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IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

Case no. 5D2024-2480

STOREY MOUNTAIN, LLC,
a/a/o FIRST HORIZON BANK,

Appellant,

v. L.T. case no. 2011-CA-007065

ASHCO, INC.,

Appellee.
_______________________________/

On appeal from the Circuit Court, Fourth Judicial Circuit,
in and for Duval County, Florida

ANSWER BRIEF OF ASHCO, INC.

ASHCO, INC.

Morgan Ashurian
mash@ashco-inc.com
1434-1 Hendricks Ave
Jacksonville, FL 32207
(904) 242-9000

CREED & GOWDY, P.A.

Nicholas P. McNamara
nmcnamara@appellate-firm.com
865 May St
Jacksonville, FL 32204
(904) 350-0075

Attorneys for Appellee, Ashco, Inc.

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<u>STATEMENT OF THE CASE AND FACTS</u>

I. Events leading up to the entry of judgment

On January 11, 2013, a final judgment was entered against Lock W. Ireland, now deceased, in the original amount of $322,474.20. A15–16. On November 29, 2021, Appellant Storey Mountain, LLC—the assignee of Florida Bank, the judgment creditor—obtained a continuing writ of garnishment directed to Appellee Ashco, Inc. A26–28. The writ required Ashco to answer whether it was an employer of Ireland and whether it was indebted to him for salary or wages. A26. The writ, stating the total judgment amount of $322,474.20, was served on November 29, 2021, to Roya Ashurian, Ashco's co-owner and co-resident agent, at 3982 Alhambra Drive West, Jacksonville, Florida 32207. A25. At the time of service, Edward Ashurian, Roya's husband and Ashco's other co-owner, was traveling outside the United States. A268:3–21; A7.

Upon Edward's return in either late December 2021 or early January 2022, he telephoned the Law Offices of Paul A. Humbert, the garnishor's attorney. A114 ¶ 7; A7. Edward informed Mr. Humbert that Ireland no longer worked for Ashco, that Ashco owed no money to Ireland, and that Ireland had passed away in December 2021. *Id.*

During this contentious conversation, Edward acknowledged that he knows Ireland but does not owe Ireland. A268:22–269:2; A7. Mr. Humbert expressed disbelief regarding Ireland's death and requested a death certificate, which Edward suggested Mr. Humbert obtain himself. A269:4–9; A7. After this call, Edward believed the garnishment issue had been resolved and that Ashco was not required to file any further response to the writ. A269:24–270:3; A280:21–281:17; A7. Mr. Humbert testified that he never conveyed to Edward that the matter was resolved. A331:6–9; A7.

On January 18, 2022, Storey Mountain served a request for admissions (A41–42) and an ex parte motion for clerk's default against Ashco (A43–50). A8. The request for admissions, served via e-filing portal and purportedly by mail to Edward Ashurian at the Alhambra Drive address, sought admissions regarding Ashco's indebtedness to Ireland in the amount of $472,966.02 as of November 10, 2021. A41; A8. However, the ex parte motion for clerk's default reflected service only via the e-filing portal (*see* A44), and there is no evidence that Ashco received it. A8.

On March 15, 2022, Storey Mountain moved for final judgment of garnishment, seeking $477,910.97. A52–54; A8. The certificates of

service on the motion and subsequent hearings reflect service to Ashco by mail to the Alhambra Drive address. A54, A56, A58; A8. However, at the July 22, 2024, evidentiary hearing on Ashco's motion to vacate, Edward testified that he did not receive the motion, the original notice of hearing, or the re-notice setting the hearing for May 4, 2022. A289:22–290:4, A290:18–291:21, A292:6–19, A293:10–296:3; A8.

Following the May 4, 2022, hearing—at which only counsel for Storey Mountain appeared—the court entered final judgment of garnishment on May 10, 2022, awarding $477,910.97 against Ashco by default. A59–60.

II. Ashco's discovery of the judgment

Upon receiving a copy of the final judgment of garnishment, Edward provided it to his son, Alan Ashurian, and directed him to deliver it to Ashco's attorneys. A292:10–19; A9. Alan, who corroborated this account, engaged the law firm of Alexander DeGance Barnett, P.A., and delivered the judgment to the firm on May 17, 2022. A86 ¶¶ 3–4; A304:9–13; A9. Two days later, on May 19, 2022, the firm filed a motion to vacate the clerk's default judgment and final judgment of garnishment. A67–76. The motion

alleged that Ashco's failure to respond to the writ was excusable because Edward had a reasonable belief, after speaking with Mr. Humbert, that the matter had been adequately addressed. A69–70. The motion also stated that Ashco acted promptly upon receiving the judgment and had a meritorious defense, as its records showed no debt owed to Ireland. A70–71.

III. Events after judgment

Following the May 10, 2022 final judgment of garnishment, Edward and Alan Ashurian respectively filed affidavits on August 31 and September 1, 2022 supporting the motion to vacate. A415–19; A83–86; A10. Although the clerk later rejected Edward's affidavit, it was nonetheless available to the court and opposing counsel for consideration during a hearing on September 1, 2022. A10. That hearing, set for only 15 minutes, revealed factual disputes material to the resolution of the motion, and the court suggested the need for an evidentiary hearing. A135:11–136:7; A10. The court, however, did not schedule a hearing or issue an order on the motion. A10.

Beginning in May 2023, Ashco's attorneys sent multiple emails to the court's judicial assistant requesting a case management conference. A143, 145, 147, 150–51; A10. No response was received.

Id. On February 26, 2024, Ashco's attorneys sent a letter to the presiding judge, after which a conference was scheduled for March 20, 2024. A153–54; A10. At the conference, the court determined that an evidentiary hearing was necessary and scheduled it for July 22, 2024. A197:5–9; A235; A10

At the evidentiary hearing, Edward testified that he genuinely believed the garnishment issue had been resolved following his conversation with Mr. Humbert. A269:24–270:3, A280:21–281:17; A10. Ashco argued that its neglect in responding was excusable, that it had acted promptly upon learning of the judgment, and that it had a valid defense, as no wages were owed to Ireland. A339:9–340:2, 341:1–12, 341:21–342:11, 343:4–9, 343:13–345:8, 345:21–346:9, 346:11–17, 346:21–349:16.

In its order granting the motion to vacate, the trial court found Ashurian credible when he testified that he believed the garnishment matter was resolved after the telephone call and that Ashco was not required to file any further response to the writ. A7–8. The Court also noted that Ashurian is 76 years old and, although he has lived in the United States for several decades, he is of Persian ethnicity, with Farsi as his native language. A7. It further observed that Ashurian

speaks English with a heavy accent and sometimes struggles to understand nuances or details in spoken English. *Id.*

SUMMARY OF ARGUMENT

This Court should affirm.

First, Ashco acted with due diligence by filing its motion within 2 days of discovering the default judgment. Contrary to Storey Mountain's argument, Florida law explicitly permits unsworn motions to be supplemented with affidavits at a later time, and this practice is consistent with due diligence. Therefore, Ashco has acted with due diligence.

Second, Ashco's neglect in responding to the garnishment was excusable. The delay resulted from a reasonable misunderstanding based on communications with Storey Mountain's counsel. The trial court determined that Edward Ashurian's testimony was credible in clarifying this misunderstanding. The circumstances support the trial court's finding of excusable neglect.

STANDARD OF REVIEW

"Gross abuse of a trial court's discretion is necessary on appeal to justify reversal of the lower court's ruling on a motion to vacate." *Sterling Drug, Inc. v. Wright*, Sorey 342 So. 2d 503, 505 (Fla. 1977) (citation omitted); *see also Gay v. Moreland*, 450 So. 2d 1270, 1272 (Fla. 5th DCA 1984) (same); *Berggren v. N. Miami Bagels, Inc.*, 336 So. 3d 68, 70 (Fla. 3d DCA 2021) (same). "Discretion … is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

Although there is no standard definition for a "gross" abuse of discretion, the Second District has characterized it as "more egregious than a typical abuse of discretion." *Allstate Floridian Ins. Co. v. Ronco Inventions, LLC*, 890 So. 2d 300, 302 (Fla. 2d DCA 2004); *see also Bethesda Mem'l Hosp., Inc. v. Laska*, 977 So. 2d 804, 806 (Fla. 4th DCA 2008).

To the extent the trial court's order relies on findings of fact, those findings are reviewed for competent, substantial evidence. *Raulerson v. Metzger*, 375 So. 2d 576, 577 (Fla. 5th DCA 1979).

ARGUMENT

I. Ashco demonstrated due diligence in moving to vacate the final judgment.

A party's requirement of due diligence stems from the understanding that "swift action must be taken upon first receiving knowledge of any default." *Westinghouse Credit Corp. v. Steven Lake Masonry, Inc.*, 356 So. 2d 1329, 1330 (Fla. 4th DCA 1978). Ashco diligently filed its motion to vacate within 9 days after the final judgement was rendered and within 2 days of discovering the final judgement. *See* A9. Contrary to Storey Mountain's primary argument on this prong, the fact that the motion was not verified at the time of filing does not negate Ashco's due diligence. *See infra* § I.A. Storey Mountain's secondary arguments—that Ashco unduly delayed in filing the Edward Ashurian affidavit and that the trial court erred in considering the lack of prejudice to Storey Mountain—are also meritless. *See infra* §§ I.B. & C.

A. Storey Mountain invents the requirement that the due-diligence timeframe continues until Ashco's unsworn motion to vacate is supplemented with sworn affidavits.

Storey Mountain frames the central issue as Ashco's delay in submitting its sworn statements after filing its motion to vacate. But

Florida law permits unsworn motions to be supplemented with affidavits at a later time, and this practice is consistent with due diligence. *Cedar Mountain Estates, LLC v. Loan One*, LLC, 4 So. 3d 15, 17 (Fla. 5th DCA 2009). In *Cedar Mountain*—a case not mentioned in the initial brief—the defendant submitted an unsworn motion outlining facts which, if established, would support a determination of excusable neglect and due diligence. *Id.* This Court explained, "We recognize that excusable neglect and due diligence must ultimately be established with evidence—either sworn testimony or affidavits—and that [the defendant's] motion was unsworn." *Id.* However, the Florida Rules of Civil Procedure "clearly do not require the motion to be verified." *Id.*; *see* Fla. R. Civ. P. 1.540(b) (setting forth requirements for a motion for relief from judgment, which do not include affidavits or verification); Fla. R. Civ. P. 1.030 (providing that "[e]xcept when otherwise specifically provided by these rules or an applicable statute, every written pleading or other paper of a party represented by an attorney need not be verified or accompanied by an affidavit"). Accordingly, this Court held that a motion to vacate alleging a sufficient basis for relief

cannot be summarily denied without affording the movant an evidentiary hearing. *Id.*

Where the moving party does not file a verified motion or an affidavit supporting such motion, Florida courts prefer to allow the moving party an opportunity to file a sworn motion or affidavit over denying the motion for the failure to show excusable neglect. *Halpern v. Houser*, 949 So. 2d 1155, 1158 (Fla. 4th DCA 2007) (where the lower court granted the appellee's motion for relief from judgment and the appellants argued the appellees failed to verify their motion and show excusable neglect, the district court reversed and remanded to allow the appellees to file a sworn motion.) (citing *Steinhardt v. Intercondominium Group, Inc.*, 771 So. 2d 614 (Fla. 4th DCA 2000) and *Eden Park Mgmt., Inc. v. Zagorski*, 821 So.2d 1263, 1264 (Fla. 4th DCA 2002)).

Simply put, it would have been reversible error for the trial court to summarily deny the motion to vacate without allowing Ashco to supplement the motion with sworn evidence. None of the cases cited by Storey Mountain are to the contrary.

Storey Mountain misplaces its reliance on *Allstate Floridian Insurance Co. v. Ronco Inventions, LLC*, 890 So. 2d 300, for the

proposition that a 7-week delay in filing a *sworn* motion fails the due diligence requirement. *See* IB10. In *Allstate,* the appellees provided *no explanation* for their 7-week delay in moving to vacate the final judgment. 890 So. 2d at 304. However, Ashco explained its delay in its motion to vacate, which was later supported by sworn affidavits asserting a sufficient basis for relief. *See* A9–10. While *Allstate* is relevant in determining what constitutes a reasonable period of time between the issuance of a final judgment and a party's *motion* to vacate, it does not support Storey Mountain's claim that Ashco's *sworn evidence* should have been provided within the timeframe required for due diligence. This issue is never addressed in *Allstate*.

In *Lazcar Int'l, Inc. v. Caraballo*, 957 So. 2d 1191, 1192 (Fla. 3d DCA 2007), see IB11, 12–13, the court held that a 6-week delay in seeking relief, explained *only* by unsworn representations of counsel, constituted a lack of due diligence as a matter of law. *Lazcar* is distinguishable because Ashco filed its motion to vacate within 2 days of discovering the default and Ashco's sworn affidavits alleged a sufficient basis for relief. *See* A9–10. The timing of Ashco's sworn affidavits, filed after the motion to vacate, does not undermine its compliance with the due diligence requirement. Instead, as

demonstrated in *Lazcar,* a defendant who fails to provide sworn evidence *at any point in time* undermines its compliance with the due diligence requirement.

Storey Mountain cites *Lazcar* for the proposition that Ashco's unsworn motion was a "legal nullity," but *Lazcar* says no such thing. *See* IB11. Regardless, the "legal nullity" argument is inconsistent with this Court's decision in *Cedar Mountain*, as well as with Florida Rules of Civil Procedure 1.540(b) and 1.030. *See supra* 9–10 After its May 17, 2022 discovery of the final judgment rendered one week before, Ashco demonstrated due diligence by filing its motion to vacate on May 19, 2022. Even Storey Mountain acknowledges, "On its face, this chronology suggests diligence in seeking to vacate a default judgment" IB12.

Also inapposite is *Bayview Tower Condo Ass'n v. Schweizer*, 475 So. 2d 982 (Fla. 3d DCA 1985). In *Bayview,* the court held that a defendant's failure after 5 months[1] to respond to a complaint was not excusable neglect. *Id.* But the delay in discovering the default went to the excusable neglect element, not the due diligence element,

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[1] The initial brief incorrectly states that *Bayview* involved a "five-week delay." IB10.

which concerns the reasonableness of the delay *after* discovering the default. As argued *infra* in section II, Ashco demonstrated excusable neglect for its failure to respond to the writ of garnishment. Insofar as *Bayview* also found the due-diligence element lacking, that was because the defendant waited a month after the discovery of the default to move to vacate the default. Thus, *Bayview* is distinguishable because Ashco filed its motion to vacate within 2 days of discovering the default and Ashco's sworn affidavits alleged a sufficient basis for relief. *See* A9–10.

B. The Edward Ashurian affidavit was of record at the time of the September 1, 2022 hearing.

According to Storey Mountain, Ashco did not file the Edward Ashurian affidavit until 23 months after the motion to vacate was filed. IB14–16. As an initial matter, this argument is irrelevant to the due-diligence prong for the same reasons argued in the preceding section. In any event, Storey Mountain is wrong. As found by the trial court, the affidavit of Edward Ashurian was filed on August 31, 2022. *See* A10 (court's finding); A111 (Ashco's notice of filing the Edward Ashurian Affidavit, reflecting that the document was filed on August 31, 2022, at 10:37:01 AM). Although the Clerk later rejected

Edward's affidavit, it was nonetheless provided to the Court and opposing counsel for consideration during the hearing on September 1, 2022. *See* A9 (court's finding that the Edward Ashurian affidavit was "submitted to the Court at the September 1, 2022, hearing").

Therefore, Storey Mountain's assertion that the affidavit was "not of record until April 4, 2024" is false. *See* Fla. R. Gen'l Prac. & Jud. Admin. 2.525(c)(2)(A) (providing that the "official court file" includes "documents filed by electronic transmission under this rule"); Fla. R. Gen'l Prac. & Jud. Admin. 2.525(c)(4) (providing that "[a]ny document in paper form submitted under subdivision (d) is filed when it is received by the clerk *or court*") (emphasis added). Indeed, at the March 20, 2024, case management conference, Storey Mountain's counsel stated he was "not disputing that [the affidavit] was filed." A189:22–23.

C. The trial court properly considered the lack of prejudice to Storey Mountain.

The trial court explained that "it was apparent that an evidentiary hearing was required to resolve the Motion to Vacate and that the matter could not be resolved on the affidavits". *See* A12. "For this reason, the fact that the affidavits were not served until shortly

before the hearing did not cause procedural prejudice to Storey Mountain." *See id.*

Storey Mountain argues that the trial court erred by considering the lack of prejudice flowing from Ashco's timing in filing the affidavits. IB16. Storey Mountain is wrong. *See Fernandez v. Difiore*, 279 So. 3d 174, 176 (Fla. 4th DCA 2019) (noting the policy favoring vacating defaults is "particularly true in cases in which the parties are not prejudiced by the late filing") (quoting *Tutwiler Cadillac, Inc. v. Brockett*, 551 So. 2d 1270, 1272 (Fla. 1st DCA 1989)); *Franklin v. Franklin*, 573 So. 2d 401, 404 (Fla. 3d DCA 1991) (in deciding whether to grant a motion to set aside a default, "[t]he courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief") (citation omitted).

The lone case cited by Storey Mountain as purportedly supporting its contrary argument, *Hepburn v. All American General Construction Corp.*, 954 So. 2d 1250 (Fla. 4th DCA 2007), IB12, contains no discussion of prejudice.

The trial court correctly considered the lack of prejudice to Storey Mountain.

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In sum, the trial court did not grossly abuse its discretion in determining that Ashco demonstrated due diligence in seeking relief from the default.

II. Ashco demonstrated excusable neglect in failing to respond to the writ of garnishment.

Much of Storey Mountain's argument on the excusable-neglect prong boils down to a disagreement with the trial court's assessment of the evidence. This Court should decline Storey Mountain's invitation to reweigh the evidence. *See infra* § II.A. Storey Mountain also argues that the trial court failed to apply a presumption that its court papers in the garnishment proceeding were received by Ashco. IB15–19. But Storey Mountain failed to preserve this argument. *See infra* § II.B. Regardless, there is competent, substantial evidence that Ashco was unaware of the ongoing garnishment proceeding. *See infra* § II.C.

A. The trial court's finding of excusable neglect is supported by competent, substantial evidence.

Storey Mountain's argument that "Ashco's testimony is not credible" (IB18) is impermissible on appeal. *See Baker v. Falcon Power, Inc.*, 788 So. 2d 1104, 1105–06 (Fla. 5th DCA 2001) ("[W]hen the decision rests largely on an evaluation of the credibility of the witnesses, this court cannot substitute its judgment for that of the trial court."). Storey Mountain's assertion that Ashco "ignored" all court proceedings until receipt of the Final Judgment fails to address the trial court's rationale for finding excusable neglect. IB15. Specifically, the trial court found that "Edward Ashurian was credible when he testified that, after his telephone call with Storey Mountain's attorney, he reasonably believed that no further response to the writ was required." *See* A12. The Court pointed to the following reasons for finding excusable neglect:

- "On the call, Ashurian explained that Ireland had not been working for Asahco [*sic*] for some time, has become ill and had just recently died." A12.

- "It is understandable that the businessman Ashurian could view a writ of garnishment as presenting an administrative or human resource issue very different from a summons and complaint alleging that Ashco owed a debt or was otherwise responsible for a business

transaction." *Id.*

- "For Edward Ashurian, English is his second language, and he may not have the same level of comprehension of a conversation as one who is a native speaker of English." A12–13.

Storey Mountain's attempt to distinguish this case from *Elliott v. Aurora Loan Services, LLC*, 31 So. 3d 304, 308 (Fla. 4th DCA 2010), is futile. Storey Mountain makes much of the fact that in *Elliott*, the movants filed a verified motion to vacate six days after discovering the default against them. IB19. But the excusable-neglect element does not concern the timing of a party's motion to vacate. Rather, such timing is pertinent to the due-diligence element. *Cf. Elliott*, 31 So. 3d at 308 ("[T]he Elliotts exercised due diligence by filing the motion to vacate the default within six days of discovery of the default."). In any event, as argued *supra* in section I, the fact that Ashco's motion to vacate was not verified at the time of filing does not negate its due diligence.

Storey Mountain also attempts to distinguish *Elliott* based on the fact that in *Elliott*, the parties—a borrower and a lender—had entered into a "special forbearance agreement" prior to entry of the final judgment of foreclosure, leading the borrower to believe the

matter had been resolved. IB20. But the existence of the forbearance agreement was not the key fact to the *Elliott* court's holding; rather, the key fact was the borrower's "reasonable misunderstanding" that "the parties were engaged in settlement negotiations" as a result of the forbearance agreement. *See* 31 So. 3d at 307.

Here, the trial court found that Edward Ashurian's credible testimony demonstrated a reasonable misunderstanding that the garnishment issue was resolved by his phone call with Storey Mountain's counsel. *See* A12–13. It is not this Court's role to reevaluate that finding. *See Baker*, 788 So. 2d at 1105–06.

B. Storey Mountain failed to preserve its argument that the trial court failed to apply the presumption that Ashco received the court papers.

Storey Mountain contends that the trial court failed to apply a presumption of service to the court papers that were purportedly served on Ashco between January and April of 2022. IB18–19. However, at no point in the proceedings below did Storey Mountain ask the trial court to apply such a presumption. Therefore, this argument is unpreserved and cannot serve as a basis for reversal. *See Waheed v. Brummer*, 162 So. 3d 163, 165 (Fla. 5th DCA 2015) ("In order to be preserved for further review by a higher court, an

issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.") (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)).

C. Ashco presented competent, substantial evidence that it was unaware that the garnishment proceedings were ongoing.

According to Storey Mountain, "Ashco's simple denial of receipt [of the court papers] does not overcome the presumption [that they were served]." IB19 (citing *Berggren v. N. Miami Bagels, Inc.*, 336 So. 3d 68, 70–71 (Fla. 3d DCA 2021)). But Storey Mountain's citation to *Berggren* is misleading. In *Berggren*, the Third District stated that "[t]he denial of receipt does not *automatically* overcome the presumption *but instead creates a question of fact which must be resolved by the trial court*." 336 So. 3d at 71 (emphasis added).

Here, Edward Ashurian testified that the only court documents Ashco received were (1) the writ of garnishment and (2) the final judgment of garnishment. *See* A292:10–19, 293:10–294:19, 295:3–296:3. He also stated in his affidavit that "Ashco did not know that the garnishment proceedings were still ongoing as against Ashco

until Ashco received a copy of the Final Judgment of Garnishment." A115.

This is competent, substantial evidence that Ashco was unaware that the garnishment proceedings were still ongoing until the time Ashco was served with the final judgment. To reiterate, it is not this Court's role to evaluate the credibility of this evidence. *See Baker*, 788 So. 2d at 1105–06.

Nevertheless, Storey Mountain cites *Wolff v. Piwko*, 104 So. 3d 372, 375 (Fla. 3d DCA 2012) to argue that Ashco should have "ke[pt] a watchful eye" on the garnishment case, even assuming that it did not receive the court papers. IB21. But this argument is circular because it assumes Ashco's awareness that the garnishment case was still ongoing. *Wolff* is also distinguishable because in that case—unlike here—the movant failed to provide evidence that he never received the court papers that were sent to his address. *See* 104 So. 3d at 375.

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In sum, the trial court did not grossly abuse its discretion in determining that Ashco demonstrated excusable neglect in failing to respond to the writ of garnishment.

CONCLUSION

This Court should affirm the trial court's order vacating the clerk's default judgment and remand to allow the parties to litigate the garnishment matter on the merits in the trial court.

CREED & GOWDY, P.A.

/s/*Nicholas P. McNamara*
Nicholas P. McNamara
Florida Bar No. 1026043
nmcnamara@appellate-firm.com
filings@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075
Counsel for Appellee, Ashco Inc.

ASHCO, INC.

/s/ *Morgan Ashurian*
Morgan Ashurian
Florida Bar No. 1054563
mash@ashco-inc.com
1434-1 Hendricks Ave
Jacksonville, Florida 32207
Telephone: (904) 242-9000
Counsel for Appellee, Ashco Inc.

CERTIFICATE OF COMPLIANCE

I CERTIFY that this document complies with the word-count limit of Florida Rule of Appellate Procedure 9.210(a)(2)(B) because it contains 4,122 words, not including words excluded under rule 9.045(e). This document also complies with the line spacing, type size, and typeface requirements of rule 9.045(b).

/s/*Nicholas P. McNamara*
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice was filed with the Clerk of Court on January 15, 2025, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record:

Kimberly Held Israel
McGlinchey Stafford
10407 Centurion Pkwy N Suite 200
Jacksonville, FL 32256
kisrael@mcglinchey.com
Trial Counsel for Appellee Florida Bank of Jacksonville

Paul A. Humbert
Law Offices of Paul A. Humbert, P.L.
9655 South Dixie Highway, Suite 312
Miami, FL 33156
pa@pahumbertlaw.com
sarahp@pahumbertlaw.com
eservice@pahumbertlaw.com
Counsel for Appellants

PI Proprietors, LLC
13846 Atlantic Blvd., #206
Jacksonville, FL 32225

/s/*Nicholas P. McNamara*
Attorney