misrepresentation and punitive damages …." Appx. 64, 73.

On February 26, 2018, with still no payment made, more emails are traded and then Respondent determines to nullify the EA and demand restitution. The Respondent writes that because no payment of any amount has been made as of that date, 38 days past due, the Respondent is now demanding payment for the full amount claimed in the February 21, 2018, email, i.e., $126,834.95. Id.

On February 27, 2018, the day after the EA was nullified and restitution demanded the former clients wrote "Per Dave's advice I have issued to you full payment of the $25,040 invoice to my bank for payment yesterday." Id. Respondent replied 2 hours later, "Not sure what "payment yesterday" means, but "I'll let you know when I receive it." Appx. 64. Dan McCool replied, "As quickly as the bank processes it you should have it shortly." Id.

At trial, Dan McCool explained that what he meant by "to my bank for payment yesterday" was that he had sent a "Bill Pay" instruction to

his bank, "which typically takes 10 days." Appx. 502, 606:12-19.

For this payment, it took 8 days, and on March 7, 2018, Respondent wrote, "Thanks also for sending the payment for December… I would like to get this account settled promptly. I'll try to send you a statement next week with the balance due, which I expect will be the 2/26 invoice ($126,834.95) minus the retainer paid …." Appx. 236.

On March 20, 2018, Respondent sent a statement of Account to the clients showing a balance of $101,834.95 after applying the $25,000 retainer to the February 26, 2018, invoice. Appx. 237.

C. Events Relating to the Retainer

On about March 20, 2018, the $25,000 retainer was applied to the unpaid February 26 Invoice. Appx. 237. On April 9, 2018, McCool sent an email to respondent requesting that all retainer funds be returned immediately. Appx. 29, 33. On May 25, 2018, the clients, in their rebuttal letter to the Bar regarding the grievance they filed, demand that the retainer be kept in trust until the dispute is resolved, pursuant to Rule 5-5.1(f). Appx. 238, 239.

The retainer amount is then promptly put into the firm's trust account.

D. The Underlying Litigation

The case at issue was the McLean Litigation, which was fast, furious, and meant corporate death to the loser. McLean filed multiple emergency motions for Judicial Dissolution, Injunctive Relief, Appointment of Custodian or in the Alternative Appointment of a Provisional Director. Appx. 361, 362-363, ¶25-43. There were multiple emergency evidentiary hearings. Id.

Despite the blitzkrieg tactics of McLean, none of the substantive relief that he sought in any of his motions was ever granted. He remained fired, with no stock ownership and no positions as a board member or officer. Appx. 361, 362-363, ¶25-43.

SUMMARY OF ARGUMENT

This is a dispute concerning the Respondent's election, as the victim of a willful, material breach of the clause in an engagement agreement requiring the clients to pay for the services rendered, to nullify the agreement and seek restitution for the fair value of the services he provided.

The Respondent very successfully represented the clients in a year of expedited, complex, corporate-life-or-death battling for exclusive control of 100% of the profits from a multi-million-dollar company. After

that year, in November of 2017, the clients hired replacement counsel. However, they did not disclose to Respondent that replacement was imminent, or even contemplated. Between the time that replacement counsel was hired and the day the clients disclosed the replacement, they ran up a $25,000 bill. The clients then refused to pay for that work and terminated the Respondent.

Respondent diligently, respectfully, and tirelessly--but unsuccessfully--attempted to collect from his then-former clients. As part of that process, Respondent notified the then-former clients that he had the option of electing to nullify the contract and demand restitution for the fair value of all of his services rendered during the relationship. When even that heads-up failed, the Respondent nullified the EA and demanded payment for the fair value of his services.

The gravamen of claim for restitution was the fact that the clients had not paid the bill. Payment had been due in 10 days and now 48 days had passed without a penny being paid and without any extension of the 10-day deadline. Respondent had a reasonable, good faith belief that he could seek restitution, and he did so.

The Referee, however, disagreed and concluded, on uncontested facts, that the clients' payment--after 57 days-- was "clearly timely." Both

halves of that conclusion are in error, payment was not timely, and beyond cavil, was not clearly paid timely.

In light of his conclusion that payment in 57 days was clearly timely, he next concludes that the nullification and restitution demand, which are set forth in multiple, contemporaneous emails, must have been a bad faith attempt to amend the EA. There is no evidence that an amendment was attempted and this conclusion was also error.

Based upon his conclusion that the ersatz amendment was unsuccessful, the Referee concludes that Respondent breached the EA, by submitting a demand for an amount higher than set forth in the EA, and on the ground of breach of agreement, concluded that the fee billed was clearly excessive, clearly overreaching and clearly unconscionable. There is no evidence of any analysis of the fee pursuant to the fee factors set forth in Rule 4-1.5(b). In fact, it is admitted by the Bar that no such analysis was done.

After the restitution demand was made, and not paid, Respondent used the $25,000 retainer that the Clients had in trust to pay a portion of the restitution demand. The Clients demanded that the money be returned to trust, citing Rule 5-1.1(f), until the dispute was resolved. The funds were promptly returned to trust, but the Referee concludes that

there was no basis for not returning them to the Clients because payment in 57 days had been clearly timely.

The Referee also errors in applying Rule 4-1.4(b) to communications with a person who was not then a client and in applying professional duties, owed only to current clients, to former clients.

The Referee then recommends suspension for a year, contrary to the Standards, which state that reprimand is appropriate for single incidents of excessive billing and for first offenses. The suspension is also contrary to the analogous cases.

Finally, the Referee recommends punitive "restitution" providing for double recovery of the retainer to the Clients.

ARGUMENT

I. Standards of Review

Here there are no disputed facts, and the Referee so found. Appx. 492, 495:14-18. "[W]here there are no genuine issues of material fact and the only disagreement is whether the undisputed facts constitute unethical conduct, the referee's findings present a question of law that the Court reviews de novo." *Fla. Bar v. Pape,* 918 So.2d 240, 243 (Fla.2005), *cert. denied,* 547 U.S. 1041, 126 S.Ct. 1632, 164 L.Ed.2d 335 (2006). This includes all issues of law, such as the Referee's conclusions regarding

aggravating and mitigating circumstances. The Florida Bar v. Brownstein, 953 So. 2d 502, 510 (Fla. 2007).

As to the recommended discipline, "[G]enerally speaking, this Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer,* 753 So.2d 555, 558 (Fla.1999). Further, when this Court reviews the recommended discipline, it does so mindful of its obligation to impose a sanction that is consistent with the purposes of lawyer discipline. The Florida Bar v. Adorno, 60 So. 3d 1016, 1031 (Fla. 2011).

II. The Written Report Reverses the Referee's Most Consequential Trial Ruling—That the Clients Did Not Pay the December Invoice Within the Deadline

On April 10, 2023, the Referee held a hearing to announce his decision on guilt. He stated, "[E]ventually Dr. Colorchip did pay that December Invoice, although not timely." Appx. 492, 496:8-9, 15. The evidence supporting that conclusion is undisputed. Payment was due in ten days, on January 19, 2018. Payment was not made until March 7, 2018, which was 57 days.

The Referee made the same ruling twice before the April 10, 2023, hearing, and based upon that ruling the Referee excluded certain

evidence. Appx. 247, 301:11-13, 303:1-7.

However, the written Report, which the Referee adopted verbatim from the draft report provided by the Bar, states "Clearly in this case, there was a contract, there was an agreed hourly rate and respondent was paid timely." Appx. 4, 19.

That statement in the Report is directly contrary to the legal rulings made by the Referee during, and at the conclusion, of the trial. It was error for the Referee to adopt that draft report and reverse his earlier rulings.

III. The Referee's Reversed Position Errs in Concluding that the Clients Had Paid Timely and Doubles the Error by Concluding that the Timely Payment Clearly Occurred

The conclusion in the Report that the December Invoice was paid timely is contrary to all of the admitted evidence and the error is doubled by concluding that the payment was not only timely but also "clearly" timely.

First, as to timeliness: Payment was due in ten days, on January 19, 2018, but payment was not made until March 7, 2018. Specifically, paragraph 6 of the EA sets a 10-day deadline for the payment of invoices: "6. The Firm will invoice monthly for the work

provided and payment will be due in 10 days." Appx. 59,60.

The Clients failed to pay the December Invoice within 10 days, and did not pay it until March 7, 2017, which was payment in 57 days. There is no evidence of any agreement to extend the 10-day deadline.

The date constituting the beginning of any 10-day payment period is also set forth in the EA. Paragraph 7(a) provides that notice shall be deemed to be given on the day the notice is emailed to the address provided herein Appx. 59, 60. Here, the uncontradicted evidence is that the Respondent emailed the December Invoice to the address provided for Dr. Colorchip on January 9. Appx. 59. Thus, per the EA, the December Invoice was received on January 9, making payment due on January 19. Appx. 59, 60 ¶6.[2]

The undisputed evidence is that payment was finally made on March 7, 2018. Specifically, on February 27, 2018, Dan McCool wrote "Per Dave [McCool, Esq.]'s advice I have issued to you full payment of the $25,040

[2] The Report notes that (a) McCool was out of the country at about that time and Respondent knew he was out of the country, (b) the Invoice was not also emailed to another address provided in the EA, (c) the Invoice was not also emailed to Ms. O'Rourke, and (d) Ms. O'Rourke was undergoing treatment for cancer at about that time. Appx. 4, 15-16. However, as explained above, none of these is legally relevant to the beginning or ending dates of the 10-day period.

invoice to my bank for payment yesterday." Appx. 64. Five hours later, he added, "As quickly as the bank processes it you should have it shortly." Appx. 64.

At trial, Dan McCool explained that what he meant by "to my bank for payment yesterday" was that he had sent a "Bill Pay" instruction to his bank, "which typically takes 10 days." Appx. 99,

For this payment, the Bill Pay process took 8 days, and on March 7, 2018, Respondent wrote, "Thanks also for sending the payment for December…." Appx. 236.

Thus, the undisputed evidence is that payment was made in 57 days, not 10 days. Fifty-seven days is not timely.

The Referee then doubles the error by concluding that it was not merely timely but was "clearly" timely. The erroneous conclusion that payment was "clearly timely" is a necessary ground for every recommendation of guilt in the Report. The Referee reasons that if payment was clearly timely, then Respondent had no basis for claiming breach of the EA and, thus, no basis for seeking restitution for quantum meruit. There would be no "first breach" by the Clients and, thus, no loss by them of their right to the hourly rates set in the EA.

If payment was clearly timely, then Respondent breached the EA, which clear breach is the Referee's sole grounds for finding that the fee was clearly excessive. Additionally, if payment was clearly timely, then there was no good faith "dispute" about ownership of the retainer funds and no good faith dispute to trigger the protections of the safe harbor in Rule 5-1.1(f). There would also be no good faith basis for the warnings of possible "collection litigation," given to the former clients.

The error that payment was "clearly timely" is also the Referee's basis for his conclusions that Respondent violated Rules 3-4.3 proscribing dishonesty and 4-8.4 proscribing unprofessionalism and 4-1.4(b) requiring sufficient explanations.

The erroneous conclusion that payment was "clearly timely" is also one of the grounds for the recommendations of suspension and of restitution and for two of the aggravating factors: dishonest motive and indifference to making restitution.

If the Supreme Court does not adopt the Referee's conclusion that it was clear that payment was timely, that would resolve, in Respondent's favor, all but one of the Referee's recommendations of guilt. The only remaining issue would be the reasonableness of the fee. Moreover, even

that conclusion, that there was a clearly excessive fee, would be resolved in Respondent's favor if the Supreme Court further declines to adopt the conclusion that payment was timely at all, whether clearly or not.

Here, there is no evidence that payment in 57 days was timely at all. Additionally, the Respondent had a good faith and reasonable basis for believing that the Client breached the EA when the Client initially failed, and then subsequently refused to pay the December Invoice. Thus, even if the Respondent was incorrect in believing that the Clients had breached the EA (and the Respondent's position is that he was not mistaken), if he had a reasonable and good faith basis for that belief, albeit mistakenly, then the recommendations of guilt involving unlawfulness, dishonesty, injustice, bad faith, unreasonableness or illegality should, respectfully, not be adopted by the Supreme Court.

IV. Mere Breach of Contract Does Not Establish that the Fee was Excessive

An additional error by the Referee, which is also directly tied to the EA, is this: if the Respondent had breached the EA (and it is the position of the Respondent that he had not) would such a breach establish--by itself—that the fee was clearly excessive.

This is a critical question to the Referee's findings of guilt for Rules

4-1.5(a) and (b), because there is no evidence that the fee was even unreasonable, let alone clearly excessive, pursuant to the fee factors set forth in Rule 4-1.5(b). The only basis for the Referee's conclusion that the fee was clearly excessive is the admitted fact that the rate charged in the February 26 Invoice is higher than the rate set forth in the EA.

The Referee is following the opinion of Mr. Betensky, who likewise relies solely upon the alleged breach of the rate in the EA for his conclusion that the fee was clearly excessive.

However, neither Mr. Betensky nor the Referee cite to any case where a breach of the contract rate was even considered as a factor in determining whether a fee was excessive.

Rule 4-1.5(b) contains an extensive list of the factors to be considered and the contract rate is nowhere among those factors. Accordingly, neither the Referee nor Mr. Betensky gives this Supreme Court any legal support for their conclusion that the fee was unreasonable. The Referee erred in concluding that a purported breach of the provisions of the EA setting forth the hourly rates, by itself, establishes that the fee charged was clearly excessive.

V. The Referee Erred in Finding that Respondent Had Breached the Rules by Not Returning the Disputed Retainer

The Referee also erroneously found that if the Clients paid, albeit after it was past due, the face amount of the December Invoice, then the Retainer should have been refunded to them when they demanded it. Appx. 4,20. However, the dispute was governed by Rule 5-1.1(f) and the retainer was properly left in trust until the dispute is resolved.

VI. The Referee Erred in Ruling that Respondent Could Not Nullify the EA and Demand Restitution for the Fair Value of His Services

The Respondent had a good faith and reasonable basis for believing that, as the EA was nullified ab initio, the Respondent was entitled to be paid for the work he performed during the representation as restitution, measured by the fair value of his services, which is sometimes called quantum meruit. This included any work for which he had already been paid the discounted rate in the EA.

Respondent had a good faith and reasonable basis for believing that-- because it is an alternate method of calculating fees--the restitution rate attaches at the beginning of the representation and continues until the end and properly includes all the hours spent on the representation. Thus, applying a restitution rate to an invoice that has

already been paid at the contract rate is not properly understood as back billing.

The Respondent further had a good faith and reasonable basis for believing that the rate of $550 per hour, which was his standard rate for work of this type, at this time, was the reasonable value of his services for this work. If the Respondent had not given a discount in the EA, the contract rate in this case would have been $550.

The law in Florida is clear. A non-breaching party to a contract may elect either (a) to affirm the contract and seek benefit of the bargain damages or (b) to void the contract and seek a restitutionary recovery. *Forbes v Prime General Contractors, Inc.*, 255 So.3d 448 (Fla. 2d DCA 2018); *Ocean Communications, Inc. v Bubeck, 956 So.2d 1222* (Fla 4th DCA 2007). Upon finding of an express breach of contract, the non-breaching party may pursue a restitutionary recovery under an equitable theory such as unjust enrichment or quantum meruit. Moreover, where material breach of contract exists, the non-breaching party may treat contract as void and seek quantum meruit recovery in excess of the contract price where the breach is willful. *Ballard v Krause,* 248 So.2d 233 (Fla. 4th DCA 1971).

During the trial, the Referee made the legal conclusion that nullification and restitution for the fair value of the services provided, i.e., restitution in an amount measured by quantum meruit, was not available in this case. That conclusion is contrary to bedrock Florida law and was in error.

The law presented to the Referee clearly shows that restitution in quantum meruit is available as a remedy for breach of contract. See Forbes v. Prime General Contractors, Inc., 255 So. 3d 448, 451 (Fla. 2d DCA 2018) (when party seeks damages for total breach, "[h]e may treat the contract as void and seek the damages that will restore him to the position, he was in immediately prior to entering the contract....")

The evidence before the Referee was clear and uncontradicted that the Respondent first notified the clients of his option of nullification and restitution, Appx. 64, 73, and then Respondent elected that option and nullified the contract and demanded payment for the fair value of all of his services. Appx. 662.

The Respondent wrote: "If Dr. Colorchip does not pay in full the undisputed amount, $18,240, then I will not believe that your questions are being asked in good faith. In that event, I will send a formal notice of

breach of contract and demand payment in full in 3 days…. I will have 2 options: [a] enforce the contract as written and seek $25,040, or [b] seek payment for what Dr. Colorchip would owe me if there was no contract, in other words, if we had not agreed to discount my rate to $400 per hour, in other words, $550.00 per hour." Appx. 64, 72-73.

In that same email string, on February 26, 2018, the undersigned then notifies the Clients that Respondent has exercised that election and is treating the contract as voided and seek restitution for the benefits conferred by Respondent. Respondent says as follows: "So, as I stated in my 2/21 email, I am now demanding payment in full for all the work without the discounted hourly rates down to $400 for me and $100 for my assistant. An invoice is attached, which, as I said on 2/21, is due in 3 days." Appx. 64, 70.

Thus, it was error for the Referee to determine that (a) Respondent breached the contract when he sent the February 26 Invoice, seeking restitution for the material breach of the contract and (b) Respondent could not demand restitution for clients' material breach of contract for failure to pay that invoice.

The Ocean Communications, Inc. v Bubeck, 956 So.2d 1222 (Fla 4th DCA 2007) case specifically addresses restitution, as distinct from

remedies at equity. "In Beefy Trail, Inc. v. Beefy King International, Inc., 267 So.2d 853, 856 (Fla. 4th DCA 1972), we recognized three distinct remedies for breach of contract: damages, restitution, and specific performance. We explained the… remedy of restitution thusly:

The purpose of restitution, however, is to require the wrongdoer to restore that which he has received and thus tend to put the injured party in as good a position as he occupied before the contract was made; in this context the injured party may be said to have considered the contract as 'terminated' or 'ended.'" Ocean at 1225.

VII. The Clients' First Breach of the EA Discharges Respondent from the Rates in the EA

First, a caveat, the First Breach Doctrine does not discharge an attorneys' ethical obligation to not charge an unreasonable fee. But it can discharge his contract duty to not charge at any rate other than the contract rate. So, if a reasonable rate existed, even though higher than the contract rate, a first breach by a client could permit the attorney to charge that rate.

Florida's "first breach" doctrine is a fundamental principle of contract law. Under the first breach doctrine, when one party to a contract breaches its obligations, the other party to the contract is

discharged from having to perform its obligations. See Focus Mgmt. Group USA, Inc. v. King, 171 F. Supp. 3d 1291, 1299 (11th Cir. 2016) ("[T]he general rule is that a material breach of the agreement allows the non-breaching party to treat the breach as a discharge of his contractual liability.") See also and Toyota Tsusho Am., Inc. v. Crittenden, 732 So. 2d 472, 477 (Fla. 5th DCA 1999).

Here, the Respondent had a good faith and reasonable basis for believing that, upon the material breach of the EA by the Clients, the Respondent had the right to treat the contract as null and void, ab initio.

Additionally, because the Clients breached the EA, the Respondent's had a good faith and reasonable basis for believing that the only ethical restriction on his fees for the representation was the ethical restriction that the total fee for the representation be reasonable.

VIII. There Is No evidence that the Fee Was Unreasonable Pursuant to Rule 4-1.5(b)

The total fee actually collected in this case was $376,124, including the $25,000 retainer. Appx. 247, 336:20-337:15. The total fee billed, including uncollected amounts, was $452,918.95 Appx. 247, 336:20-337:15; Appx. 81. There is no evidence pursuant to Rule 4-5.1(b) that either of those amounts was unreasonable. Appx. 247, 337:15-24, 338:4-9, 338:20-

339:21, 340:20-341:9. The Bar did not introduce any evidence regarding the reasonableness of the fee, pursuant to the fee factors enumerated in Rule 4-1.5(b).

Moreover, there is no evidence introduced by the Bar pursuant to Rule 4-1.5 as to what a reasonable fee would have been in this matter.

Instead, the Referee concluded that the fee here was clearly excessive merely because it was in excess of the hourly rates set in the EA. But, contract hourly rates are not included in any of the factors set forth in Rule 4-1.5(b).

All of the evidence regarding the reasonableness of the fee was presented by the Respondent, who testified in great detail that every relevant factor showed the total fee charged was more than reasonable. Appx. 392, 417:8–424:7; 424:8–449:17.

IX. The Report refuses to recognize the reduced attorney's duties to former clients.

The Bar admits that the Respondent's was terminated as counsel for the Clients on February 13, 2017. Thus, as of that date, his ethical responsibilities to his clients were materially diminished and included only his conflict duties and confidentiality duties' Except for those duties, he no longer had any fiduciary duties to the client and was free, as the victim of a

breach of contract, to pursue all of the contract remedies available to any other victim of a breach of contract.

Critically, at the time the Respondent's issued the February 26 invoice, he was no longer the attorney for the clients.

X. The Referee Erred in Adopting The Various Opinions Of Mr. Betensky

The Referee erred in relying on the Bar's expert, Mr. Betensky, as to his opinion that the fee was overreaching and unconscionable. Also, as to his opinion that the retainer should have been returned.

Mr. Betensky's opinions excluded any consideration of (1) the Clients' material breaches of the EA; (2) the Respondent's good faith and reasonable belief that he had the right to seek restitution for the fair value of his services; (3) the factors that the Court must consider in determining whether a fee is reasonable or is over-reaching; (4) the termination of the attorney-client relationship and the diminished professional duties owed to former clients; and (5) Rule 5-1.1(f). He and the Bar admit that he only looked at the rights granted in the EA, and not at the additional rights the Respondent had as a matter of law.

Specifically, Mr. Betensky also admitted that he hadn't even looked at the Rule 4-1.5(b) fee factors regarding the fee. Appx. 247, 289:4-

292:13.

He erred in opining that restitution is not a legally recognized remedy. Appx. 247, 314:11-22.

He admitted on cross-examination that disputed retainers, pursuant to Rule 5-1.1(f), are to remain in the trust account. Appx. 247, 317:19-25, 318:1-9.

He did not form an opinion whether the $326,000 in fees, which was the total amount of fees billed and collected through February 14, 2018, was reasonable. Appx. 247, 336:20-25, 336:1-24.

He further admits that he did not form an opinion as to what the range of reasonable fees for this matter would have been Appx. 247, 338:10-18. He further admitted that he is not a fee expert. Appx. 247, 338:10-18.

He further admits that he did not form an opinion whether the total amount of fees billed, including the February 22, 2018, Invoice, which is $452,000, was reasonable. Appx. 247, 339:20-25 & 341:1-9.

Betensky admits that his opinion--that the February 26 Invoice was overreaching and unconscionable--was limited to an analysis of the rights granted in the EA and at equity. Appx. 247, 342: l-25; 343:1-15. He also did not do a restitution analysis.

Another critical mistake by Betensky that the Referee relied upon was Betensky's refusal to recognize the change in the status of Dr. Colorchip and Dan McCool from (a) clients—who are owed all the ethical duties related by that status—to (b) former clients, who are owed only more limited duties. They are no longer owed the duty of loyalty, nor the duty to put the interests of the client before the interests of the attorney. Other than the limited duties that remain as to former clients, a former attorney is free to advance his own interests, even to the detriment of the former clients.

Betensky repeatedly incorrectly refers to the "former clients" as the "clients" thereby implying upon the former attorney the duties no longer owed to former clients. Appx. 247, 272:13-16; 274:7-14; 275:20-21; 278:24-279:2; 282:21-283:1; 293:15-24, 294:11-20, 295:4-12, 297:14-16, 311:21- 312:2, 343:9-15.

For example, Betensky repeatedly states that the February 26 Invoice was issued to a client. He should have admitted that it was issued to a former client. Appx. 247,278-279:17-2, 331-312:21-2; 343:9-15.

XI. The Referee Erred In Concluding That The Respondent Could Not Follow The Safe Harbor Provided All Attorneys In Rule 5-1.1(f)

The $25,000 retainer was in the Respondent's retainer account at the time the clients breached the EA. Appx. 392, 486:15 – 25. Pursuant to the EA, the retainer was applied to an unpaid bill. Appx. 392, 486:15 – 25, 487:2. The clients, in an April 9, 2018, email from Dan McCool to the respondent then claimed that the $25,000 belonged to them. Appx. 391. On May 25, 2018, they demanded that pursuant to Rule 5-1.1(f), the money be put in trust until the ownership dispute was resolved Appx. 238, 239, The money was promptly returned to the trust account. Appx. 392, 488:7-14.

Despite the controlling Rule 5-1.1(f), the Report concludes that the Respondent's decision to keep the money in trust is the same as grand theft. Appx. 4,19. Thus, the Report strips the Respondent (and apparently all attorneys) of the protections granted them in Rule 5-1.1(f).

XII. The Referee erred in applying Rule 4-1.4(b) to communications with a non-client.

The Report applies Rule 4-1.4(b), regarding explaining matters to clients, to a non-client. The Referee states that "Respondent should have notified the clients [that he would increase the hourly rate if they breached the

contract] prior to engaging in the representation." Appx. 4,16 (emphasis added).

XIII. The Referee Erred In Concluding That The Respondent Had Acted Unlawfully, Dishonestly Or Unjustly, In Violation Of Rule 3-4.3

The Referee erred in concluding that the Respondent acted unlawfully, dishonestly, or unjustly, in violation of Rule 3-4.3. This is error because Respondent had a reasonable, good-faith belief that (a) the Clients' failure to pay within 10 days was a willful, material breach of the EA, entitling Respondent to elect to nullify the contract and seek restitution for the fair value of his services; and (b) Respondent, pursuant to Rule 5-1.1.(f), could keep the funds in trust until the resolution of the dispute.

XIV. The Referee Erred In Concluding That The Respondent Had Violated The Rules Of Professional Conduct, In Which Is Proscribed By Rule 4-8.4(A)

The Referee erred in concluding that the Respondent had violated the Rules of Professional conduct, which is proscribed by Rule 4-8.4(a). This is error because Respondent reasonably concluded that the Clients' failure to pay within 10 days was a willful, material breach of the EA, entitling Respondent to elect to nullify the contract and seek restitution for the fair value of his services; and (b) Respondent, pursuant to Rule 5-1.1.(f), could keep the funds in trust until the resolution of the dispute.

XV. Referee Erred in Recommending Restitution Regardless Of Double Recovery

The Referee recommends restitution of the $25,000, "regardless" of the outcome of the appeal of the $25,000 judgment in the civil case. The Report cites to The Florida Bar v. Smith, 866 So. 2d 41, 49 (Fla. 2004), regarding the Court's ability to order restitution. However, the Smith case forbids Referees from doing what the Report does here regarding restitution. "In *Florida Bar v. Della–Donna,* 583 So.2d 307 (Fla.1989), this Court stated that "[d]isciplinary actions cannot be used as a substitute for what should be addressed in private civil actions against attorneys. They are not intended as forums for litigating claims between attorneys and third parties.... We cannot and should not turn restitution as a condition to practicing our profession into a judgment for a third party." 583 So.2d at 312 (citations omitted). *See also Florida Bar v. Neale,* 384 So.2d 1264, 1265 (Fla.1980) ("The rights of clients should be zealously guarded by the bar, but care should be taken to avoid the use of disciplinary action under [the rules of ethics] as a substitute for what is essentially a malpractice action.")."

Here, as the Report plainly recognizes, there is a civil case between the same attorney and clients, which sought exactly the same relief,

restitution of the $25,000 retainer, and in which summary judgment in favor of the clients on that issue was granted and is now on appeal (for having been granted before any discovery of any kind was taken.) The restitution ordered in the Report is explicitly ordered "regardless of what happens in the appeal ...."

To put that recommendation more candidly, the $25,000 recommendation is explicitly punitive. If the appeal sustains the judgment in civil court for restitution of the $25,000, then the award of the exact same restitution in this proceeding would be a double recovery by the clients and a 100% penalty to the Respondent. Conversely, if the appeal overturns the restitution ordered by the summary judgment, then that might result in a determination by the civil court that no such restitution is warranted. However, the restitution recommended in the Report would still have to be paid, even if the civil Court finds that the money rightly belongs to the Respondent. Another 100% penalty. The punitive framing of the restitution recommended in the Report is clear error by the Referee. The Florida Bar v. King, 174 So. 2d 398, 403 (Fla. 1965) (no fine, imprisonment or other punitive sentence can be imposed in disciplinary proceedings).

XVI. Discipline

A. The Referee Erred in Failing to Follow the Standards for Discipline

The Report doesn't follow the Standards for Imposing Lawyer Sanctions. The Comments to the standards state that public reprimand is appropriate in most cases for a violation of a duty owed as a professional. Fla. Stds. Imposing Law. Sancs., 7.1, comment sv Public Reprimand. If a violation occurred here, at worst, that Comment should have been followed here. Additionally, and specific to excessive fees, the Comments state that the court typically imposes public reprimands for a single instance of excessive or improper fees. Id.

B. The Referee Erred In Failing To Follow The Precedent Cases Resolving Similar Violations

Regarding the Report's conclusion that the Respondent failed to return the retainer, a similar case resulted in a public reprimand, restitution and costs. See The Florida Bar v. Hipsh, 441 So. 2d 617, 617 (Fla. 1983). There, the referee found that respondent earned a total fee of $2,866.00 and had earlier received a retainer of $5,000.00. Id. Respondent refused to refund the portion unearned, in violation of the Florida Bar Code of Professional Responsibility. Id. The referee recommended suspension for thirty days, restitution and costs. Id. The Supreme Court disagreed and

reduced it to a public reprimand, restitution, and costs. Id.

Regarding the Report's conclusion that the Respondent breached the Engagement Agreement, similar cases resulted in a public reprimand, restitution and costs. See, The Florida Bar v. Hollander, 607 So. 2d 412 (Fla. 1992). There, the Supreme Court ordered public reprimand and six-month probation for breach of the engagement agreement, plus charging an unreasonable fee. Id., at 416. See also, The Florida Bar v. Alford, 400 So. 2d 458 (Fla. 1981), where the Supreme Court found breach of an engagement agreement and ordered a public reprimand and probation for 18 months. Id., at 460. See also, The Florida Bar v. Gray, 380 So. 2d 1292 (Fla. 1980), where the Supreme Court held that intentional breach of an engagement agreement warrants public reprimand. Id., at 1293. See also, The Florida Bar v. Jordan, 523 So. 2d 570 (Fla. 1988), where the Supreme Court held breaching an engagement agreement warrants public reprimand and restitution. Id., at 570-71. See also, The Florida Bar v. Schwarz, 355 So. 2d 776 (Fla. 1978), where the Supreme Court held that breaching an engagement agreement warrants public reprimand, probation, and costs. Id., at 776-77. And see, The Florida Bar v. Whitley, 515 So. 2d 225 (Fla. 1987), where the Supreme Court held that breach of an escrow agreement

with the client warrants a public reprimand. Id., at 226.

Regarding the Report's conclusion that the Respondent charged a clearly excessive fee, a similar case, resulted in a public reprimand and restitution. See, The Florida Bar v. Kavanaugh, 915 So. 2d 89 (Fla. 2005), which is cited in the Report, but not on this point, where the Supreme Court ordered a public reprimand and restitution. Id., at 95. See also, The Florida Bar v. Mirabole, 498 So. 2d 428 (Fla. 1986), where the Supreme Court held that bill of over $24,000 for representing client in $3,000 mechanic's lien action warrants a public reprimand. Id., at 429.

Regarding the Report's conclusion that the Respondent threatened lawsuits and retaliation, a similar case, resulted in a public reprimand. See, The Florida Bar v. Perlmutter, 582 So. 2d 616 (Fla. 1991), in which the Supreme Court approved a consent judgment for public reprimand for threatening multiple lawsuits, threatening retaliation, and entering into an agreement for excessive fees. Id., at 616-17.

Regarding the Report's conclusion that the Respondent failed to communicate with the clients concerning their questions on fees, see, The Florida Bar v. Fields, 482 So. 2d 1354 (Fla. 1986), where the Supreme Court ordered a public reprimand. Id., at 1358-59.

As to the discipline cases cited as comparable by the Referee, it is perhaps most telling that the Report does not cite a single case involving former clients. The Report does cite to The Florida Bar v. Draughon, 94 So. 3d 566, 571 (Fla. 2012), which the Report describes as a case where the attorney, who was suspended for a year, was not "acting in a formal attorney-client relationship…." Appx. 4, 24. That description suggests that Draughon was acting in an informal attorney-client relationship, which, it implies, might sort of be like the relationship with a former client, but, in truth, there was no "client," informal or otherwise. "Draughon was acting on behalf of his own corporation, and not as a lawyer representing a client [even an informal client or a former client] in a transaction." Id. (Bracketed material added.) Moreover, the comment regarding suspensions in in the Standards for Imposing Lawyer Sanctions states that Draughon was suspended for making fraudulent transfers to defraud creditors. Hence, his 1-year suspension. Id.

Additionally, the Report cites The Florida Bar v. Carlon, 820 So. 2d 891, 898 (Fla. 2002), where a 91-day suspension was ordered, for what the Report describes as clearly excessive fees. Appx. 4, 23. However, the fees were not just clearly excessive, the court was "convinced that what

Carlon['s] … itemized statement for services … were intentional misrepresentations of the time expended for services rendered." Thus, the fees were also fraudulent.

The Report also cites The Florida Bar v. Kavanaugh, 915 So. 2d 89, 94 (Fla. 2005), where the Supreme Court issues a "caution that lawyers who charge excessive fees are guilty of serious ethical breaches that diminish public confidence in the legal profession." Appx. 4, 24. The Supreme Court then declined the Bar's invitation to invoke a greater sanction and ordered a public reprimand. Id. at 95.

The Report next cites The Florida Bar v. Forrester, 656 So. 2d 1273, 1276 (Fla. 1995), where a 90 day suspension is ordered for, according to the Report, not returning the unearned portion of her fees. Appx. 4, 24. The Report's description, however, does not mention that the attorney only obtained those fees by converting the assets of an estate to herself, which is fraud and conversion. Id.

The Report also cites The Florida Bar v. Richardson, 574 So. 2d 60, 61 (Fla. 1990), where a 91 day suspension was ordered for charging clearly excessive fees. Appx. 4, 24. The Report does not include the magnitude of the excess. Richardson charged over $13,000 for services whose generous-

to-reasonable value was about $3200, an excess of 400%. Id. He also routinely charged minimum fees, regardless of the lesser amount of time actually spent on the task. Id.

In addition to being proportional to the discipline ordered in similar cases, discipline should be constrained by the purposes of discipline. The Supreme Court has held that: "[T]he court's judgment must be just and fair to the public and to the accused attorney; it must be sufficient to punish a breach of ethics and at the same time encourage reformation; it must be severe enough to deter others who might tend to engage in similar violations …." The Florida Bar v. Larkin, 370 So. 2d 371 (Fla. 1979).

C. The Referee Erred Regarding Aggravating Factors

When no genuine issues of material fact exist, the referee's conclusions regarding the existence or nonexistence of aggravating and mitigating factors present questions of law that this Court reviews de novo. *23 *Fla. Bar v. Brownstein,* 953 So. 2d 502, 510 (Fla. 2007) (citing Fla. Bar v. Pape, 918 So. 2d 240, 243 (Fla. 2005)).

Without any elaboration at all, the Report finds four aggravating factors: Standard 3.2(b)(2) Dishonest or selfish motive; Standard 3.2(b)(7) Refusal to acknowledge the wrongful nature of conduct; Standard 3.2(b)(10)

Indifference to making restitution; and Standard 3.2(b)(9) substantial experience. Appx. 4, 26.

Substantial experience in the practice of law qualifies as an aggravating factor only if the acts of misconduct are the kinds of violations that are more likely to be committed by inexperienced lawyers than by seasoned lawyers. Fla. Bar v. Broome, 932 So. 2d 1036, 1042 (Fla. 2006). There is no evidence that clearly excessive fees are any more likely to be committed by inexperienced lawyers than by seasoned lawyers.

Next, dishonest or selfish motive does not apply when the conduct is based on an honest understanding of the law. The Florida Bar, v. Brutus, 216 So.3d 1288 (2017). Likewise, refusal to acknowledge the wrongful nature of the conduct cannot be based merely on the respondent's asserting his innocence and contesting the charges. The Florida Bar v. Mogil, 763 So.2d 303 (2000). And finally, the Referee's conclusion as to indifference to restitution, refers to the Respondent's decision to appeal the summary judgement granted in the civil case. It should not be an aggravating factor to pursue a good faith appeal.

D. The Referee Overlooked Mitigating Factors

The Referee found but three mitigating factors: absence of a prior disciplinary record, Full and free disclosure and character. Appx. 4, 26.

Mitigating circumstances consist of "any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Fla. Stds. Imposing Law. Sancs. 9.31. The record reflects without dispute the following additional mitigating factors:

Lack of actual harm: The only portion of collected fees that was found to be excessive was the $25,000 in retainer funds. But those funds are in trust, pursuant to Rule 5-1.1(f) and following that Rule should not properly be considered as harm to the client.

Also without comment, the Report finds only 3 mitigating factors: Standards for Imposing Lawyer Sanctions 3.3(b)(1) absence of a prior disciplinary record; 3.3(b)(5) Full and free disclosure and cooperation; and 3.3(b)(7) Character or reputation. Appx. 4, 26.

Mitigating factor 3.3(b)(2) should also apply. Also, the Supreme Court should find as a mitigation fee for that even with the higher fee, the clients "still had an excellent result" and the Bar does not dispute that fact. See The Florida Bar v. Kavanaugh, 915 So. 2d 89, 94 (Fla. 2005).

CONCLUSION

Respectfully, the Supreme Court should not accept the Referee's erroneous conclusions of law, recommendations of guilt or recommended

discipline. The Respondent request that the Supreme Court find no guilt and impose no discipline. If the Supreme Court finds some fault in the Respondent, he respectfully requests that the discipline be limited to no more than a public reprimand.

CERTIFICATE OF SERVICE

We certify that, pursuant to and in compliance with Florida Rule Judicial Administration 2.516, this Second Amended Initial Brief was e-filed via eDCA and was served via electronic correspondence and/or via US Mail on November 1, 2023, upon: Mark Lugo Mason , mmason@floridabar.com, 651 E Jefferson St, Tallahassee, FL 32399-6584 and Curtis Alva, Esq., Curtis@alvalaw.com, Law Office of Curtis Alva, 200 E 13th Street, Riviera Beach, FL 33404.

/s/ Curtis Alva

CERTIFICATE OF FONT COMPLIANCE

I CERTIFY that Respondent's Second Amended Initial Brief complies with the font requirements of Fla. R.App.P. 9.210(a)(2).

/s/ Curtis Alva