THE SUPREME COURT OF FLORIDA

CASE NO. SC10-21

BANCO INDUSTRIAL DE VENEZUELA, C.A., MIAMI AGENCY, a foreign corporation; and BIV INVESTMENTS AND MANAGEMENT, INC., a Florida corporation a/k/a BIV INVERSORES Y PROMOTORES,

Petitioners,

vs.

ESPERANZA DE SAAD and JOSEPH BEELER, P.A.,

Respondents.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT
CASE NO. 3D08-1713

RESPONDENT, ESPERANZA DE SAAD'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This answer brief on the merits is filed on behalf of Respondent, Esperanza de Saad (de Saad). This Court accepted jurisdiction after the Petitioners[1] asserted purported conflict with the Third District's decision below and (1) *Alternative Development, Inc. v. St. Lucie Club & Apartment Homes Condominium Association*, 608 So. 2d 822 (Fla. 4th DCA 1992), and (2) decisions of other district courts of appeal on when a trial court can grant summary judgment in a breach of contract claim. In their merits brief, BIV also urges the Court to consider arguments that were summarily rejected by the district court below, arguments that were waived, and an interlocutory decision rendered more than seven years ago.

STATEMENT OF THE CASE AND FACTS

BIV's brief misrepresents the facts and repeatedly (and incorrectly) states that it was compelled to indemnify de Saad after she "knowingly" committed federal crimes and acted for an improper personal benefit. No such finding was made by the courts below. In fact, in granting de Saad's motion for judgment of acquittal on the money laundering and conspiracy charges (for which indemnification was awarded), the federal district court determined that de Saad was entrapped by the government as a matter of law.

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[1] Petitioners are Banco Industrial de Venezuela, C.A., Miami Agency (BIV Miami), and BIV Investments and Management, Inc., a/k/a BIV Inversores Y Promotores (BIV Investments) (collectively BIV or the bank).

BIV also grossly misstates the Third District's holding as requiring it to indemnify de Saad for a count of money structuring to which she ultimately pled guilty. As the Third District's decision demonstrates, this separate charge occurred seven months after de Saad's acquittal of the eleven counts that are the subject of this indemnification action. She has never sought indemnification for the money structuring charge, and the Third District's decision only requires BIV to indemnify de Saad for her successful defense of the charges that resulted in an acquittal.

A. Section 607.0850, Florida Statutes.

Section 607.0850, Florida Statutes, served as the basis for de Saad's indemnification award. The statute is titled "Indemnification of officers, directors, employees, and agents," and contains provisions for both voluntary and mandatory indemnification of employees who are subjected to litigation by reason of that employment. Subsections (1), (2), and (7) pertain to voluntary indemnification. The voluntary indemnification provisions are subject to certain standards of conduct. §§ 607.0850(1), (2), (7), Fla. Stat.

Subsection (3), on the other hand, is a mandatory provision. It provides:

> To the extent that a director, officer, employee, or agent of a corporation has been successful on the merits or otherwise in defense of any proceeding referred to in subsection (1) or subsection (2), or in defense of any claim, issue, or matter therein, he or she shall be indemnified against expenses actually and reasonably incurred by him or her in connection therewith.

§ 607.0850(3), Fla. Stat.[2] The "proceeding referred to in subsection (1)" is one brought against any person:

> by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against liability incurred in connection with such proceeding, including any appeal thereof. . . .

§ 607.0850(1), Fla. Stat. Subsection (3) does not contain any language that incorporates or refers to any other provision of subsections (1), (2), or (7).

B. The Employment Contract.

On December 1, 1997, de Saad entered into an employment contract to serve as Vice President of BIV Miami for a term of two years. (R.V.14, 2428-40).[3] De Saad's employment contract with BIV, in pertinent part, provides:

> VI. Term of the Contract
>
> The term of this Contract shall be two (2) years and two (2) months, starting on December 1, 1997, renewable automatically for periods of two (2) years. "THE EMPLOYER" may terminate this Contract at any time, prior to the date of termination, only for a justified reason, if "THE EMPLOYEE" is involved in any of the following situations:
>
> If she is arrested or imprisoned for a felony, fraud, insubordination, dishonest behavior, not related to the obligations ste[sic] forth herein, immorality, drug abuse, negligence, larceny, or malfeasance. If "THE EMPLOYER" decides to terminate this Contract without a duly justified reason before the termination date, it

[2] All emphasis by underline herein is supplied unless otherwise noted.

[3] The Record on Appeal is cited to by volume and page number (R.volume, page).

shall pay "THE EMPLOYEE" all corresponding salaries and items for the remaining term of the Contract.

VII. Prior Notice

If "THE EMPLOYER" decides not to renew this Contract upon its termination, it must send written notification to "THE EMPLOYEE" at least two (2) months in advance. . . . If "THE EMPLOYER" decides to terminate the Contract before its termination date without a duly justified reason, it shall pay "THE EMPLOYEE" all the items set forth herein through the termination date of this Contract.

* * *

XII. Entire Agreement

* * *

c) "THE EMPLOYEE" and "THE EMPLOYER" fully accept that "THE EMPLOYEE" shall be subject to the Employee Manual governing the employees of the Minami[sic] Branch, without distinction.

XIII. Legality of this Employment Contract

This Contract shall be governed solely and exclusively by the laws of the State of Florida, specifically those of Dade County, Florida. These laws expressly provide that "THE EMPLOYEE" shall reside in Florida on the date of acceptance of this Contract and [] "THE EMPLOYER" shall be legally registered in the State of Florida. Therefore, it is agreed that the (sic) of other States or countries shall not be applicable to this Contract or to the Employee/Employer relationship governed hereby. . . .

All matters set forth herein shall be governed by the personnel manual, effective and in force, for the Miami Branch, in accordance with the provisions approved by the Board of Directors of Banco Industrial de Venezuela, C.A.

(*Id.*, 2431-34). The personnel manual, which was incorporated by reference into the employment contract, provides in pertinent part:

E.2 DISCIPLINARY PROBATION (continued)

* * *

Grounds for Immediate Dismissal or Suspension of Employment <u>*Pending Clarification of Charges*</u>:

* * *

- Conclusive evidence of dishonesty or <u>involvement in a misdemeanor or felony</u>.

(*Id.*, 2451) (emphasis by underline in original, emphasis by italics supplied).

C. The Underlying Criminal Action and This Action.

On May 19, 1998, de Saad was arrested as part of a federal government reverse-sting operation that targeted foreign banks with a presence in the United States for investigation of alleged money laundering. (R.V.29, 5293; 5298). The investigation was essentially a fishing expedition. The government had no information that de Saad was predisposed to commit any illegal act, and only came into contact with her after they were referred to BIV Miami by a BIV executive in Venezuela, who did not know and did not advise de Saad that the accounts would be used for an illegal purpose. (*Id.*, 5294; 5297-98). If the BIV executive had referred the undercover agents to BIV's New York branch, they never would have met de Saad. (*Id.*, 5298).

De Saad was ultimately charged with ten counts of money laundering represented to be the proceeds of narcotics activity, and one count of conspiracy to launder money. (R.V.1, 109). The charges against de Saad arose out of her purported conduct while acting as an officer of the bank. The Second Superseding

Indictment identified de Saad as "a Vice President at Banco Industrial De Venezuela's agency in Miami, Florida." (R.V.4, 842). Although the undercover agents never told de Saad that the accounts they were opening were to be used for illegal purposes, the Indictment charged that de Saad facilitated a money laundering scheme by opening accounts at BIV Miami, issuing bank drafts and checks from accounts at BIV Miami to third parties, and by agreeing to alert others of any inquiries into the illegal use of the accounts. (R.V.6, 845-46; 850-51).

The Indictment alleged that de Saad caused wire transfers of monies that were represented to be the proceeds of narcotics trafficking to be deposited into undercover accounts at the bank. (*Id.*, 853-54). It charged that de Saad accepted a fee for her participation in the scheme, and that one of the other defendants deposited a $20,000 check into a bank account at BIV Miami, which was then split into four $5,000 checks and cashed for the benefit of de Saad. (*Id.*, 845; 852-53).

Within days of de Saad's arrest, BIV's board of directors passed a resolution to suspend de Saad without pay "with the understanding that if the findings against her taking place in U.S. Courts are negative, her remunerative payment will be acknowledged retroactively." (R.V.14, 2441-46). BIV made this decision purposely. BIV's president testified that the bank chose to be equivocal by not firing de Saad because it was an election year in Venezuela, and to fire de Saad would have been to admit that the bank (which is owned by the government of

Venezuela) had committed money laundering. (*Id.*, 2455-56; 2458).

De Saad requested that BIV assist with her defense, but BIV refused. (R.V.1, 110-11). Although BIV was aware of the specific allegations against de Saad by February 1999, the bank took no action, either in favor or against de Saad, during the pendency of the criminal matter. (R.V.14, 2412-14; 2455-58). BIV also conducted internal and external audits and was of the opinion by April 1999 that de Saad had violated bank policies and procedures, but did not terminate de Saad's contract. (*Id.*, 2414-15; 2455; 2458-59). While the bank did not terminate de Saad, it did fire other employees who were allegedly involved. (R.V.29, 5371).

De Saad's criminal trial began on November 14, 1999. (R.V.1, 110). BIV continued to refuse to indemnify de Saad or to assist in her defense. (*Id.*, 111). During the trial, on November 18, 1999, BIV's president wrote a letter to de Saad in which he reaffirmed the validity of the employment contract, but notified her of the bank's intention not to renew the contract as of February 1, 2000. (R.V.6, 863-65). De Saad's contract expired by its own terms on that date. (V.14, 2431-33).

After the close of the government's case, de Saad moved for judgment of acquittal, and the court reserved ruling. (R.V.6, 871). Thereafter, the jury returned a verdict convicting de Saad on all counts. (*Id.*). De Saad filed a renewed motion for judgment of acquittal, which was granted. (*Id.*, 866-890).

The federal district court judge concluded that no rational jury could have

found the government proved beyond a reasonable doubt the elements of the crimes for which de Saad was charged. (R.V.6, 866-890). The court highlighted that the government repeatedly concealed from de Saad that the undercover agents' money was the proceeds of narcotics activity, and that de Saad reasonably believed the other defendants to be legitimate business men and women. (*Id.*, 867-70; 879). The court concluded that de Saad could not have known that the money involved was the proceeds of narcotics trafficking, and that de Saad was entrapped by the government as a matter of law. (*Id.*, 872-90).

Approximately seven months later, while the government's appeal of the acquittal order was pending, de Saad and the government entered into a settlement. (R.V.14, 2525-35). Under the terms of the agreement, de Saad pled guilty to a separate information charging her with one count of structuring a financial transaction to evade a reporting requirement (based upon her alleged receipt of the four $5,000 checks), and the government voluntarily dismissed its appeal of the acquittal order. (*Id.*, 2525-35; V.19, 3514-15; V.29, 5288).

De Saad was acquitted on the money laundering and conspiracy charges, but BIV never paid the amounts owed under the employment contract, which the bank deliberately kept in force, for the approximately twenty months between the date of de Saad's suspension through the expiration of the contract. (R.V.14, 2411).

The instant action followed. De Saad's Amended Complaint against BIV

sought statutory indemnification under section 607.0850, Florida Statutes, to recover the significant expenses she incurred during the more than two-year long criminal proceeding, and damages based upon BIV's breach of the employment contract. (R.V.1, 103-12). De Saad did not seek indemnification for the structuring charge to which she pled guilty. (R.V.33, 6124-25).

BIV filed a six-count counterclaim against de Saad seeking to recover damages for fees, costs, and expenses the bank incurred in monitoring the criminal proceeding against de Saad and in defending itself against regulatory and governmental actions that were triggered as a result of the money laundering charges against de Saad. (R.V.5, 643-64). BIV was never criminally or civilly charged based upon any alleged money structuring by de Saad. (R.V.36, 6767-69).

De Saad moved for summary judgment on the statutory indemnification claim and BIV moved for summary judgment as to all claims. (R.V.6, 818-835; V.9, 1432-86). After a hearing, the trial court granted summary judgment in favor of de Saad and denied BIV's motion for summary judgment. (R.V.10, 1796; V.33, 6102-6214). Thereafter, de Saad moved for summary judgment on the breach of contract claim and on BIV's counterclaims. (R.V.13, 2241-53; V.14, 2410-27). Following hearings (R.V.34, 6348-6403; 6412-73), the trial court granted the motion on the breach of contract claim, and granted in part and denied in part the

motion as to the counterclaims. (R.V.29, 5370-85; V.36, 6765-86).[4]

The court held a nine-day bench trial on the issue of indemnification damages, and awarded $2,596,913.80 in damages for expenses she incurred in posting a bond to secure her release from prison and for a portion of her defense fees and costs. (R.V.29, 5287; 5356). Although BIV claims that de Saad sought indemnification for frivolities such as "living expenses" and shopping at "high-end retail stores," this is false. (IB, p. 15). De Saad did not seek and was not awarded indemnification for such items. (*Id.*, 5289-91; 5350-56).

De Saad then moved for summary judgment on the issue of damages for the breach of contract claim, which was granted after a hearing. (*Id.*, 5393-95; V.32, 6029-30; V.35, 6482-6508). The trial court entered final judgment in favor of de Saad for a total of $2,895,096.41 on the indemnification claim, and entered final judgment on the breach of contract claim to both de Saad and Joseph Beeler, P.A.,[5]

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[4] As to the counterclaims, the court concluded that de Saad could not be held liable for damages BIV suffered as a result of proceedings brought against it by independent regulatory and governmental bodies, but that issues of fact existed as to whether de Saad could be held liable for damages BIV incurred in conducting its own investigation into the charges against de Saad. (R.V.36, 6765-86). The parties stipulated to partial judgment on the remaining counterclaims so that final judgment could be entered. (R.V.31, 5934-35). Should reversal be warranted for any reason, de Saad respectfully requests that the Court remand to the Third District with instructions to address the limited issue raised in the cross-appeal.

[5] BIV's brief refers to an assignment de Saad executed in favor of Joseph Beeler, P.A. in its recitation of the facts, but does not raise any issues relating to the assignment in its argument. (IB, pp. 12; 14; 18-19). BIV therefore waives any arguments related to standing, and further waived such arguments by failing to

awarding total damages of $1,058,023.82 to de Saad. (R.V.36, 6789-92).

BIV appealed the final judgment, and the Third District issued an opinion affirming the trial court's decision. (R.LVIIII, 7403-7413). On the indemnification issue, the Third District correctly determined that de Saad's judgment of acquittal of all eleven counts was "success[] on the merits or otherwise" and that she was prosecuted "by reason of the fact" that she was a "director, officer, employee, or agent of the corporation" as required by section 607.0850(3), Florida Statutes. (*Id.*, 7406-09). Thus, the district court concluded that de Saad was entitled to mandatory indemnification for these counts. (*Id.*).

In a footnote, the Third District rejected Petitioners' contention below that, because de Saad later pled guilty to the separate money structuring charge,

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argue and brief them in the district court below. *See Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (a failure to fully brief and argue points on appeal "constitutes a waiver of these claims"). *See also Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) (same). In any event, the assignment issues were amply briefed before the trial court below and the court properly determined that the assignment did not preclude de Saad from participating in this action because: (a) Joseph Beeler, P.A.'s interest in this litigation was limited solely to the fees, costs, and expenses owed to him by de Saad; (b) Joseph Beeler, P.A. specifically authorized de Saad's claim in this case; and (c) BIV waived its right to object to de Saad as a real party interest. (R.V.29, 5380-84). The trial court similarly concluded that a prior "restyling" of the case by the district court in *De Saad v. Banco Industrial de Venezuela*, 843 So. 2d 953 (Fla. 3d DCA 2003), did not foreclose de Saad's claim because that appeal, which merely recognized Joseph Beeler, P.A.'s interest in the case, did not consider de Saad's independent right to pursue her claim. (*Id.*, 5384-85). *See, e.g, Fink v. Holt*, 609 So. 2d 1333, 1335 (Fla. 4th DCA 1992) (captions are procedural matters and the applicable rule of civil procedure requires a caption to contain "the name of at least the first party on each side of the controversy.").

subsection (7) of the statute should apply to bar indemnification. (*Id.*, 7409). The district court noted that "the proscription against indemnification in subsection (7) applies to voluntary indemnification by the corporation separate and apart from the mandatory indemnification required by subsections (1) and (3)," and cited *Alternative Development* as distinguishable authority. *Id.*[6]

On the breach of contract claim, the Third District correctly interpreted the unambiguous employment contract between de Saad and BIV and determined that BIV was the sole breaching party. (*Id.*, 7409-11).

SUMMARY OF THE ARGUMENT

Florida's mandatory corporate indemnification provision allows corporate officials to resist unjustified lawsuits, secure in the knowledge that if vindicated, the corporation will bear the expenses they incur during litigation that results by reason of that employment. Section 607.0850(3), Florida Statutes, mandates indemnification of the expenses actually and reasonably incurred by a corporate officer "[t]o the extent" that he or she has been "successful on the merits or otherwise" in the defense of any proceeding brought "by reason of the fact" of that employment, or in the defense of "any claim, issue, or matter therein." The district court properly interpreted this provision and concluded that de Saad was entitled to

[6] The trial court similarly concluded that *Alternative Development* was distinguishable. (R.V.33, 6187-88).

mandatory indemnification because she was "successful on the merits or otherwise" in the defense of eleven counts of a criminal indictment in which she was charged "by reason of the fact" that she was a BIV vice president.

Subsection (3) of the statute is wholly separate from subsection (7), which permits a corporation to provide "other and further" voluntary indemnification so long as the corporate officer has not acted with certain intent. To the extent that the Fourth District in *Alternative Development* held that the standards of conduct under subsection (7) apply to a claim for mandatory indemnification, this Court should disapprove of that decision and approve the decision below.

Additionally, to the extent BIV now claims that the standards of conduct under subsection (1) apply to a claim for mandatory indemnification under subsection (3), this argument has been waived by BIV's failure to brief or argue the issue in the district court below. But, in any event, the plain language of subsection (3) demonstrates that BIV is wrong. This Court should affirm the summary judgment in de Saad's favor and the award of indemnification damages.

The district court also correctly affirmed the summary judgment in favor of de Saad on the breach of contract claim based upon the clear and unambiguous language of the employment contract, which demonstrates that BIV was required to either terminate de Saad for a duly justified reason, or pay the amounts due under the contract. Contrary to BIV's brief, no genuine issue of material fact

precluded entry of summary judgment in de Saad's favor on this claim.

Finally, BIV urges the Court to consider an interlocutory decision rendered by the Third District more than seven years ago. De Saad submits that the Court does not have jurisdiction to review the 2003 decision. However, if jurisdiction is proper and if the Court decides to exercise it, de Saad submits that the Court should likewise affirm, as the district court correctly concluded that section 607.0850 applies to BIV because it operates under a certificate of authority to transact business in Florida pursuant to section 607.1505(2), Florida Statutes, and is therefore subject to the same "duties, restrictions, penalties, and liabilities" imposed on a domestic corporation. § 607.1505(2), Fla. Stat.

Because the employment contract contained a valid and enforceable choice-of-law provision that required the "Employee/Employer" relationship between BIV and de Saad to be governed exclusively by Florida law, there was no need for the district court to consider section 607.1505(3), Florida Statutes.

STANDARDS OF REVIEW

1. An appellate court applies a *de novo* standard of review to orders granting a motion for summary judgment or a judgment on the pleadings. *See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001); *Boatwright Const., LLC v. Tarr*, 958 So. 2d 1071, 1072 (Fla. 5th DCA 2007).

2. Following a nonjury trial, "[a] trial court's factual findings and legal

conclusions should not be disturbed unless the appellate court is convinced that they are unsupported, inconsistent, or contrary to the law." *J. Sourini Painting, Inc. v. Johnson Paints, Inc.*, 809 So. 2d 95, 98 (Fla. 2d DCA 2002).

ARGUMENT

I. SUMMARY JUDGMENT WAS PROPERLY GRANTED ON THE INDEMNIFICATION COUNT.

A. BIV's argument that the standards of conduct under subsection (1) apply to a claim for mandatory indemnification under subsection (3) is waived and fails on the merits.

Throughout its brief, BIV argues that both lower courts erred in concluding that de Saad was not required to meet the standards of conduct under section 607.0850(1), i.e., to show that she acted in good faith, in the best interests of the corporation, and without knowledge that her conduct was unlawful. BIV waived this argument by failing to brief or argue that de Saad was required to make such a showing in the district court below. *See Coolen*, 696 So. 2d at 742 n.2. BIV's only argument regarding the standards of conduct under subsection (1) below concerned the amount of the indemnification damages.[7]

Once the Court accepts jurisdiction over a case, its "authority to consider issues other than those upon which jurisdiction is based is discretionary and is

[7] BIV claimed that the trial court was "punishing" it with the indemnification award, and argued that the court erred in suggesting that the bank should have indemnified de Saad from the beginning because, according to BIV, she failed to meet the requirements for permissive indemnification. (R.LX, Tab A, 49-50).

exercised only when these other issues have been properly briefed and argued and are dispositive of the case." *Murray v. Regier*, 872 So. 2d 217, 223 & n.5 (Fla. 2002). As this issue was clearly not "properly briefed and argued," it cannot be considered by this Court in the exercise of its conflict jurisdiction. *See Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 563 (Fla. 2005); *Murray*, 872 So. 2d at 223 & n.5; *Savoie v. State*, 422 So. 2d 308, 310, 312 (Fla. 1982).

In any event, the statute itself makes it clear that the standards of conduct under subsections (1) and (2) do not apply to a claim for mandatory indemnification under subsection (3). The reference in subsection (3) to subsections (1) and (2) is only to define the type of proceeding to which subsection (3) applies. That proceeding is one brought against any person "by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation. . . ." §607.0850(1), Fla. Stat. Success on the merits or otherwise under subsection (3) obviates the need for a factual finding necessary in order to obtain voluntary indemnification under subsections (1) and (2).

The fact that subsection (3) references the "proceeding" under subsection (1), but does not reference the standards of conduct contained in that section demonstrates that the clause was deliberately excluded. *See Pro-Art Dental Lab, Inc. v. V-Strategic Group, LLC*, 986 So. 2d 1244, 1258 (Fla. 2008) ("Under the canon of statutory construction *expressio unius est exclusio alterius*, the mention of

one thing implies the exclusion of another."). The standards of conduct under subsections (1) and (2) are therefore inapplicable under subsection (3). *See also O'Brien v. Precision Response Corp.*, 942 So. 2d 1030, 1033 (Fla. 4th DCA 2006) ("When an officer successfully defends on the merits 'or otherwise' the officer is statutorily entitled to have a court award indemnification attorneys fees").

Courts interpreting similar statutes have reached the same conclusion. *See, e.g., Green v. Westcap Corp. of Delaware*, 492 A.2d 260, 265 (Del. 1985) (interpreting Delaware's nearly identical provisions and explaining that standards of conduct under 8 Del. C. § 145(a) and (b) do not apply to a claim under 8 Del. C. § 145(c), which mandates indemnification "[t]o the extent that a director, officer, employee or agent . . . has been successful on the merits or otherwise in defense of any action . . . referred to in subsections (a) and (b) of this section"); *Del Monte Fresh Produce, N.A., Inc. v. Kinnavy*, No. 07 C 5902, 2010 WL 1172565 at *12 (N.D. Ill. March 22, 2010) (interpreting a New Jersey statute that is based on the Delaware statute and following *Green* to hold that the mandatory provision did not incorporate the other "factual prerequisites" for indemnification).[8] Thus, in addition to being waived, this argument lacks merit.

[8] *See also Miller v. U.S. Foodservice, Inc.*, 405 F. Supp. 2d 607, 617, n.7 (D. Md. 2005) ("Pursuant to § 145(c), if a former officer is "successful on the merits or otherwise" in a proceeding described in § 145(a), then he is entitled to indemnification regardless of whether or not he acted in good faith. . . . Thus, the good faith inquiry under § 145(a) is not mandated under § 145(c)").

B. The standards of conduct under subsection (7) do not apply to a claim for mandatory indemnification under subsection (3).

The Third District correctly rejected BIV's claim that the standards of conduct under subsection (7) must be considered before mandatory indemnification can be ordered under subsection (3), based upon the plain language of the statute. Both the trial and district courts also correctly determined that the Fourth District's decision in *Alternative Development* is factually distinguishable from the case at bar. However, to the extent there is any conflict between the decision below and *Alternative Development*, the Court should approve the decision below and disapprove of *Alternative Development*.

Nothing in subsection (3) indicates that it is dependent upon or limited by the provisions of subsection (7). Additionally, the plain language of subsection (7) demonstrates it does not apply to a claim for mandatory indemnification:

> (7) The indemnification and advancement of expenses provided pursuant to this section are not exclusive, and a corporation may make any other or further indemnification or advancement of expenses of any of its directors, officers, employees, or agents, under any bylaw, agreement, vote of shareholders or disinterested directors, or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office. However, indemnification or advancement of expenses shall not be made to or on behalf of any director, officer, employee, or agent if a judgment or other final adjudication establishes that his or her actions, or omissions to act, were material to the cause of action so adjudicated and constitute:
>
> (a) A violation of the criminal law, unless the director, officer, employee, or agent had reasonable cause to believe his or her conduct

> was lawful or had no reasonable cause to believe his or her conduct was unlawful; [or]
> (b) A transaction from which the director, officer, employee, or agent derived an improper personal benefit.
>
> * * *

§ 607.0850(7), Fla. Stat.

By its plain terms, subsection (7) only applies where a corporation is voluntarily seeking to indemnify its officer, and not where mandatory indemnification is sought. The provision explains that a corporation is free to provide "other or further" voluntary indemnification of its corporate officers in addition to that provided under subsections (1) and (2), if the corporation so chooses. Consistent with subsections (1) and (2), subsection (7) provides that a corporation is prohibited from making such "other or further" voluntary indemnification if the corporate officer acts with certain intent. Subsection (7) does not apply to the case at bar or to any other circumstance where the corporation has not provided "other or further" indemnification through "bylaw, agreement, vote of shareholders" or otherwise.[9]

The purpose of subsection (7) is clear -- it allows a corporation to provide

[9] Subsection (7) also only applies when "a judgment or other final adjudication establishes that his or her actions . . . were material to the cause of action so adjudicated." Thus, subsection (7) applies when the officer's conduct gives rise to the cause of action. Here, de Saad's conduct with respect to the four checks was not material to the government's charge of money laundering. (R.V.6, 888) ("de Saad's receipt of the four checks cannot be considered as evidence that she was predisposed to launder drug money, the conduct for which she was charged.").

indemnification to its officers in addition to that provided by the statute, but prevents the corporation (or unscrupulous corporate officers) from creating agreements that would indemnify, for example, conduct that the officer knows is in violation of the law, or conduct that amounts to willful misconduct or conscious disregard for the best interests of the corporation. *See, e.g., Colonial Guild Ltd. v. Pruitt*, 2004 WL 627921 (Ohio Ct. App. March 31, 2004) (refusing to enforce indemnification agreement which resolved to "ratify all acts" and indemnify officer for same where he was admittedly found liable of willful misconduct).

Notwithstanding the clear language of the statute, BIV contends that under *Alternative Development*, the lower courts erred in failing to apply the standards of conduct contained in subsection (7). *Alternative Development* is distinguishable from the case at bar. In that case, officers were seeking indemnification for breach of fiduciary duty and fraud claims in a suit filed against them by a condominium association and its shareholders. 608 So. 2d at 827. In such a case, where an officer is sued not by a third party but by his or her own corporation, it is especially important for the court to scrutinize the request for indemnification because the corporation faces the possibility of having to pay the legal fees of the very individuals sued. *See Turkey Creek Master Owners Ass'n v. Hope*, 766 So. 2d 1245, 1247 (Fla. 1st DCA 2000).

In the case at bar, the underlying action was not between the corporation and

de Saad, but between a third party (the federal government) and de Saad. For this reason alone, the lower courts correctly concluded that *Alternative Development* is distinguishable and does not apply to this case.

To the extent *Alternative Development* holds the standards of conduct in subsection (7) should be applied to a claim for mandatory indemnification under subsection (3), it was wrongly decided based upon the clear language of the statute and should be disapproved of by this Court. Significantly, no other decision issued prior to or subsequent to *Alternative Development* has ever applied subsection (7) to a mandatory indemnification claim under subsection (3). *See, e.g., O'Brien*, 942 So. 2d at 1030; *Investors Ins. Group v. Kling*, 712 So. 2d 1258 (Fla. 1st DCA 1998); *Mosely v. de Moya*, 497 So. 2d 696, 698 (Fla. 3d DCA 1986).

This Court is currently reviewing *Wendt v. La Costa Beach Resort Condominium Association*, 14 So. 3d 1179 (Fla. 4th DCA 2009), Case No. SC09-1914, which also involves the proper interpretation of section 607.0850, Florida Statutes. In *Wendt*, without mentioning its prior *Alternative Development* decision, the Fourth District held that a claim for indemnity under section 607.0850 is unavailable in the context of a lawsuit between a corporation and its own directors for breach of fiduciary duty. In that decision, the Fourth District certified conflict with the First District's decision in *Turkey Creek*, which held that the statute "also provides for indemnification in a case . . . where a corporation has sued its own

agent." *Wendt*, 14 So. 3d at 1182.

If *Wendt* was correctly decided by the Fourth District, it further demonstrates that *Alternative Development* is no longer good law, since under the facts of *Alternative Development* (where the corporation was suing its directors for breach of fiduciary duty), section 607.0850 would not apply at all. But regardless, like *Alternative Development*, *Wendt* is factually distinguishable from the case at bar because it involves a lawsuit between the corporation and its directors for breach of fiduciary duty. The question in this case is whether the standards of conduct under subsection (7) apply to a claim for mandatory indemnification under subsection (3). Under the plain statutory language, that question should be answered in the negative. Because *Wendt* does not involve this issue, the Court's determination in that case is not likely to have any bearing on the one at bar.

BIV also incorrectly relies on an Ohio appellate court decision to argue that subsection (7) applies to subsection (3). *Pruitt*, 2004 WL 627921. BIV's reliance upon this case is misplaced. As in *Alternative Development* (and *Wendt*), the underlying Florida action in *Pruitt* was one between the corporation and the officer for breach of fiduciary duty. *Id.* at *2. The corporate officer unsuccessfully defended himself in the underlying action and sought indemnification from the corporation pursuant to an indemnification agreement. *Id.*

The Ohio court properly applied subsection (7) in that case, since the

corporation was attempting to provide "other or further" indemnification of its corporate officers by agreement, and correctly concluded the officer could not be indemnified for his defense costs in a lawsuit in which a jury found him guilty of breaching his fiduciary duty to the corporation, as this clearly amounted to "willful misconduct or a conscious disregard for the best interests of the corporation," in violation of section 607.0850(7)(d). *Id.* at *2-*3. Unlike *Colonial Guild*, this is not a case where a corporation has provided for "other or further" indemnification by agreement, and therefore the Third District correctly determined that the standards of conduct under subsection (7) are wholly inapplicable.

Subsection (9) of the statute[10] further demonstrates that subsection (7) does

[10] Subsection (9) provides in pertinent part:

> (9) . . . . On receipt of an application, the court, after giving any notice that it considers necessary, may order indemnification . . . including expenses incurred in seeking court-ordered indemnification . . . if it determines that:
>
> (a) The director, officer, employee, or agent is entitled to mandatory indemnification under subsection (3), in which case the court shall also order the corporation to pay the director reasonable expenses incurred in obtaining court-ordered indemnification. . . ;
>
> (b) The director, officer, employee, or agent is entitled to indemnification … by virtue of the exercise by the corporation of its power pursuant to subsection (7); or
>
> (c) The director, officer, employee, or agent is fairly and reasonably entitled to indemnification . . . in view of all the relevant circumstances, regardless of whether such person met the standard of conduct set forth in subsection (1), subsection (2), or subsection (7).

not apply where indemnification is mandatory because (9)(a), which governs applications for mandatory indemnification, makes no reference to subsection (7); rather, voluntary indemnification under subsection (7) is dealt with separately in (9)(b). Subsection (9)(c) further provides for indemnification regardless of whether the officer met the standard of conduct set forth in subsections (1), (2) or (7). This shows that the Legislature did not intend subsection (7) to apply in circumstances where the court finds the officer is entitled to mandatory indemnification under subsection (3). *See Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 315 (Fla. 2006) (when the Legislature includes a requirement in one provision and excludes a similar requirement in a related provision, it intends a distinction because the Legislature "'knows how to' accomplish what it has omitted" in a particular statute).

C. The Trial Court and the Third District correctly held that de Saad was entitled to mandatory indemnification under subsection (3).

Contrary to BIV's brief, no material issues of fact remained as to whether de Saad was "successful on the merits or otherwise" in the defense of the underlying criminal proceeding, and whether she was charged in that proceeding "by reason of the fact" that she was an officer of the bank.

First, summary judgment was not precluded by BIV's filing of affidavits by expert witnesses who lacked personal knowledge and stated their personal legal opinions as to whether de Saad was successful on the merits or otherwise and

charged by reason of the fact that she was a corporate officer. Florida law is clear that such affidavits are inadmissible on summary judgment. *See Buzzi v. Quality Serv. Station, Inc.*, 921 So. 2d 14, 15 (Fla. 3d DCA 2006) (Rule 1.510 affidavits "'shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' . . . '[A]n affidavit in support of summary judgment may not be based upon factual conclusions or conclusions of law.'"); *Florida Dep't of Fin. Servs. v. Assoc. Indus. Ins. Co.*, 868 So. 2d 600 (Fla. 1st DCA 2004) (affidavits in support of summary judgment "may not be based on factual conclusions or conclusion of law," may not "contain[] statements that are not based upon [the affiant's] personal knowledge," and may not include statements "based upon [the affiant's] 'understanding' of the underlying issues and [the affiant's] 'opinion' of such issues").

Second, the Third District properly analyzed the pertinent statutory language, applied case law interpreting analogous phrases in Delaware's strikingly similar corporate indemnification statute, 8 Del. C. § 145,[11] and correctly

[11] The Delaware statute, 8 Del. C. § 145(a), (c), provides, in pertinent part:

> (a) A corporation shall have power to indemnify any person who was or is a party . . . to any . . . completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation. . . .

determined that de Saad's acquittal of eleven counts of a criminal indictment that charged her in her capacity as the vice-president of BIV was success on the merits or otherwise, and that she was therefore entitled to mandatory indemnification.

"Successful on the Merits or Otherwise." BIV claims that de Saad was required to prove that the money structuring charge to which she pled guilty (and for which she neither sought nor received indemnity) was "unrelated" to the money laundering and conspiracy charges in order to be considered successful on the merits or otherwise. The bank cites no authority for this claim, and the plain language of the Florida statute and related Delaware case law do not support it.

First, de Saad was not charged with structuring in the Second Superseding Indictment. That charge was brought in a separate charging document filed after the money laundering case had been tried and the jury's verdict on those eleven counts had been set aside. But even if de Saad had been charged with structuring in addition to the other offenses in the Indictment, this fact would not preclude de Saad from recovering the fees and costs she incurred in defending against the

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* * *

> (c) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

eleven counts on which she was ultimately successful.

Section 607.0850(3) provides that a corporate officer is entitled to indemnification "[t]o the extent" that he or she is "successful on the merits or otherwise in defense of any proceeding referred to in subsection (1) or subsection (2), or in defense of any claim, issue, or matter therein." § 607.0850(3), Fla. Stat. The Legislature's use of the expansive language "to the extent" and "any claim, issue, or matter therein," clearly indicates that an officer who has been partially successful in a proceeding is entitled to indemnification for the successful claims. Nothing in the statute requires innocence of all charges or complete success in the proceeding.[12] It is therefore irrelevant that the government dismissed its appeal of the acquittal order as part of a negotiated plea agreement and whether the money structuring charge is "related" to the money laundering and conspiracy charges.

Interpreting the identical "successful on the merits or otherwise" language in the Delaware statute, a Delaware court has similarly held that two officers were entitled to mandatory indemnification after they entered into a settlement in a criminal proceeding whereby one officer agreed to plead *nolo contendere* to a

[12] Although Florida's Legislature has adopted Delaware's "successful on the merits or otherwise" language, section 8.52 of the Revised Model Business Corporation Act and multiple jurisdictions require a director to be "wholly successful" in a proceeding in order to be entitled to indemnification. *See, e.g., Chudy v. Bequette*, 2007 WL 2122439 at *4 (Wash. Ct. App. July 25, 2007) (Washington); *Waskel v. Guaranty Nat. Corp.*, 23 P.3d 1214, 1219 (Colo. Ct. App. 2000) (Colorado); *Scott v. Poindexter*, 53 S.W.3d 28, 34 (Tex. Ct. App. 2001) (Texas).

single charge and the other officer agreed to forego his appeal of a single charge for which he was convicted, in exchange for the prosecution's agreement to drop all other charges. *See Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. Ct. 1974).[13]

Thus, the Third District correctly held that dismissal of the eleven charges against de Saad, for whatever reason, constituted a "success." *See Perconti v. Thornton Oil Corp.*, 2002 WL 982419 at *4 (Del. Ch. May 3, 2002) ("[d]ismissal of the charges against Perconti by the government, for whatever reason, constituted 'success'"); *Merritt-Chapman*, 321 A.2d at 141 ("Success is vindication. In a criminal action, any result other than conviction must be considered success."). Summary judgment was properly entered on this basis.

"By Reason of the Fact": BIV also argues that de Saad was not charged by reason of the fact that she was an officer of BIV because (1) the government stipulated that de Saad acted alone in dismissing a related regulatory action against BIV; (2) the Second Superseding Indictment charged de Saad as an individual; and (3) de Saad knew that her conduct was prohibited by BIV.

Stipulations made in a regulatory action between the government and BIV

[13] *See also MCI Telecomms. Corp. v. Wanzer*, 1990 WL 91100 at *8-11 (Del. Super. Ct. June 19, 1990) (in civil case where jury held officer liable on breach of fiduciary duty, but found in officer's favor on three other counts, officer could recover defense costs for the three counts for which he was "successful").

are wholly irrelevant to this case. The analysis of whether de Saad was charged "by reason of the fact" that she was an officer of the bank centers on the allegations made against her in the Indictment in the underlying case. *See Perconti*, 2002 WL 982419 at *3-7 (looking to indictment to conclude president and CEO of corporation was charged in underlying criminal action "by reason of the fact" that he was an officer of the corporation); *Merritt-Chapman*, 321 A.2d at 141-42 (determining based upon indictment that chairman of the board and president of wholly-owned subsidiary was charged in underlying criminal matter "by reason of the fact" that he was employee or agent of the corporation).[14]

BIV improperly focuses on the style of the criminal case and ignores the allegations of the Second Superseding Indictment which, as the district court properly noted, charged de Saad with ten counts of money laundering and one count of conspiracy to launder money while acting in her capacity as the vice-president of BIV. (R.LVIIII, 7404).

The Third District noted the analogous case of *Perconti*, in which a Delaware court correctly granted summary judgment concluding that similar

[14] *See also Heffernan v. Pac. Dunlop GNB Corp.*, 965 F.2d 369 (7th Cir. 1992) ("To determine whether Heffernan was sued 'by reason of the fact' that he was a director . . . we begin by reviewing the allegations in the underlying action's complaint."); *Wanzer*, 1990 WL 91100 at *7-8 (concluding Wanzer was sued in underlying action "by reason of the fact" that he was a director of the corporation based upon allegations of amended complaint).

charges in an indictment demonstrated the defendant was charged "by reason of the fact" that he was a corporate officer. *Perconti*, 2002 WL 982419 at *1. In that case, Perconti sought indemnification for a criminal proceeding that he contended was dependent upon alleged breaches of his corporate authority and fiduciary duties he owed the company as president and CEO. *Id.* at *3. Interpreting the meaning of "by reason of the fact," the court concluded that only a causal connection or nexus between the charges alleged in the criminal proceeding and the corporate function of Perconti was required. *Id.*[15] The court explained, "[i]f the conduct resulting in the prosecution was done in his capacity as a corporate officer, without regard to what his motivation may have been, then the ensuing prosecution was 'by reason of the fact that' he was a corporate officer." *Id.*

The court concluded that Perconti was charged "by reason of the fact" that he was a corporate officer where the crimes he was charged with occurred because of his status as an officer of the corporation. *Id.* at *6-7. The court explained:

> The inquiry, in these circumstances, is into whether the criminal scheme is alleged to have employed the corporate powers (or, for example, confidential inside information acquired through the corporate status) conferred upon the officer by virtue of his status.

[15] *See also In re Miller*, 290 F.3d 263, 267 (5th Cir. 2002) (the language "by reason of the fact" requires "no more than a nexus between the corporate officers' or directors' official activity and the matter for which indemnification is sought."); *Westphal v. U.S. Eagle Corp.*, 2002 WL 31820973 (Del. Ch. Nov. 27, 2002) (interpreting "by reason of the fact" as "convey[ing] the concept of a causal connection or nexus between . . . the charges alleged in the prior proceedings and the corporate function or 'official corporate capacity'").

> Here, Perconti's use of the corporate powers entrusted to him was critical to, and instrumental in, the carrying out of the scheme in which he participated and because of which the Indictment issued.

Id. *See also Merritt-Chapman*, 321 A.2d at 142 (holding on summary judgment that chairman and president of corporation's wholly-owned subsidiary was charged in an indictment "by reason of the fact" that he was an employee of the corporation where an indictment charged him with participation in a plan to cause the corporation to secretly purchase hundreds of thousands of shares of its own stock, in violation of federal securities laws); *Homestore, Inc. v. Tafeen*, 888 A.2d 204 (Del. 2005) (on summary judgment, holding vice president of corporation was charged "by reason of the fact" that he was an officer of the corporation based upon *Perconti*); *Reddy v. Elec. Data Sys.*, 2002 WL 1358761 (Del. Ch. June 18, 2002) (granting summary judgment and finding vice president of company was charged "by reason of the fact" that he was an employee of the company in both a criminal indictment and a civil suit notwithstanding allegations in both suits that the employee acted based upon personal greed).

Likewise, de Saad was charged with crimes that were alleged to have occurred because of her status as an officer of BIV. Without that status, she would not have had the opportunity to allegedly assist in laundering money by opening accounts, withdrawing funds, or alerting others if any inquiries were made into the illegal use of the accounts. As in *Perconti*, de Saad's alleged use of the corporate

powers entrusted to her was instrumental to carrying out the actions alleged in the Second Superseding Indictment. Accordingly, the Indictment demonstrated a clear nexus between de Saad's official activity and the money laundering and conspiracy charges, and summary judgment was correctly entered on this basis.

BIV relies upon cases that stand for the proposition, generally, that whether an employee's actions fall within the scope of employment is a factual question. (IB, p. 34).[16] These cases are inapplicable. The question of whether de Saad's actions fell within the scope of her employment is irrelevant under subsection (3). If the Legislature had intended indemnification to apply only in circumstances where an officer is acting within the scope of his or her employment, it would have included such language in the statute.

Finally, the bank relies on out-of-state decisions where it was determined, based on the particular facts of those cases, that issues of material fact existed as to whether the individuals were sued "by reason of the fact" that they were corporate officers. *See In re Miller*, 290 F.3d at 267; *Westphal*, 2002 WL 31820973 at *1.[17]

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[16] *Gabor & Co. v. Gabor*, 569 So. 2d 817 (Fla. 3d DCA 1990), and *Blatt v. Panelfab Int'l Corp.*, 314 So. 2d 196 (Fla. 3d DCA 1975), are similarly inapplicable. Neither case discusses the underlying complaint or any facts about the underlying action, and it is impossible to determine why the district court concluded that issues of fact remained.

[17] *First Am. Corp. v. Al-Nahyan*, 17 F. Supp. 2d 10, 30 (D.D.C. 1998), cited by BIV, is inapplicable. The Virginia statute in that case requires a stricter indemnification standard than Florida -- complete success and that the director must be made a party to the proceeding "because he is or was a director of the

Unlike these cases, the clear allegations of the underlying Indictment established that de Saad was charged by reason of her status as a BIV vice president.

II. SUMMARY JUDGMENT WAS PROPERLY GRANTED ON THE BREACH OF CONTRACT COUNT.

De Saad respectfully submits that the Court should decline to exercise jurisdiction to review the breach of contract claim. There is no conflict between the Third District's decision below and any decision relied upon by BIV, nor does claim involve a matter of public importance. As such, the Court's exercise of jurisdiction would amount to nothing more than second-tier appellate review. In any event, summary judgment was properly entered in favor of de Saad.

A. BIV's Unreasonable Interpretation of the Contract did not Preclude Entry of Summary Judgment.

BIV erroneously argues that summary judgment was inappropriate on the breach of contract claim because it claims the employment contract was susceptible to more than one reasonable interpretation. BIV has asserted conflict with *Fecteau v. S.E. Bank, N.A.*, 585 So. 2d 1005 (Fla. 4th DCA 1991), and *Langford v. Paravant, Inc.*, 912 So. 2d 359 (Fla. 5th DCA 2005), which hold that when a contract is ambiguous, and the parties present two reasonable

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corporation"). *H.R. Plate v. Sun-Diamond Growers of California*, 225 Cal. App. 3d 1115, 1118-19, 1122 (Cal. Ct. App. 1990), cited by BIV, is also inapplicable. That case involves an indemnification provision that, unlike here, required the officer to meet particular standards of conduct set forth in the statute.

interpretations of the contractual language, summary judgment is inappropriate. *Fecteau*, 585 So. 2d at 1007; *Langford*, 912 So. 2d at 360-61.

The lower courts correctly determined that the employment contract was unambiguous, and that BIV's interpretation that it could suspend de Saad without pay indefinitely was not reasonable.

The meaning of a contract and its effect are matters of law, not fact. *See Paladyne Corp. v. Weindruch*, 867 So. 2d 630, 633 (Fla. 5th DCA 2004); *Leseke v. Nutaro*, 567 So. 2d 949, 950 (Fla. 4th DCA 1990). It is well settled that where the terms of a contract are unambiguous, the parties' intent must be determined from the four corners of the document. *See Barakat v. Broward County Hous. Auth.*, 771 So. 2d 1193, 1194 (Fla. 4th DCA 2000). In construing a contract, courts are required to read provisions harmoniously to give effect to all portions of the contract, and to give effect to every term in the agreement. *See Paladyne Corp.*, 867 So. 2d at 631. Additionally, "words in a contract are presumed to have been used with their ordinary and customary meaning." *KEL Homes, LLC v. Burris*, 933 So. 2d 699, 702 (Fla. 2d DCA 2006). *See also Barakat*, 771 So. 2d at 1195.

De Saad's employment contract with BIV provided for a two-year term, beginning on December 1, 1997, to renew automatically for periods of two years. (R.V.14, 2431). The contract permitted BIV to terminate the contract at any time prior to the date of termination for a duly justified reason, which under the contract

includes if she "is arrested or imprisoned for a felony, fraud, insubordination, dishonest behavior," not related to the obligations set forth in the contract, or for "immorality, drug abuse, negligence, larceny, or malfeasance." (*Id.*, 2431-32). Under the unambiguous contract, BIV was required to pay de Saad the amounts owed under the contract unless it terminated her for a duly justified reason.

BIV never terminated de Saad's employment as provided by the contract. To the contrary, in order to advance its own interests, it purposely refrained from terminating de Saad and kept the employment contract in effect.

BIV argues the contract could reasonably be interpreted to allow the bank to suspend de Saad without pay in May 1998 (after her arrest) through February 1, 2000, in light of the lack of final resolution of the charges against her. BIV bases this argument on the provision of the personnel manual which provided "Grounds for Immediate Dismissal or Suspension of Employment *Pending Clarification of Charges*:" including, "[c]onclusive evidence of dishonesty or involvement in a misdemeanor or felony." (*Id.*, 2451) (emphasis by underline in original, emphasis by italics supplied). BIV argues that ambiguity exists as to when the charges were "clarified," and that conclusive evidence of de Saad's involvement in a felony did not occur until she pled guilty to the structuring charge.

BIV's argument requires the Court to equate the term "clarification" with "resolution" or "disposition." Both lower courts found this result absurd based

upon the meaning of the term itself. (R.V.29, 5377; LVIIII, 7410). The trial court explained that under BIV's interpretation, the employer could "evade the bargained-for requirement to either terminate justifiably or compensate, by simply placing the employee on suspension indefinitely without any legitimate reason whatsoever until the term of the contract expired." (R.V.29, 5378). BIV's interpretation "entirely nullifies and renders meaningless the word 'clarification' as a term agreed upon by the parties that should be given effect." (*Id.*).

Moreover, as the Third District properly noted, the term clarify means "to make clear or easier to understand." (R.LVIIII, 7410). Both courts correctly concluded that the charges against de Saad were "clarified" in February 1999 by the Second Superseding Indictment, which placed BIV on notice of the money laundering and conspiracy charges and the facts giving rise to the money structuring charge, or certainly by the findings made in internal and external audits performed following the Indictment. (R.V.29, 5377; LVIIII, 7410).[18]

Despite this knowledge, BIV intentionally did not terminate de Saad's employment contract.[19] In fact, eight months after learning of the allegations in the

[18] BIV admitted that it was aware that de Saad had committed money structuring after the Second Superseding Indictment was filed. (R.V.34, 6377-78). Based upon the audits, BIV was fully satisfied that de Saad had violated bank policies and procedures by April 1999. (R.V.14, 2414-15; 2455; 2458-59; 2488-97).

[19] BIV improperly relies upon Judge Schwartz's concurring opinion as support for its unreasonable interpretation that it could indefinitely suspend de Saad. (IB, p. 41). Judge Schwartz simply pointed out that BIV waived any argument that the

Second Superseding Indictment, on November 14, 1999, BIV reaffirmed the contract in a letter from BIV's President, and advised de Saad that her contract remained fully valid and would not be renewed as of February 1, 2000:

> As you know, under the terms of the contract referred to, you were suspended from employment and pay on May 25, 1998, by Banco Industrial de Venezuela, because of your arrest and subsequent filing of charges against you by the Federal Prosecutor's Office of the United States of America in the District of Los Angeles, California. The employment contract, nevertheless, was not terminated at that time, and therefore, although suspended, it has remained valid until now. Therefore, through this notice and pursuant to the aforementioned Articles of the referenced employment contract, on behalf of Banco Industrial de Venezuela, we hereby notify you that the Bank has decided not to renew your employment contract; consequently, it is terminated effective February 1, 2000, thereby meeting the requirement of two-months' notice established by said contract. (R.V.6, 863-65).

BIV also erroneously relies upon a resolution passed by BIV's board of directors just days after de Saad's arrest, as the resolution actually supports de Saad's position that she is entitled to all items owed under the contract. Through the resolution, the board did not terminate the contract but resolved to suspend de Saad without pay "with the understanding that if the findings against her taking place in U.S. Courts are negative, her remunerative payment will be acknowledged retroactively." (R.V.14, 2441-46). De Saad's acquittal of the money laundering charges was such a negative finding, and she was entitled to her retroactive

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suspension without pay was, in effect a termination for cause, by its failure to raise such an argument in either court. (R.LVIIII, 7412-13) (Schwartz, J., concurring).

remunerative pay under both the employment contract and the resolution.

The lower courts thus correctly construed the employment contract and personnel manual in accordance with its plain terms, and properly granted summary judgment in de Saad's favor on the breach of contract claim.

B. No Material Facts in Dispute Regarding BIV's Affirmative Defenses.

BIV erroneously claims that summary judgment was precluded because issues remained as to its affirmative defenses. The bank contends that the district court failed to consider whether de Saad breached the contract first and whether she failed to mitigate her damages, asserting conflict with *Fabel v. Masterson,* 951 So. 2d 934 (Fla. 4th DCA 2007); *Marshall Const., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So. 2d 845 (Fla. 1st DCA 1990), and *Jones v. Sterile Prods. Corp.*, 572 So. 2d 519 (Fla. 5th DCA 1990). The district court properly determined that BIV was the sole breaching party, and therefore had no reason to address BIV's other meritless affirmative defenses.

BIV also argues that de Saad breached a provision of the contract requiring her to "devote all her time and effort to the business of [BIV]" and a provision of the personnel manual requiring her to "avoid even the appearance of legal or ethical impropriety in all [her] actions." (IB, p. 42). BIV did not raise or argue these provisions in the appeal below, and this argument is therefore waived. *See*

Coolen, 696 So. 2d at 742 n.2.[20]

In any event, BIV's argument that de Saad breached the contract first because she was in prison, and could not come to work, fails. This argument would require the Court to improperly imply "reasonableness" into the parties' contract. *See Barakat*, 771 So. 2d at 1193-95 (reversing trial court's dismissal of action for severance pay; trial court's conclusion that employee rendered employment contract incapable of performance by his imprisonment would improperly imply "reasonableness" into the contract, which provided that if employee "should be terminated, then he will be given severance pay"). If BIV had intended for there to be conditions that would relieve it from compensating de Saad without terminating her employment, it could have included those terms in the contract. It is not the role of the court to rewrite the contract to make it more reasonable for one party, or to relieve a party from what turned out to be a bad bargain. *Id.* at 1195.

BIV also incorrectly argues that de Saad had a duty to mitigate her damages

[20] In a footnote, BIV argues that de Saad also breached bank policy by providing advice about Swiss and Bahamian banks. Even if this were true, BIV cannot rely upon later-acquired information to claim it is relieved from paying de Saad the amounts due under the contract when it never terminated her for a duly-justified reason, as the contract required. *See Tomasini v. Mount Sinai Med. Ctr. of Fla., Inc.*, 315 F. Supp. 2d 1252, 1257 (S.D. Fla. 2004) (rejecting employer's contention that it was relieved from paying amounts owed under employment contract where doctor was not asked to resign "for cause," even though employer later discovered wrongdoing that would have constituted grounds for termination "for cause").

once the charges against her were sufficiently clarified. *See Sys. Components Corp. v. Florida Dep't of Transp.*, 14 So. 3d 967, 982 (Fla. 2009) ("There is no actual 'duty to mitigate,' because the injured party is not compelled to undertake any ameliorative efforts."). To the extent that de Saad had any such duty, she certainly was not required to mitigate before BIV breached the employment contract. Until BIV terminated de Saad's contract effective February 1, 2000, she remained employed and BIV remained obligated to pay the compensation under the contract. This point is illustrated by cases cited in BIV's brief, which hold that a plaintiff may have a duty to mitigate his or her damages after a contract has been breached. *See Juvenile Diabetes Research Found. v. Rievman*, 370 So. 2d 33, 36 (Fla. 3d DCA 1979); *Zayre Corp. v. Creech*, 497 So. 2d 706, 707 (Fla. 4th DCA 1986).[21]

Accordingly, the lower courts properly determined that no issues of material fact remained as to BIV's affirmative defenses.

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[21] BIV claims in a footnote (IB, p. 45) that the trial court erred in granting summary judgment while affirmative defenses were pending, in conflict with *Hospital Correspondence Corp. v. McRae*, 682 So. 2d 1177, 1182 (Fla. 5th DCA 1996), and *Fasano v. Hicks*, 667 So. 2d 1033, 1034 (Fla. 2d DCA 1996), which hold that summary judgment is improper where valid affirmative defenses remain. BIV has never demonstrated that any valid affirmative defenses remained, or that there were any issues of material fact. *See BSP/Port Orange, LLC v. Water Mill Props., Inc.*, 969 So. 2d 1077, 1078 (Fla. 5th DCA 2007) (affirming summary judgment where affirmative defenses were either rebutted or insufficient to preclude summary judgment).

III. THE THIRD DISTRICT PROPERLY AFFIRMED THE INDEMNIFICATION DAMAGES.

The Third District did not err in affirming (without discussion) the indemnification damages in this case, which included indemnity for loans de Saad used to post a $1.5 million bond to secure her release from prison and to pay a portion of her attorneys' fees and costs. BIV contends that de Saad was not entitled to indemnity for these expenses, and misconstrues subsection (3) as allowing recovery of only "the attorneys' fees and costs of de Saad's attorneys." (IB, p. 46).

As the trial court properly concluded, the nature of the inquiry turns on whether the expense was "actually and reasonably incurred" by the indemnitee. § 607.0850(3), Fla. Stat. The court provided detailed Findings of Fact and Conclusions of Law demonstrating that the posting of de Saad's bond was a reasonable expense for which she was entitled to indemnification. (R.V.29, 5355). The court explained that it was extremely important for de Saad to be released from prison in this case so she could assist in her defense; that the law firms retained by de Saad each served a distinct purpose and were necessary due to the complexity of the case; and that, because BIV refused de Saad's requests for indemnification, "[d]e Saad, a Venezuelan national, did the only thing she could reasonably do: borrow money from friends and relatives in Venezuela subject to the significant Venezuelan interest rates, thus incurring the substantial damages relating to the repayment of those loans." (*Id.*, 5345-48; 5355; 5358).

The trial court accepted the testimony of de Saad's witnesses as truthful concerning the amounts, use, and repayment of the loans, rejected testimony from BIV's expert witness that there was insufficient documentation as to whether the loans were made at all, were used for legal expenses, and were repaid, and found it significant that BIV never produced a single witness or document to refute the testimony from de Saad's witnesses concerning the veracity of the loans. (*Id.*, 5355-56).[22] The court also noted that de Saad abandoned claims for other reimbursable expenses and fees and sought a ruling that was "more conservative than the evidence might have otherwise justified." (*Id.*).

Although BIV contends the trial court's award was designed to "punish" BIV for not indemnifying de Saad from the beginning, this argument is specious. The trial court noted that BIV made a business decision for which it could not be criticized in opting not to indemnify de Saad in order to place itself in a better light with the government, against whom BIV faced several proceedings which could have resulted in the loss of its ability to continue to operate in the United States. However, the court found that in refusing to assist in de Saad's defense, BIV took a calculated risk that it may later face an indemnification claim, "believing there was no chance that De Saad could or would prevail." (*Id.*, 5358). That decision

[22] The trial court also found the testimony of de Saad's expert witness to be more credible than BIV's expert witness concerning the effect of the exchange rate between the Bolivar and the U.S. dollar. (*Id.*, 5356).

backfired, as BIV became statutorily obligated to indemnify de Saad based upon her successful defense of the criminal proceeding. (*Id.*).

BIV also improperly argues that the trial court failed to analyze the voluntary indemnification provisions under subsection (1) of the statute in determining that BIV could or should have indemnified de Saad in the first instance. BIV's argument ignores subsection (6) of the statute,[23] which permits a corporation to advance funds to its officer even if it is ultimately determined that the officer does not meet the standard for permissive indemnification.

IV. THE COURT SHOULD DETERMINE THAT IT LACKS JURISDICTION TO CONSIDER THE 2003 DECISION OR SHOULD AFFIRM THAT DECISION ON THE MERITS.

Lastly, BIV urges the Court to consider the merits of an interlocutory decision that the Third District rendered over seven years ago in *De Saad v. Banco Industrial de Venezuela, C.A.*, 843 So. 2d 953 (Fla. 3d DCA 2003), where it reversed a judgment on the pleadings entered in favor of BIV on the statutory indemnification count.

In arguing that jurisdiction is proper, BIV improperly relies on *Boca Burger*

[23] Section 607.0850(6) provides:

> (6) Expenses incurred by an officer or director in defending a civil or criminal proceeding may be paid by the corporation in advance of the final disposition of such proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if he or she is ultimately found not to be entitled to indemnification by the corporation pursuant to this section. . . .

and *Murray*, both of which stand for the general proposition that once the Court accepts conflict jurisdiction over a case, it has jurisdiction over all issues properly raised and argued. *See Boca Burger*, 912 So. 2d at 563; *Murray*, 872 So. 2d at 223 & n.5. Neither *Murray* nor *Boca Burger* involves the exercise of this Court's discretionary jurisdiction to review a completely separate decision in an earlier appeal. De Saad submits that the Court's statements in those cases regarding its authority to consider matters other than the conflict issue refer to its authority to decide issues raised and argued in this appeal, and not to re-visit an unrelated decision that was rendered final more than seven years ago.

Florida Rule of Appellate Procedure 9.120(b) sets forth the process for reviewing "decisions" of district courts of appeal and states as follows:

> The jurisdiction of the supreme court described in rule 9.030(a)(2)(A) shall be invoked by filing 2 copies of a notice, accompanied by the filing fees prescribed by law, with the clerk of the district court of appeal within 30 days of rendition of the order to be reviewed.

The plain language of the rule establishes that this Court's discretionary jurisdiction does not extend to the review of a seven-year-old decision that was not a part of the appeal on review. It should also be noted that BIV did not ask the district court to reconsider its prior ruling in the plenary appeal on the basis that manifest injustice would result if the court adhered to the earlier ruling. *See Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965) (appellate court should reconsider issue previously decided on former appeal as matter of grace, where manifest injustice

would result from strict adherence to the prior ruling).

The two appeals in this case have completely different district court case numbers,[24] and the appellate briefs from the 2003 appeal are not a part of the record on appeal in this case. Indeed, the district court's docket for the 2003 case reveals that the court file was destroyed on September 28, 2005. *See* Appendix "A" attached hereto.[25] De Saad therefore respectfully submits that this Court does not have jurisdiction to consider the 2003 decision.

If jurisdiction is proper, and this Court decides to exercise it, de Saad submits that the Court should approve the Third District's 2003 decision, which held that section 607.0850 applies to BIV because it operates under a certificate of authority to transact business in Florida pursuant to section 607.1505, Florida Statutes. *De Saad*, 843 So. 2d at 954. Pursuant to section 607.1505(2):

> A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by this act is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

The Third District correctly held that section 607.0850(3) clearly imposes a liability as contemplated by section 607.1505(2). *Id.* at 955. The district court

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[24] The Third District case number below was 3D08-1713. In the prior appeal, the Third District case number was 3D02-1340.

[25] Pursuant to section 90.202(6), Florida Statutes, this Court may take judicial notice of "[r]ecords of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States."

properly rejected BIV's argument that the term "corporation" in section 607.0850(3) is limited to domestic corporations because the plain language of section 607.1505(2) must be read *in pari materia* with section 607.0850. *Id.* at 954. *See also Hollander v. Rosen*, 555 So. 2d 384, 385-86 (Fla. 3d DCA 1989) (foreign corporation authorized to do business in Florida is subject to Florida's statutory provisions regarding access to corporate books and records, and the statutory penalty is applicable if access is wrongfully refused); *Padovano v. Wotitzky*, 355 So. 2d 871, 872-73 (Fla. 2d DCA 1978) (same); *Advance Mach. Co. v. Berry*, 378 So. 2d 26, 27 (Fla. 3d DCA 1979) (limitations period applicable to dissolved corporation under § 607.297, Fla. Stat., applied to foreign corporation).

BIV erroneously contends that the district court erred in failing to consider section 607.1505(3) in its 2003 decision.[26] There was no reason to reach this provision of the statute because, as the district court noted, de Saad's contract with BIV provided that the parties' relationship would be governed solely and exclusively by Florida law. *Id.* at n.1. Florida courts are required to enforce choice-of-law provisions in contracts unless the law of the foreign state contravenes the strong public policy of Florida or is unjust or unreasonable. *See Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 311 (Fla.

[26] Section 607.1505(3) provides "This act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state."

2000) (holding that contractual choice-of-law provisions are presumptively valid and enforceable in Florida unless the law of the chosen forum contravenes strong public policy). BIV has never made any such showing, and the choice-of-law provision is therefore valid and enforceable.

Although BIV appears to argue in a footnote that the contractual choice-of-law provision should not bind it for purposes of indemnification, this argument is meritless. The choice-of-law provision governs "the Employee/Employer relationship" between BIV and de Saad. (R.V.14, 2434). De Saad's right to indemnification arises from that very relationship. *See* § 607.0850(3), Fla. Stat.[27] Thus, the provision clearly applies to de Saad's indemnification rights.

The Fifth District's decision in *Chatlos Foundation, Inc. v. D'Arata*, 882 So. 2d 1021 (Fla. 5th DCA 2004), *rev. denied*, 894 So. 2d 969 (Fla. 2005), relied upon by BIV, is factually distinguishable because in that case there was no contractual choice of law provision. The Fifth District was therefore required to consider section 607.1505(3) and whether indemnification fell within the internal affairs doctrine. *Id.* at 1022-23. In this case, on the other hand, the parties contracted for

[27] *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1154 (Cal. 1992) ("When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to *all* disputes arising out of the transaction or relationship.") (emphasis in original).

Florida law to apply, and thus there was no need for the district court to conduct a choice of law analysis or to consider the internal affairs doctrine.

In any event, de Saad submits that the mandatory indemnification required by statute does not involve the "internal affairs" of the bank. As Judge Sharp correctly explained in a dissenting opinion to *Chatlos*:

> "Internal affairs" of a corporation usually involve matters such as the steps taken in the course of the original incorporation, the election or appointment of directors and officers, the adoption of by-laws, the issuance of corporate shares, preemptive rights, the holding of directors' and shareholders' meetings, methods of voting including any requirement for cumulative voting, shareholders' rights to examine corporate records, charter and by-law amendments, mergers, consolidations and reorganizations and the reclassification of shares. See Restatement (Second) of Conflict of Laws § 302 (1971).
>
> In contrast, indemnity is defined as "the *duty* to make good any loss, damage, or liability incurred by another" or "the *right* of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty." . . . Black's Law Dictionary (8th ed. 2004). These duties and rights involve much more than the mere "inner workings" of the corporation. In fact, under section 607.8050 [sic], a legal duty may be imposed on a corporation to indemnify an officer, director, employee or agent *despite* a contrary determination by the board or shareholders.

Id. at 1027 (Sharp, J., dissenting) (italics in original). The indemnification required by section 607.0850(3) is mandated by the Legislature. It is entirely separate and distinct from the voluntary indemnification authorized by subsections (1), (2), and (7). Even if the voluntary indemnification under subsections (1), (2), and (7) somehow pertains to the "inner workings" of the corporation, de Saad submits that

the indemnification mandated by subsection (3) clearly does not.

While BIV claims that the Third District's 2003 decision carries "unintended consequences" i.e., the inability of foreign corporations to predict whether Florida law or the law of the state of incorporation will govern their indemnification obligations, that concern is not present in a situation where, as here, the parties have expressly contracted for the law of a particular forum to uniformly govern their relationship. *See Yates v. Bridge Trading Co.*, 844 S.W.2d 56, 62 (Mo. Ct. App. 1992) (internal affairs doctrine did not bar application of Missouri corporate law to issuance of stock by a Delaware corporation; "the parties were free to choose the law governing their stock issuance so long as there was a uniform law applied to all shareholders, and the parties and the corporation had substantial contacts with the state whose law was selected."). *See also Nedlloyd Lines*, 834 P.2d at 1149-55 (enforcing contractual choice-of-law provision in shareholders' agreement in action for breach of fiduciary duty). As de Saad and BIV contracted for Florida law to uniformly govern their employee/employer relationship, that valid choice-of-law provision should be enforced.

Finally, the internal affairs doctrine is a presumption, which can be rebutted when another state has a more significant relationship to the occurrence or the parties. *See* Restatement (Second) of Conflict of Laws §§ 6, 302, 309. Florida clearly has the most significant relationship to this dispute under the principles

espoused by the Restatement, and as demonstrated by the contract and the underlying criminal indictment. Among other things, the parties contracted for de Saad to act as vice president of BIV's agency in Miami, required her to reside and work in Florida, and the indictment charged de Saad as a result of her alleged actions while performing her duties on behalf of BIV in Florida. Thus, every aspect of this case involves the Florida forum.

Accordingly, the Court should approve the Third District's 2003 decision in this case as well as the decision under review.

CONCLUSION

Respondent, Esperanza de Saad, respectfully submits that the Court should approve the Third District's decision below in its entirety. Should reversal be warranted for any reason, de Saad respectfully requests that the Court remand to the Third District with instructions to address the limited issue raised in the cross-appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via overnight delivery/Federal Express this **7th** day of **June, 2010**, to: Carol A. Licko, Esq., Hogan & Hartson L.L.P., *Counsel for Petitioners*, Mellon Financial Center, 1111 Brickell Avenue, Suite 1900, Miami, Florida 33131; Jessica L. Ellsworth, Esq., Hogan & Hartson, L.L.P., *Pro Hac Vice Counsel for Petitioners*, Columbia Square, 555 13th Street, N.W., Washington, DC 20004-1109; William L. Richey, Esq., William L. Richey, P.A., *Counsel for Respondent, Joseph Beeler, P.A.*, One Biscayne Tower, 34th Floor, 2 South Biscayne Boulevard, Miami, Florida 33131-1897; and H. Eugene Lindsey, III, Esq., Katz Barron Squitero Faust, *Counsel for Respondent, Joseph Beeler, P.A.*, 2699 South Bayshore Drive, 7th Floor, Miami, Florida 33133.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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