IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-21
Lower Tribunal Nos.: 3D08-1713, 01-13868

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,

v.

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

Respondents.
_____/

PETITIONERS' INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This case will determine whether Florida law (as set forth in § 607.0850, Fla. Stat.) mandates that a corporate officer who knowingly commits a crime for personal gain is entitled to mandatory indemnification merely because the officer pleads guilty to a lesser crime than originally charged by the government.

This case presents this issue of great public importance through glaring facts. Esperanza de Saad ("de Saad") was vice-president and general manager of an international bank with an agency in Miami—Banco Industrial de Venezuela, C.A., Miami Agency ("BIV-Miami Agency").[1] She was responsible for assuring BIV's compliance with federal and state law. Yet, during an undercover sting operation, de Saad knowingly violated federal law by facilitating the deposit of roughly $4 million in drug proceeds into BIV accounts. A jury found de Saad guilty of eleven counts of money laundering and conspiracy to launder money, but the trial judge set the verdict aside. The federal government appealed, and while the appeal was pending, de Saad pled guilty to felony money structuring on the condition that the government drop its appeal. She paid a $50,000 fine, was sentenced to probation, and agreed to never again be employed by a financial institution in the United States without the government's prior express written consent.

[1] Petitioners BIV-Miami Agency (a foreign corporation authorized to conduct banking business in Florida) and its Florida subsidiary, BIV Investments and Management, Inc., are referred to collectively in this brief as "BIV."

De Saad then sued BIV seeking indemnification for her criminal defense fees. She also sought damages for breach of her employment contract. The trial court, on summary judgment, required BIV to pay over $4.5 million to indemnify de Saad despite her guilty plea, and it required BIV to pay over $1 million in damages to de Saad under her employment contract, finding that BIV's suspension of her during the criminal proceedings was a breach of the contract even though she was wholly unavailable to perform her job duties while in jail and on trial in California for money laundering. The Third DCA affirmed. Banco Industrial de Venezuela, C.A., v. De Saad, 21 So. 3d 46 (Fla. 3d DCA 2009) (App. A).

This case presents a series of important questions with statewide impact for all corporations doing business in Florida. The first is whether Florida mandates indemnification for a corporate officer who knowingly breaks the law for personal gain and pleads guilty to a felony charge arising from that conduct. Both the Third DCA and trial court said "yes," holding indemnification was required as a matter of law. In doing so, the lower courts concluded de Saad was "successful on the merits or otherwise" under subsection (3) of Florida's indemnification law because even though pleading guilty to a felony, she avoided further jail time. The lower courts concluded that de Saad was charged in her criminal proceeding "by virtue of the fact she was an officer" and was not required to meet the other requirements of subsection (1) of the statute—that is, to show she acted in good faith, in the best

interests of the company, and without knowledge that her conduct was unlawful. The lower courts further concluded that subsection (7) of the statute did not apply to a mandatory indemnification claim under subsection (3). In requiring indemnification, the Third DCA misapprehended Florida law and disregarded the significant differences between Delaware's and Florida's indemnification statutes. Florida's Legislature, as a matter of public policy, enacted an statute that prohibits a corporate officer from seeking indemnification if the officer knowingly violated the law or obtained an improper personal benefit. § 607.0850(7), Fla. Stat. The lower courts ignored Florida's requirements for indemnification and instead adopted Delaware law, even though Delaware has no similar prohibition as that set forth in Florida's subsection (7). In doing so, the Third DCA's opinion created a direct and express conflict with Alternative Development, Inc. v. St. Lucie Club & Apt. Homes Condo. Ass'n, 608 So. 2d 822 (Fla. 4th DCA 1992)

The second question is whether the Third DCA correctly held, in conflict with several other DCAs, that a trial court can grant summary judgment on a breach of contract claim where it must pick between reasonable contract interpretations, resolve ambiguities, and disregard a party's failure to reasonably mitigate damages. The third question is whether the trial court's unprecedented award of indemnification for loans and loan interests for, among other items, living expenses, withstands scrutiny. And finally, the fourth question is whether

Florida's indemnification statute even applies to foreign corporations like BIV, given that the Florida Business Corporation Act clearly states it does not regulate the "internal affairs" of foreign corporations.

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

BIV appeals the Third DCA's conclusion that a corporate officer who knowingly engages in criminal conduct, and pleads guilty to a federal felony charge arising from that conduct, can nonetheless force indemnification on the theory that she negotiated a plea deal to a lesser crime than originally charged by the government. App. A. BIV also appeals the Third DCA's holding that de Saad was entitled to summary judgment for breach of contract because BIV suspended her pending resolution of the criminal charges against her. Id. BIV further asserts that the Third DCA wrongly decided the threshold issue whether BIV-Miami Agency, a foreign corporation, is even subject to Florida's indemnification statute. De Saad v. Banco Indus. de Venezuela, 843 So. 2d 953 (Fla. 3d DCA 2003).[2]

[2] This Court can consider issues other than those upon which jurisdiction is based when they are properly raised and argued. See Boca Burger, Inc. v. Forum, 912 So. 2d 561, 563 (Fla. 2005); Murray v. Regier, 872 So. 2d 217, 223 n.5 (Fla. 2002).

The trial court's summary judgment rulings are found at App. 22, 45, 47, and 51.[3] The trial court's final judgment assessed BIV with $4.5 million in indemnification damages and $1.1 million in contract damages. App. 52. The Third DCA's decision is at App. A. The Court granted review on March 15, 2010.

B. Statutory Background.

The Florida Business Corporation Act ("Act") distinguishes between entities incorporated in Florida and those incorporated elsewhere. § 607.01401(5), (12), Fla. Stat. While a foreign corporation authorized to transact business in Florida has the same rights, privileges, duties, restrictions, penalties, and liabilities as a domestic corporation, § 607.1505(2), Fla. Stat., the Act does not regulate "internal affairs" of foreign corporations. § 607.1505(3), Fla. Stat.

A domestic corporation's indemnification of corporate officers is governed by § 607.0850, Fla. Stat. According to the Third DCA, so too is a foreign corporation's indemnification of corporate officers. This statute grants a corporation discretion to indemnify corporate officers in certain situations,

[3] "App. _" refers to the tab of the appendix filed with this Initial Brief.

§ 607.0850(1), and requires indemnification in other situations, § 607.0850(3).[4] It also precludes indemnification—entirely—where a final judgment establishes that the corporate officer's actions that led to the judgment violated criminal law or provided an improper personal benefit to the corporate officer. § 607.0850(7), Fla. Stat.[5]

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[4] Section 607.0850(1) and (3) state in relevant part:

> (1) A corporation shall have power to indemnify any person who was or is a party to any proceeding . . . by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation . . . against liability incurred in connection with such proceeding, including any appeal thereof, if he or she acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful. * * *
>
> (3) 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(1), (3), Fla. Stat. (emphases added).

[5] Section 607.0850(7) states in relevant part:

> 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 . . . . 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:

C. Factual Background

De Saad is a Venezuelan national who was employed by BIV-Miami Agency as its vice-president and general manager from 1994 until May 25, 1998. App. 7 at 19, 37. She was BIV-Miami Agency's highest ranking officer in Florida and was responsible for compliance with federal and state law. Id. at 37, 51-52.

De Saad negotiated and entered into a 26-month employment contract with BIV in December 1997. App. 7 at 90, App. 9. Her contract required her to "devote all her time and effort to the business of [BIV-Miami Agency] and under no circumstances shall she engage during the term of this Contract in any type of activity or business, financial or otherwise, such as financial gain, profits, or any other pecuniary activity, that may interfere with her functions and responsibilities as an Employee." App. 9 at § I. It incorporated the policies outlined in BIV-Miami Agency's personnel manual. Id. at § XII(c) and § XIII; App. 7 at 92-93. The personnel manual specified that employees "should avoid even the appearance of legal or ethical impropriety in all their actions" and that BIV-Miami Agency

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> (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. (emphases added).

"expects the full, faithful and conscientious performance of duties by each officer and employee in the best interests of the Bank." App. 27 at 43.

Despite these contractual obligations, de Saad was arrested in the federal government's undercover sting operation "Operation Casablanca," which targeted the laundering of drug money. Fred Menoza, "a government informant, known money launderer, and drug dealer" had opened two accounts at BIV-Miami Agency through de Saad. App. 1 at ¶¶ 13, 17; App. 7 at 168. Mendoza and de Saad met many times after he opened the accounts, and she offered him advice about the pros and cons of Swiss banks accounts and Bahamian banks. App. 1 at ¶¶ 21-23, 27, 28; App. 7 at 141-142, 192. De Saad told Mendoza that she would provide this advice only if her name was kept secret. She also recruited another employee to assist her in providing advice to Mendoza. App. 37 at 153-156.

Carmen Salima Irigoyen ("Salima"), another individual caught in the sting operation, met and spoke with de Saad many times as Mendoza's "lawyer." See, e.g., App. 1 at ¶¶ 13, 17; App. 7 at 139-140, 176-177, 215. In early 1998, Salima attempted to cash a $20,000 check at BIV-Miami Agency to give to de Saad. App. 1 at ¶ 25; App. 24 at 3. De Saad had the $20,000 check divided into four separate $5,000 checks to avoid having a Currency Transaction Report generated, "which she knew would have happened if a single $20,000 check had

been cashed." App. 24 at 3; accord App. 7 at 241-242.[6] De Saad had BIV employees cash the checks on separate days to avoid reporting requirements. App. 24 at 3; App. 7 at 242-243; App. 1 at ¶ 26. She had the cash from one check deposited into her personal bank account. App. 24 at 3-4; App. 7 at 242-243. She admitted in pleading guilty that she "acted for the purpose of evading [CTR] requirement." App. 24 at 4.

As a result of Operation Casablanca, the U.S. government indicted de Saad and others for money laundering on May 14, 1998. App. 11 at Dkt. Entry # 1; see also App. 23. BIV immediately suspended her until her guilt or innocence was determined. App. 8; App. 14 at 44. De Saad's employment contract provided that BIV could terminate her at any time if she was "arrested or imprisoned for a felony, fraud, insubordination, dishonest behavior," and the personnel manual incorporated therein provided that BIV would have grounds to immediately terminate or suspend her employment "pending clarification of charges" and "[c]onclusive evidence of dishonesty or involvement in a misdemeanor or felony." App. 9 at § VI; App. 27 at 32. A few months later, de Saad told a BIV employee

[6] Under the Bank Secrecy Act, all financial institutions must file a Currency Transaction Report, or "CTR," on any transaction that generates $10,000 in cash for or on behalf of the same person on the same business day. The CTR is designed to combat illegal sources of revenue, and the circumvention of this requirement—for example, by breaking a single currency transaction into multiple transactions of values less than $10,000—is known as "structuring." See 31 U.S.C. § 5313 (CTR requirement); 31 U.S.C. § 5324 (structuring prohibition).

who had cashed one of the $5,000 checks for her that "what she was worried about were the checks," that "the only proof that they had were the checks," and that "the only problem, big problem, she had was were [sic] the checks cashed by us." App. 12 at 26-29; see also App. 32 at 124-126.

De Saad's criminal case went to trial in December 1999.[7] She hired four law firms to defend her, including Joseph Beeler, P.A. ("Beeler"), to which she assigned her right to indemnification. App. 13 at ¶ 9, App. 7 at 423. On December 20, 1999, the jury found her guilty of all eleven counts. App. 16 at 20-7, 20-8. The trial court set aside the jury's verdict, App. 10, but noted that although he felt the government had failed to prove de Saad's involvement in money laundering "beyond a reasonable doubt," the government had presented evidence that she "received four $5,000 checks from Salima for the services she provided, and a jury certainly could have considered her receipt of the checks and the manner in which they were cashed as evidence of some wrongdoing." Id. at 23, 25.

The government appealed to the United States Court of Appeals for the Ninth Circuit. App. 11 at Dkt. Entry 465. While the appeal was pending, Beeler negotiated a guilty plea for de Saad to the felony crime of "Structuring a Monetary Transaction in violation of Title 31 U.S.C. §5324(a)(3)"—in exchange for the

[7] Because de Saad's guilt or innocence remained unclear in November 1999, BIV notified her that her contract was not being renewed in accord with the 60-day notice provision in the contract. App. 15; App. 9 at § VII.

government's dismissal of its appeal. App. 24. Her plea was directly based on evidence about the four $5,000 checks identified in the Second Superseding Indictment, offered as evidence during the trial, and referred to by the trial judge as evidence of "wrongdoing." App. 23 at ¶¶ 45-50; App. 10 at 23; App. 7 at 396-398. Her plea was filed in the same criminal case, before the same federal judge, with de Saad and the government represented by the same attorneys. App. 7 at 160-161; App. 11. In connection with her guilty plea, de Saad was fined $50,000, sentenced to one year of probation, and agreed never to seek or accept employment with any financial institution in the United States without the prior express written consent of the U.S. Attorneys' Office. In return, the government withdrew its Ninth Circuit appeal. App. 24 at 6-8; App. 17. The lengthy criminal proceedings against her came to an end after, and because, she pled guilty to a felony crime.

There is no question that de Saad's conduct harmed BIV. Because Venezuela owns BIV-Miami Agency, her misconduct implied that Venezuela was involved in laundering money. App. 14 at 53. A federal grand jury, the U.S. Federal Reserve, and the State of New York investigated BIV-Miami Agency. App. 18; App. 19; App. 20. And BIV-Miami Agency had to defend two lawsuits. See United States v. Banco Industrial de Venezuela, No. 8:00-cv-373 (C.D. Cal.) (filed Apr. 17, 2000); United States v. $4,007,891.28 seized from Banco Industrial de Venezuela, No. 2:98-cv-5762 (C.D. Cal.) (filed July 17, 1998).

After years of litigation, BIV-Miami Agency prevailed in one case (No. 2:98-cv-5762, transferred to No. 2:99-cv-1373). In the other, the government ultimately dismissed its claims after determining that de Saad "was the only BIV employee who had actual knowledge of, and participated in, the conspiracy to launder drug proceeds through BIV [and] that in doing so, de Saad personally benefited and that BIV acted appropriately in suspending de Saad from her position without pay as General Manager of the Miami Agency once it learned of her activities." App. 29 at ¶ 4.

D. Course of Proceedings and Disposition Below.

1. De Saad And Beeler File Suit Against BIV.

Shortly after pleading guilty, de Saad sued BIV for indemnification of her attorneys' fees and costs in the criminal proceedings under § 607.0850, Fla. Stat., and for breach of contract because BIV suspended her while she was under arrest and on trial. Four years later, Beeler intervened based on de Saad's assignment of her indemnification right to him. He filed a parallel two-count complaint. App. 5.[8]

[8] BIV-Miami Agency asserted counterclaims based on the damages it incurred from de Saad's misconduct: the significant costs of the federal, state, and internal investigations and litigation to which it was subjected, and the loss of use of bank funds. App. 4; App. 6. The trial court granted partial summary judgment against BIV-Miami Agency on its counterclaims, holding that it could not recover for damages incurred defending the governmental proceedings. App. 48. This ruling is in error for many of the same reasons that the indemnity and breach of contract summary judgment rulings were in error. It should be vacated for reevaluation in light of the Court's holding as to the indemnity and breach of contract claims.

2. After The Third DCA Holds That Foreign Corporations Are Subject to Florida's Indemnification Statute, The Trial Court Grants Summary Judgment Against BIV On Indemnification.

The threshold issue on the indemnification claim was whether Florida's indemnification statute applies to foreign corporations. On a motion for judgment on the pleadings, the trial court held that the statute was facially inapplicable to foreign corporations and dismissed the claim. As the trial court reasoned, Chapter 607 defines corporation, as used in the indemnification statute, to mean only entities incorporated in Florida. The Third DCA reversed. De Saad, 843 So. 2d at 954. The Third DCA concluded although the indemnification statute is limited to Florida corporations, another statutory provision makes foreign corporations subject to the same duties and liabilities as domestic corporations. Id. (citing § 607.1505(2), Fla. Stat.). The Third DCA rejected the argument that indemnification was part of the "internal affairs" of a foreign corporation that Florida does not regulate. § 607.1505(3), Fla. Stat.

On remand and after discovery, BIV and de Saad both moved for summary judgment on indemnification. BIV argued that de Saad had assigned her entire indemnification claim to Beeler and therefore had no claim left to pursue. The trial court rejected this argument based on unspecified "material issues in dispute." App. 21 at 90-91. The trial court also rejected, initially, de Saad's suggestion that the felony structuring guilty plea was an "unrelated" charge, given the

government's express agreement to drop its appeal of the money laundering charges in exchange for her plea. Id. at 16-17; see also id. at 21 (COURT: "When you say 'unrelated charge,' it's not an unrelated charge, it wasn't charged in this, but certainly it's related to the conduct that the government felt was money laundering."). But the trial court then changed course and granted summary judgment because having "reviewed the statutes and the Fourth District opinion,[9] [the court] believe[d] that that opinion is distinguishable from this case." Id. at 91. The trial court did not require, and de Saad did not submit, any evidence showing that she acted in good faith and in the best interests of the company, and that she did not know her conduct was not unlawful. The trial court's resulting order simply states that "Plaintiff's Motion for Summary Judgment is granted." App. 22.

BIV moved for reconsideration. First and foremost, neither the trial court nor de Saad (nor Beeler) had distinguished (or could distinguish) the Fourth DCA's decision in Alternative Development. BIV further pointed out that given the trial court's ruling that "material issues [were] in dispute" as to whether de Saad had assigned her entire right to seek indemnification to Beeler, it made no sense for the trial court to have—in the next sentence—granted summary judgment to de Saad on her indemnification claim. R.7218-19; 7225-27; App. 39 at 7. At the reconsideration hearing, the trial court recognized the merit to BIV's point,

[9] Alternative Dev., Inc., 608 So. 2d at 828.

explaining that "I did say those words, but I think that's more because that's just, you know, words that you are taught to say when you are denying a Motion for Summary Judgment." App. 39 at 7-8. The trial court stated that it "withdr[e]w that statement" and found there were no disputed facts and that BIV is "not entitled to relief and they [de Saad and Beeler] are"—despite the fact that neither de Saad nor Beeler had moved for summary judgment based on assignment. Id. at 8.

BIV also requested reconsideration because de Saad's submission failed to establish that there were no facts in dispute. R.7228-36. But just as with the initial summary judgment ruling, the trial court denied BIV's motion as to this argument without addressing it—or the evidence on which they relied. The trial court's one sentence ruling simply stated that "[e]xcept for my clarification in terms of the inartful or the inaccurate language I used in denying defendant's [sic] motion, I am going to deny the Motion for Reconsideration." App. 39 at 26-27. See also App. 40 (Order stating that BIV's motion for reconsideration "is DENIED.").

Over a year later, Beeler moved for summary judgment on his indemnification claim against BIV "for the same reasons as previously set for by Mrs. de Saad."[10] R.2584. BIV opposed the motion, pointing out—among other items—the Fourth DCA's Alternative Development decision and the numerous

[10] Beeler attempted to join de Saad's summary judgment motion at the hearing. But Fla. R. Civ. P. 1.510(c) does not permit oral requests for summary judgment, and the trial court found Beeler "wasn't part of this motion." App. 21 at 4, 5, 31.

disputed facts. R.4068-87. The court granted summary judgment to Beeler "for the same reasons" it had granted summary judgment to de Saad. App. 45 at 12.

The trial court then conducted a nine-day bench trial on indemnification damages. App. 46 at 3. Among the "expenses" that BIV objected to were over $2 million in loans and loan interest that included monies spent on living expenses, for bail, and at high-end retail stores—not defending the criminal charges.[11] After searching state and federal indemnification decisions, BIV was unable to locate a single decision that had awarded recovery for these types of "expenses." The trial court, however, was undeterred from being the first court in the country to do so. It awarded repayment of over $2 million of loans and interest on loans (at interest rates of up to 25%), and willingly overlooked the fact that documents substantiating many of the loans "were not provided to the court." Id. at 69.

The trial court justified its decision by stating that BIV should be punished for failing to "stand by" de Saad in 1998 and for failing to indemnify her from the beginning, in favor of a "business decision" made to "put itself in a better light with the government." Id. at 69. The trial court went so far as to state that "BIV must now pay for that miscalculation." Id. Because the trial court believed de Saad had proved herself to be "successful on the merits or otherwise" under

[11] BIV also objected to costs not recoverable under the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, 915 So. 2d 612, 616 (Fla. 2005). Despite noting the "ample authority" that the Guidelines did not permit recovery of these costs, the trial court granted recovery anyway. App. 46 at 64.

subsection (3), the court never required or considered the additional statutory requirements set forth in subsections (1) and (7) of § 607.0850, Fla. Stat.. Under subsection (1), BIV could only have indemnified de Saad up front if she had "acted in good faith and in a manner that . . . she reasonably believed to be in, or not opposed, to the best interests of the corporation" and if she "had no reasonable cause to believe . . . her conduct was unlawful." § 607.0850(1), Fla. Stat. The trial court also failed to consider subsection (7), which limits indemnification demands otherwise mandated by subsection (3). The trial court's confusion regarding Florida law on this point affected its entire ruling. The trial court assessed a total of $4,531,264.54 against BIV on the indemnification claim alone.

3. The Trial Court Grants Summary Judgment Against BIV On The Breach Of Contract Claim.

De Saad and Beeler moved for summary judgment on the breach of contract claim based on the "plain language" of the contract. R.2410-2568, R.2578-2579. BIV opposed the motions because the parties offered differing reasonable interpretations of the contractual rights, which could not be resolved on summary judgment; there was a disputed fact as to whether de Saad breached the contract before she accused BIV of having done so, which would preclude her recovery; and de Saad's summary judgment motion relied heavily on the same letter from the bank president that the trial court had concluded "raise[d] some question of fact" when BIV submitted it with BIV's earlier motion for summary judgment on the

indemnification claim. R.2795-2995; App. 21 at 90. Nevertheless, the trial court granted summary judgment to de Saad and Beeler. App. 47. It held that the meaning of the contract was a matter of law, appropriate for summary judgment, and then proceeded to adopt de Saad's proposed interpretation of BIV's contractual right to suspend de Saad without pay. Id. at 7-8. The trial court rejected BIV's argument that her interpretation required the court to read a time limitation into the contract. Id. at 8-9. Finally, the trial court rejected BIV's argument that summary judgment could not be awarded because of disputed facts as to her performance under the contract and her duty to mitigate. Id. at 10.

De Saad and Beeler next moved for summary judgment on contract damages. R.5393-5446; R.5490-92. BIV opposed the motion on the basis that factual disputes existed as to whether the award should be reduced based on de Saad's duty to mitigate and disputed facts about mitigation. R.5927-33. The trial court entered judgment against BIV for $1,058,023.82—apparently holding that de Saad had no duty to mitigate her damages. App. 52 at 3.

4. Final Judgment.

The trial court's final judgment entered on May 30, 2008 awards: (1) $2,596,913.80, along with accrued interest of $298,182.61 and post-judgment interest at a rate of 11% to de Saad on the indemnification claim; (2) $1,013,661.92, along with accrued interest of $622,506.21 and post judgment interest to Beeler on

the indemnification claim; (3) $987,144.64, along with accrued interest of $70,879.18 and post-judgment interest on the breach of contract claim to both de Saad and Beeler; and (4) nothing to BIV on its counterclaims. App. 52.

In entering final judgment for de Saad and Beeler, the trial court opted not to resolve whether de Saad had a viable claim on which she could recover—even though her fee agreement with Beeler specified that she assigned him "all right, title and interest she may have to indemnification or other payment from her employers, Banco Industrial de Venezuela, S.A. and BIV Investments and Management, Inc." App. 13 at ¶ 9 (emphasis added); App. 7 at 423. The trial court simply sidestepped the issue of which party had a claim against BIV, resulting in separate indemnification awards in favor of each of de Saad and Beeler, and now pending attorneys' fees demands by their multiple separate counsel. BIV appealed, and de Saad and Beeler filed cross-appeals, App. 53; App. 54; App. 56.

5. The Third DCA's Decision.

The Third DCA affirmed. On the indemnification claim, it "follow[ed]" the interpretation of Delaware's indemnification statute offered by two Delaware trial court decisions as controlling on the meaning of Florida's indemnification statute. Banco Industrial de Venezuela, C.A. v. De Saad, 21 So. 3d 46, 49 (3d DCA 2009) (citing Perconti v. Thornton Oil Corp., 2002 WL 982419 (Del. Ch. 2002) and Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138 (Del. Super.

Ct. 1974)). It also held that subsection (7) of Florida's statute did not limit the indemnification described in subsections (1) and (3). Id. at 49 n.4 (citing § 607.0850, Fla. Stat.). And on the breach of contract claim, it held that BIV had breached the contract by suspending de Saad and not reinstating her once the charges against her were clarified—and then proceeded to list possible options for when this "clarification" might have occurred. Id. at 50. The fact that the Third DCA could not tell when this "clarification" occurred gave it no pause in affirming summary judgment. Judge Schwartz, in concurrence, suggested that the suspension was effectively a termination for cause that was "fully justified by the contract and the facts of the case," but nevertheless affirmed the summary judgment ruling. Id. at 50-51.

SUMMARY OF THE ARGUMENT

This case will resolve a conflict between the Third and Fourth DCAs by determining whether the Florida legislature's adoption of Section 607.0850 can be read to mandate indemnification for corporate officers who claim to be "successful on the merits or otherwise" under subsection (3) by pleading guilty to fewer than all criminal charges against him or her, but who nonetheless have admittedly and knowingly committed crimes and acted for improper personal gain under subsection (7). While the Fourth DCA has held that § 607.0850(7) limits indemnification demands otherwise mandated by § 607.0850(3), the Third DCA in

this case held to the contrary. The Fourth DCA was correct, and the Third DCA's decision here should be reversed. The Florida Legislature spoke in clear and unambiguous terms when it adopted language, not found in the indemnification provisions of Delaware or any other state, that specifically requires indemnification "shall not be made" for a proceeding in which the final judgment shows the individual seeking indemnification knowingly committed a crime and acted for improper personal gain. The Third DCA and trial court below ignored both this clear language of the statute and the policy reflected in this provision to conclude that Delaware law controlled the result, and that all corporations in Florida, whether incorporated or merely doing business in the state, must indemnify corporate officers who plead guilty to fewer than all criminal counts charged against them, even when they knowingly and admittedly have violated criminal law and have acted for their own improper personal gain.

In addition to misinterpreting Florida's indemnification statute, the Third DCA also affirmed the trial court's erroneous grant of summary judgment despite numerous material disputed facts. There were material factual disputes over the two factors necessary for indemnification that the trial did purport to analyze: whether de Saad's guilty plea counts as "success" in the criminal proceeding against her and as to whether she was charged "by reason of the fact" she was an officer at BIV. Moreover, there was no evidence at all in the record showing de

Saad could satisfy the additional requirements for mandatory indemnification (under subsection (3)) for a proceeding under subsection (1), specifically: a showing that de Saad acted in good faith, in the best interests of the company, and without knowledge that her conduct was unlawful. Both lower courts ignored these statutory requirements.

Similarly, the Third DCA affirmed the trial court's grant of summary judgment to de Saad on her breach of contract claim despite material disputed facts. The Third DCA approved of the trial court rejecting BIV's reasonable interpretation of de Saad's employment contract—in a summary judgment ruling—and failing to address which party breached first, when damages began accruing, and the extent to which de Saad could have mitigated her damages. It also affirmed the unprecedented obligation—in Florida or anywhere else—imposed by the trial court to force BIV to indemnify de Saad for loans and loan interest.

Finally, this case comes to the Court with a wrongly decided threshold issue: whether a foreign corporation like BIV-Miami Agency is even subject to Florida's indemnification statute, which on its face applies only to domestic corporations.[12] The Third DCA's decision to apply Florida law to a matter of internal affairs—like indemnification of officers—is unprecedented and ignores the statutory provision leaving matters of internal affairs for regulation by the place of incorporation.

[12] BIV Investments is a Florida corporation and subsidiary of BIV. BIV–Miami Agency, not BIV Investments, was de Saad's employer.

ARGUMENT

I. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED TO DE SAAD AND BEELER ON INDEMNIFICATION (COUNT I).

A. Legal Standard.

The Court reviews a trial court's grant of summary judgment de novo. See Volusia County v. Aberdeen at Ormond Beach, LP, 760 So. 2d 126, 130 (Fla. 2000). In so doing, the Court reviews de novo both whether there is a "genuine issue of material fact," id., and whether the trial court properly resolved any questions of law, such as statutory interpretation. Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001). If there is even the "slightest doubt" as to whether the moving party has conclusively established that no disputed material issues exist, summary judgment is improper. Williams v. City of Lake City, 62 So. 2d 732, 733 (Fla. 1953) (holding that if "the slightest doubt remains, a summary judgment cannot be granted") (emphasis in original).

The trial court erred in granting summary judgment to de Saad and Beeler, and the Third DCA erred in affirming this judgment, because both courts (1) misinterpreted Florida's statutory indemnification law and (2) ignored disputed issues of material fact. Both are addressed below.

B. The Third DCA and Trial Court Misinterpreted Florida's Indemnification Statute.

The trial court concluded in its grant of summary judgment that de Saad and Beeler were entitled to summary judgment because they proved that de Saad was

"successful on the merits or otherwise" and that she was named in the criminal proceeding "by reason of the fact" that she was an officer of BIV. See Fla. Stat. §§ 607.0850(1), (3); App. 21 at 91; App. 22; App. 47 at 12.[13] The Third DCA affirmed. 21 So. 3d at 49. That is incorrect as a matter of law. Not only was there a factual dispute over those two factors, but the lower courts' analyses completely overlook the further requirements of subsection (1) (requiring that de Saad show she was acting in good faith, in the best interests of the company, and that she did not know her conduct was unlawful). Given her guilty plea and her acknowledgement of an improper personal benefit, de Saad could not, and did not even try to, submit evidence satisfying these additional requirements of subsection (1). Nonetheless, both lower courts ignored these requirements, apparently concluding that her guilty plea constituted "success on the merits or otherwise" under subsection (3) and that no other factor had to be considered. But subsection (3) specifically requires the "success" be "in defense of any proceeding referred to in subsection (1)," and subsection (1) requires that the proceeding be one in which she was sued "by reason of the fact that he or she is or was as director, officer, employer or agent of the corporations," (here a disputed issue of fact), and that she show she was acting in good faith, in the best interests of the company, and did not

[13] These were the only two factors that de Saad and Beeler even tried to prove. Indeed, de Saad's summary judgment motion attached only the 2003 Third DCA's opinion on indemnification, the Second Superseding Indictment, the November 18, 1999 BIV letter to de Saad, the acquittal order and her plea agreement.

know her conduct was unlawful. De Saad could not meet these requirements, and the lower courts misapprehended Florida law in ignoring them.

The lower courts also overlooked the policy decision that the Legislature made in subsection (7). Section § 607.0850(7), Fla. Stat., states that "indemnification . . . shall not be made to . . . any . . . officer . . . 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" either a knowing "violation of the criminal law" or a "transaction from which the . . . officer . . . derived an improper personal benefit." Id. (emphases added).

As a result of the Legislature's considered policy decision in enacting this prohibition, Florida has determined that a corporate officer should not gain the benefit of indemnification if the final judgment in a proceeding establishes the officer's material conduct was a knowing violation of the criminal law or involved receipt of an improper personal benefit. This legislative judgment is consistent with the overall public policy of Florida, which generally prohibits indemnification after intentional wrongful acts. Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989). And the Legislature's judgment is a consistent one. Not only are corporate officers precluded from indemnification under these circumstances, but so are officers of limited liability companies. § 608.4229(2), Fla. Stat. (containing same restriction).

The Fourth DCA recognized the import of the plain and unambiguous language of subsection (7) in Alternative Development, Inc., 608 So. 2d at 828. There, the court explained that the mandatory indemnification subsection, § 607.0850(3), which provides for indemnification to the extent a party prevails, is limited by the preclusive language in § 607.0850(7), which refers to the "cause of action" adjudicated. Id. (holding that "if the trial court finds under § 607.0850(7) that the Dehons did not meet the requisite standard of conduct as it gave rise to the action, then they are not entitled to indemnification for prevailing on Count II."). See also Colonial Guild Ltd. v. Pruitt, 2004 WL 627921, at *2 (Ohio Ct. App. Mar. 31, 2004) (holding that the Florida indemnification statute "expressly prohibits indemnification of a director, officer, employee, or agent" if the requirements of § 607.0850(7) are not met). The trial court found—without stating a reason—that the Fourth DCA's decision was "distinguishable." App. 21 at 91. In fact, the Fourth DCA was correct as a matter of law, and the trial court erred in adopting a different statutory interpretation. The Third DCA's opinion affirming the trial court is in express and direct conflict with the Fourth DCA's opinion.

De Saad did not even attempt to overcome the express prohibition on indemnification for officers who take action material to a judgment that is illegal or provides an improper personal benefit to that officer. That is because she could not avoid either of the two factors that bar her receipt of millions of dollars in

indemnification. She knowingly broke the law, as her guilty plea shows, and she accepted an improper personal benefit, in the form of a $20,000 total payment to her, as an incentive to do so. As a result, the trial court's grant of summary judgment to her was in error and must be reversed. See, e.g., Ranger Const. Indus., Inc. v. Martin Cos. of Daytona, Inc., 881 So. 2d 677, 682 (Fla. 5th DCA 2004) (reversing summary judgment where granted on "legally incorrect" basis).

De Saad and Beeler asked the courts below to overlook the plain and unambiguous language, to reject the Fourth DCA's analysis in Alternative Development, and to conclude that the Florida Legislature "intended" to permit indemnification for conduct an officer undertakes knowing it violates the law or to improperly benefit at the corporation's expense. But even if correct, any such "intent" is not relevant here. Where—as here—the terms of a statute are "clear and unambiguous," then " 'the statute must be given its plain and obvious meaning.' " Saleeby v. Rocky Elson Const., Inc., 3 So. 3d 1078, 1082 (Fla. 2009) (citation omitted). While Respondents have argued that Delaware law does not include this prohibition, that argument should have been rejected by the Third DCA as irrelevant. The Florida Legislature had every right to exercise its independent judgment and decide that under Florida law, corporate officers who knowingly commit crimes and seek to profit at the expense of the corporation to

which they owe a duty of care and loyalty should not get the benefit of indemnification.[14]

Under the correct interpretation of Florida's indemnification statute, the fact that de Saad knowingly violated the law and acted for improper personal benefit, at the expense of BIV, renders erroneous both the trial court's grant of summary judgment to de Saad and Beeler and the Third DCA's affirmance of that judgment.

C. The Third DCA and The Trial Court Ignored Disputed Issues Of Material Facts That Prohibit Entry of Summary Judgment to De Saad And Beeler On The Indemnification Claim.

In addition to relying on an erroneous statutory interpretation, the Third DCA erred in ignoring (as did the trial court) the disputed facts at issue on the only two factors analyzed by the courts in awarding millions of dollars in indemnification: (1) that de Saad was "successful on the merits or otherwise" under subsection (3) and (2) that de Saad was charged with a crime "by reason of the fact" that she was an officer under subsection (1). On these two factors, however, de Saad and Beeler failed to show the absence of disputed facts. Just the

[14] Among other differences, Florida is a Model Business Corporation Act state; Delaware is not. In fact, more similarities exist between Florida's statute and the Model Business Corporation Act than between Florida's and Delaware's statutes. *See* Stuart R. Cohn, "Dover Judicata: How Much Should Florida Courts Be Influenced by Delaware Corporate Law Decisions?" 83 Fla. Bar J. 21 (Apr. 2009) ("The prominence of Delaware courts should not…lead to an overly submissive attitude or one that gives undue influence to Delaware decisions . … there are considerable differences between Florida and Delaware law that ought to provide caution to Florida courts.").

opposite: the record plainly showed disputed facts as to each factor, either of which standing alone was sufficient to defeat summary judgment.

1. There were disputed facts as to whether de Saad was "successful on the merits or otherwise."

The meaning of "successful on the merits or otherwise" under subsection (3) of Florida's indemnification law is a matter of first impression in this Court. De Saad and Beeler argued that she was "successful on the merits or otherwise" in the criminal proceedings because she pled guilty to fewer than all charges brought against her, and because her guilty plea to felony structuring was somehow "unrelated" to the issue of her success in the criminal proceedings. De Saad—who had the burden to establish evidence in her favor as the moving party—identified no summary judgment evidence to support her assertion of "unrelatedness." See Fla. R. Civ. P. 1.510(c). Relying on her lawyer's opinion that the structuring charge was "unrelated" was insufficient to support summary judgment. See, e.g., Frechter v. K Mart Corp., 578 So. 2d 316, 317 (Fla. 3d DCA 1991) ("plaintiff's opinions and beliefs do not constitute admissible evidence on summary judgment").

The "unrelatedness" of her guilty plea was vehemently disputed. For starters, everything happened in a single criminal preceding against de Saad—C.D. Cal. No. 2:98-cr-504-CAS-4—which terminated with her guilty plea. App. 11 at Dkt. 520. She pled guilty before the same judge, represented by the same defense

attorneys, and with the government represented by the same prosecutor. Id. In addition, the money laundering indictment contained the allegations about the $20,000 in checks that formed the basis of her guilty plea. Compare App. 23 at ¶¶ 45-50 with App. 24 at 3-4.[15] The U.S. government offered the $20,000 in checks as evidence against de Saad during her criminal trial. App. 7 at 398. The individuals who cashed the checks for de Saad testified at that trial, and the checks were introduced as evidence. App. 31; App. 32; App. 33. Both sides' closing arguments focused on the checks. App. 34. And the federal judge, although he overturned the jury's guilty verdict on the money laundering charges, referred to the checks as evidence of "wrongdoing." App. 10 at 23.

There can be no dispute that the criminal proceeding against de Saad came to an end only after she pled guilty. Because the U.S. government agreed to dismiss its appeal in exchange for her guilty plea, her plea enabled her to dodge appellate review of whether the jury correctly found her guilty of the money laundering charges. App. 24 at 8; App. 17 (confirming that plea was in exchange for government's dismissal of its appeal seeking to reinstate the guilty verdict).

[15] Even before the U.S. government filed its Second Superseding Indictment including allegations about the checks, de Saad had told an employee who had cashed one of the checks for her "that what she was worried about were the checks" and that "the only problem, big problem, she had was were [sic] the checks cashed by us." App. 12 at 26-29; see also App. 32 at 124-26.

In addition, two of de Saad's criminal defense attorneys acknowledged that the proceeding was one single, continuous criminal proceeding. App. 25 at 13-14 (stating that in Lindsey's view, the government linked the money laundering and structuring together); App. 35 (Beeler's resume stating that a "negotiated settlement" ended the money laundering case against de Saad); App. 44 at 240-241; (Beeler's testimony that a "negotiated settlement" is "accurate" summary of how his representation of de Saad concluded); id. at 225-226 (Beeler's testimony that the money laundering and money structuring were "intertwined"). So did the U.S. government's lead prosecutor, Duane Lyons, who stated that "[t]he acts to which Ms. De Saad plead guilty arose out of the same events for which Ms. De Saad was charged and originally convicted." App. 26 at ¶ 7.

BIV provided substantial additional evidence creating a disputed issue of fact on de Saad's claim to be "successful on the merits or otherwise." Specifically, Marcos Daniel Jiménez, the U.S. Attorney for the Southern District of Florida from 2002-2005, offered his expert opinion that the criminal case against de Saad "did not result in a success on the merits for de Saad," App. 30 at ¶ 5, and that the United States was actually the prevailing party. Id. at ¶ 11. A second expert, Robert B. Serino—who worked for 17 years as Deputy Chief Counsel in the Office of the Comptroller of the Currency—also opined that de Saad's conviction "was not a success on the merits for de Saad." App. 38 at ¶¶ 2-4, 7.

Neither court below, in granting and affirming summary judgment against BIV, addressed these expert opinions. The courts' failure to address the evidence of disputed material facts, which should have precluded summary judgment, was reversible error. See, e.g., Turner v. PCR, Inc., 754 So. 2d 683, 690 (Fla. 2000).

Given that de Saad and Beeler did not identify any summary judgment evidence establishing that her guilty plea was "unrelated" to the criminal proceeding and her "success" therein, and that BIV presented substantial summary judgment evidence that the plea was related and that de Saad did not succeed on the merits of the criminal proceedings against her, the trial court's grant of summary judgment against BIV was in error. Williams, 62 So. 2d at 733; see also App. 21 at 16-17, 21 (rejecting suggestion that felony structuring was "unrelated" to the money laundering charges); National Union Fire Ins. Co. of Pittsburgh, Pa. v. Continental Illinois Corp., 652 F. Supp. 858, 864-865 (N.D. Ill. 1986) (holding that "successful on the merits or otherwise" must be decided as a factual matter).

2. There were disputed facts as to whether de Saad was charged criminally "by reason of the fact" she was a BIV officer.

De Saad and Beeler also claimed to satisfy the statutory requirement to show that de Saad was a party to the criminal proceeding "by reason of the fact" that she was an officer of BIV. The trial court did not attempt to explain how de Saad and

Beeler had conclusively demonstrated that BIV could not prevail on this factor.[16] The Third DCA also offered no explanation. In fact, BIV presented substantial evidence disputing the (unsupported) assertion that de Saad was a party to the criminal proceedings "by reason of the fact" that she was a BIV officer.

First, the government—the author of the Second Superseding Indictment—stipulated that de Saad acted alone and not as an officer of BIV in dismissing its claim against BIV. App. 29 ("De Saad was the only BIV employee who had actual knowledge of, and participated in, the conspiracy to launder drug proceeds through BIV [and] that in doing so, de Saad personally benefited and that BIV acted appropriately in suspending de Saad from her position without pay as General Manager of the Miami Agency once it learned of her activities.").

Second, the Second Superseding Indictment itself shows that de Saad was a party to this proceeding as an individual. See, e.g., App. 23 at 1 (case style), id. at 4 ("Defendant [Salima] also paid defendants ESPERANZA DE SAAD and MARCO TULIO HENRIQUEZ a fee for laundering money."); id. at 9 (defendant Salima told an undercover officer "that she would split her commission with

[16] The "by reason of the fact" standard essentially looks at whether a person is made party to a proceeding in an official capacity for action taken to benefit the corporation, or in an individual capacity for actions taken to benefit the individual. See, e.g., Souder v. Rite Aid Corp., 911 A.2d 506, 510 (Pa. Super. Ct. 2006); Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 562 (Del. 2002). Neither de Saad nor Beeler provided any conclusive evidence that de Saad was made a party to the criminal proceeding in her official capacity. App. 24 at ¶ 6a.

defendant ESPERANZA DE SAAD"); id. at 11-12 (discussing $20,000 in checks); id. at 16-17 (ten counts of money laundering). De Saad herself characterized this indictment as being brought against "individuals," not officers. R.820.

Third, BIV presented evidence that de Saad could not have been a party to the criminal proceeding by virtue of being an officer since de Saad knew that her conduct was expressly prohibited by BIV. App. 7 at 130; App. 27 (Personnel Policy Manual, at G.1 Legal and Ethical Standards, G.2 Loyalty, G.3 Employment, G.6 Conflict of Interest; Misuse of Corporate Position or Property; Gifts; Loans, and G.7 Reporting of Illegal or Questionable Activities); App. 28 (Compliance Manual §§ 1, 2, and 7, discussing compliance with the Bank Secrecy Act, the required use of CTRs, the required reporting of suspicious conduct, and the prohibition on money laundering). This amounts to far more than the "slightest doubt" that her misconduct was outside the scope of her employment and that she was a party to the criminal proceeding by virtue of being a BIV officer.[17]

Both in and out of the indemnification context, the District Courts of Appeal consistently find summary judgment inappropriate when there is a genuine issue of

[17] Even under Delaware's indemnification scheme on which Respondents have relied, indemnification "is typically subject to a requirement that the indemnitee have acted in good faith and in a manner that he reasonably believed was in the best interests of the company." Majkowski v. Am. Imaging Mgmt. Servs., LLC 913 A.2d 572, 586 (Del. Ch. 2006). De Saad clearly did not, yet neither the trial court nor the Third DCA addressed this issue.

material fact as to whether an officer or employee was acting in the capacity of, and within the scope of their duties as, an officer or employee when the events that form the basis of the claims occurred. See, e.g., Williams v. Roth, 622 So. 2d 606, 606 (Fla. 1st DCA 1993); O.E. Smith's Sons, Inc. v. George, 545 So. 2d 298, 300 (Fla. 1st DCA 1989); Montadas v. Dade Scrap Iron & Metal, Inc., 666 So. 2d 1054, 1055 (Fla. 3d DCA 1996); Gabor & Co. v. Gabor, 569 So. 2d 817, 818 (Fla. 3d DCA 1990); State ex rel. Blatt v. Panelfab Int'l Corp., 314 So. 2d 196, 198 (Fla. 3d DCA 1975); Goodman v. Hartigan, 862 So. 2d 890, 893 (5th DCA 2003). Florida case law thus makes clear that whether an employee's actions fall within the scope of employment, or a corporate officer's actions are "by virtue of the fact" she is an officer, is inherently a fact question to be decided by the trier of fact.

Florida courts are no different than other courts around the country that also view this issue as a question of fact. See In re William L. Miller, 290 F.3d 263, 267 (5th Cir. 2002) (affirming no indemnification under Delaware law; "whether a nexus [between the corporate officers' or directors' official activity and the matter for which indemnification is sought] exists is a question of fact to be determined by the trial court"); Westphal v. U.S. Eagle Corp., 2002 WL 31820973, at *3 (Del. Ch. 2002) (denying summary judgment in indemnification claim based on factual dispute as to whether individual was sued by reason of his employment with the company"); First Am. Corp. v. Al-Nahyan, 17 F. Supp. 2d 10, 31 (D. D.C. 1998)

(denying indemnification under Virginia law "because both parties have introduced sufficient evidence to demonstrate that the fact [whether the employee was charged by reason of the fact that he was an officer] is in dispute"); H.R. Plate v. Sun-Diamond Growers of Cal., 225 Cal. App. 3d 1115, 1125 (1990) (reversing indemnification of officer under California law, as whether a corporate agent is sued by reason of his official corporate position is a factual question.).[18]

BIV presented the trial court with substantial record evidence disputing whether de Saad was made a party to the criminal action by virtue of conduct undertaken within the scope of her duties as a BIV employee. She discussed with a confidential informant the pros and cons of opening Swiss bank accounts and buying a bank in the Bahamas to launder money between companies—and stated that she was giving her advice as a professional and friend, independent of BIV rather than as an officer of BIV, and that she would be a source of knowledge for the informant. App. 36 at 8, 14, 22, 35, 38-39, 68-69, 78-79. Notably, when a bank employee whom de Saad had instructed to research how to buy a Bahamian bank asked if the matter had "anything to do with" BIV as the "bank could not provide that service," de Saad told him to handle the matter on a "consultant basis"

[18] Notably, mere use of an employment position or an employer's resources does not mean an employee meets the "by reason of the fact" factor. See Healey v. Scovone, 1999 WL 535298, at *3 (10th Cir. July 26, 1999) (affirming, under New Mexico law, no indemnification where the court could not "fathom any manner in which [the employee's] alleged acts were the kind he was authorized to perform or that he was motivated in any manner to further his employer's interests").

and do the work on his "own time," such as "weekends" or "vacation days." App. 37 at 153-156. De Saad did not in any way share the $20,000 payment she received with BIV. Rather, de Saad ultimately personally received or had deposited into her personal bank account the $20,000 in currency.

The professional opinion of BIV's experts further undermined de Saad's and Beeler's motions for summary judgment on statutory indemnification. Jiménez, as a former U.S. Attorney, offered expert testimony that de Saad's receipt and acceptance of those funds was "highly unusual, not consistent with the actions of a bank officer transacting legitimate banking business and consistent with money laundering activity." App. 30 at ¶ 8. He also opined that de Saad's admission of guilt as to the structuring violation is an admission that she was guilty of criminal wrongdoing and that she derived an improper personal benefit. Id. at ¶ 10. And Serino, as the former Deputy Chief Counsel of the OCC, offered expert testimony that de Saad was not charged as an officer of the bank with violation of the federal law (18 U.S.C. § 215) that prohibited her from receiving the $20,000 commission. App. 38 at ¶ 8. To the contrary, de Saad was actually charged with an offense that did not have to be committed by a bank official. Id.

Given all of this evidence and the factual disputes that it created—disputes that could only be resolved at trial—summary judgment was improperly granted.

II. SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIMS WAS IMPROPER.

A. Legal Standard.

The Court reviews de novo the Third DCA's affirmance of the trial court's grant of summary judgment on the breach of contract claim and the award of damages. It is well established that summary judgment is improper if, after resolving all inferences in favor of the non-moving party, there is a material dispute as to the meaning of a contract. See Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 643 (Fla. 1999) (reversing summary judgment because material dispute existed as to meaning of contract). In particular, where each side argues a reasonable interpretation of contractual language, "[t]his renders the contract ambiguous; summary judgment is improper." Birwelco-Montenay, Inc. v. Infilco Degremont, Inc., 827 So. 2d 255, 257 (Fla. 3d DCA 2001).

B. A Party's Reasonable Interpretation Of A Contract Cannot Be Rejected By A Trial Court On Summary Judgment.

BIV interpreted its contract with de Saad to give it the right to suspend her after her arrest and continue that suspension without pay through the final resolution of the charges against her. This interpretation of the contract is reasonable and stems from the terms of BIV's personnel manual, which is incorporated (twice) into de Saad's employment contract. See App. 9 at § XIII;

App. 27 at 32.[19] Section E.2 of the personnel manual specifies certain grounds for immediate dismissal or suspension pending clarification of charges. One of those grounds is where the charges involve "[c]onclusive evidence of dishonesty or involvement in a misdemeanor or felony." App. 27 at 32.[20] In this case, the charges against de Saad were not clarified by "conclusive evidence of dishonesty or involvement in a . . . felony" until she pled guilty to the felony structuring charge—in February 2001, after her employment contract expired.

De Saad and Beeler, in contrast, argued that the charges must have been clarified at some earlier (unspecified) point in time. The Third DCA guessed that the point in time could have been when the Second Superseding Indictment was filed or when BIV completed an internal audit after de Saad's indictment—either of which would have been, at best, an wholly inaccurate "clarification" since "[c]onclusive evidence" of her involvement in a felony was not established until the First Superseding Criminal Information was filed against her in conjunction with her plea. App. 27 at 32.

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[19] De Saad admitted that the personnel manual was part of her contract. App. 7 at 92-93. While the record did not show who drafted the employment contract, it showed that she presented the first draft of the contract to BIV, and negotiated all the terms in it. App. 7 at 90; App. 41 at 21. At summary judgment, the court should have drawn inferences against her litigation-induced interpretation.

[20] The manual states "[d]ischarge is immediate upon proof of dishonesty." App. 27 at 33.

The trial court improperly granted summary judgment by adopting de Saad's proposed interpretation of the contract and rejecting BIV's. App. 47 at 7-8. The Third DCA erroneously affirmed, creating a direct and express conflict over whether—when disputed interpretations exist—a trial court can simply choose one of those interpretations in granting summary judgment. As the Fourth DCA recognizes, "[w]hen there are two reasonable [contractual] interpretations, summary judgment is inappropriate because there is a genuine issue of material fact." Fecteau v. S.E. Bank, NA, 585 So. 2d 1005, 1007 (Fla. 4th DCA 1991). The Fifth DCA similarly holds that when parties present different reasonable interpretations, "the issue of proper interpretation becomes one of fact, precluding summary judgment." Langford v. Paravant, Inc., 912 So. 2d 359, 360-361 (Fla. 5th DCA 2005). A clear issue of fact exists here given the competing interpretations of the employment contract and personnel manual incorporated therein. However, the Third DCA ignored this well-established law in both DCA's.

As BIV argued in opposing summary judgment, it reasonably read the contract to permit it to suspend de Saad so long as any uncertainty remained as to the charges against de Saad. Immediately after de Saad's arrest, BIV's Board of Directors convened and executed 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." App.

8. At this point, it was not clear how long de Saad would be suspended, but it would be until the outcome of the charges was clear—i.e., until the charges were clarified based on the existence or non-existence of conclusive acts of misconduct by de Saad.[21] During the remaining time on de Saad's contract, however, there was no definitive clarification that the charges against her were unwarranted. She continued to maintain her innocence about all of her conduct, including the $20,000, even after the December 20, 1999 jury verdict finding her guilty on all counts. App. 16. Ultimately, de Saad's suspension continued because the merit of the charges against her was not clarified before the contract expired.

The trial court and Third DCA both held that BIV's interpretation was not reasonable because the "clarification of charges" could not reasonably mean "resolution of charges." Banco, 21 So. 3d at 50; App. 47 at 8. But the personnel manual specifically referred to "conclusive evidence of dishonesty or involvement in a misdemeanor or felony" App. 27 at 32 (emphasis added)—which became available only when de Saad's guilty plea clarified that there was conclusive evidence she engaged in unlawful felony structuring—over a year after the contract expired. Moreover, the ambiguity as to when any supposed "clarification" occurred creates a fact issue as to the starting point for assessing damages that could not be resolved on summary judgment. See Dade County School Bd., 731

[21] As BIV's expert Serino explained, if BIV had not suspended de Saad, the banking authorities would have. See App. 42 at 75-76, 78.

So. 2d at 643 (citing, inter alia, Fecteau, 585 So. 2d at 1007). The trial court also erred in viewing BIV's interpretation as creating a conflict between the contract and the personnel manual. App. 47 at 9.

Given the recognition by all of the parties, the trial court, and Judge Schwartz of the Third DCA that "a discharge would have been fully justified by the contract and the facts of the case," 21 So. 3d at 51 (concurring opinion), nothing in the record renders unreasonable BIV's interpretation that it had grounds to (1) terminate de Saad or (2) take the lesser step of suspending her until the merit of the charges against her were conclusively clarified. The trial court erroneously read a terminate-or-compensate ultimatum into the contract where no such provision existed. App. 47 at 9.

C. Disputed Material Facts Precluded Summary Judgment.

1. Which party breached the contract first.

De Saad's contract with BIV required her to "devote all her time and effort to the business of [BIV-Miami Agency] and under no circumstances shall she engage during the term of this Contract in any type of activity or business, financial or otherwise, such as financial gain, profits, or any other pecuniary activity, that may interfere with her functions and responsibilities as an Employee." App. 9 at § I. It also, by incorporating the personnel manual required her to "avoid even the appearance of legal or ethical impropriety in all [her] actions." As BIV

argued below, the record shows that de Saad had breached these terms of her contract—as well as being unavailable for work at all after her arrest when she was in jail and then in California defending against criminal charges—long before whenever the supposed "clarification" of the charges and BIV's purported breach occurred. Her plea agreement in fact demonstrates that de Saad violated federal law in February 1998—over three months before her suspension. App. 24.[22]

In granting and affirming summary judgment to de Saad, the courts below ignored the black letter principle of law that a dispute as to who first breached a contract precludes summary judgment. If de Saad breached first, BIV had no duty to perform any obligations under the contract. The Third DCA's failure to recognize this legal principle puts its decision in conflict with well-established Florida law. See, e.g., Fabel v. Masterson, 951 So. 2d 934, 936 (Fla. 4th DCA 2007); Marshall Const., Ltd. v. Coastal Sheet Metal & Roofing, Inc., 569 So. 2d 845, 848 (Fla. 1st DCA 1990), Jones v. Sterile Prods. Corp., 572 So. 2d 519, 520 (Fla. 5th DCA 1990). Given the far more than a "slight doubt" as to who breached first, summary judgment should not have been granted to granted to de

[22] She also breached bank policy, and thus her employment contract, by covertly providing advice about Swiss and Bahamian banks, among other things. See App. 43 at 14, 22, 35, 38, 68; App. 37 at 153-156. See also App. 42 at 66-67 (BIV's expert Serino explained: "The acceptance of bribes, to me, is a fraud on her bank. It's a breach of her duty of loyalty to the institution. It could also be failure to report suspicious activities of fraud on the institution. . .").

Saad. See Marshall Const., 569 So. 2d at 848 (reversing breach of contract judgment where prior breach by plaintiff excused defendant from contract).

2. Whether de Saad could have reasonably avoided damages.

The trial court granted summary judgment against BIV on the breach of contract claim because it found that BIV breached its contract with de Saad when it did not terminate or reinstate her the moment the charges against her were (in the court's view) sufficiently clarified. The trial court never resolved exactly when this moment occurred—nor could it point to any undisputed facts that would support such a resolution. Moreover, at that moment (whenever exactly that unspecified moment occurred), under clear Florida law, de Saad's obligation to take reasonable steps to avoid damages kicked in. And yet the trial court granted summary judgment to de Saad on damages without any regard to BIV's affirmative defense of mitigation. App. 3 at 5 ¶ 9; App. 2 at 4 ¶ 9. The trial court ignored the disputed material fact as to whether de Saad could have reasonably avoided damages by cursorily asserting that de Saad "was not required to mitigate her damages for the breach of contract." App. 50 at 18; see also App. 51.

That was a clear error in applying Florida law. As this Court explained last year in System Components Corp. v. Florida Department of Transportation, 14 So. 3d 967, 982 (Fla. 2009), the doctrine of avoidable consequences " 'prevents a party from recovering those damages inflicted by a wrongdoer that the injured party

could have reasonably avoided.' " Id. at 982 (citation omitted). Under this doctrine, the injured party must take "ordinary and reasonable care" to ameliorate their damages. Id.; see also Young v. Cobbs, 110 So. 2d 651, 653 (Fla. 1959); Thomas v. Western World Ins. Co., 343 So. 2d 1298, 1303 (Fla. 2d DCA 1977) ("[I]t is black-letter contract law that a party suffering a breach is obligated to take all reasonable means to protect himself and mitigate his damages.").[23]

De Saad sought as damages the full amount of the contract for the nearly twenty months left in the contract when she alleged that the breach occurred. App. 1 at ¶ 41. BIV presented evidence that de Saad filed a credit application in November 1999 listing over $9,000 in monthly income from the International Bankers Investment Group. App. 49. Nevertheless, the trial court granted summary judgment as to the full amount of damages she sought—without applying any reduction based on mitigation or avoidable consequences. That judgment was error, and should have been reversed, not affirmed, by the Third DCA.[24]

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[23] In an employment contract context, this principle requires starting with the amount due under the unexpired term of the contract and reducing that by "an amount which the employee actually earned, or could have earned through the use of due diligence in other employment of like nature, for the remainder of his term of employment under the contract." Juvenile Diabetes Research Found. v. Rievman, 370 So. 2d 33, 35-36 (Fla. 3d DCA 1979); see also Zayre Corp. v. Creech, 497 So. 2d 706, 707-708 (Fla. 4th DCA 1986).

[24] The Third DCA also left standing the trial court's error in granting summary judgment while affirmative defenses were pending—in direct and express conflict

III. THE AWARD OF EXPENSES FOR REPAYMENT OF LOANS AND LOAN INTEREST AS DEFENSE EXPENSES WAS ERRONEOUS.

The Third DCA's affirmance of the trial court's award of damages on the indemnification claim was premised on two legal errors, each of which are reviewed de novo. Major League Baseball, 790 So. 2d at 1074. First, the Third DCA affirmed the trial court award of over $2 million to de Saad for indemnification "expenses" wholly unrelated to the fees and costs charged by her four law firms. These expenses consisted of loans from friends and family to secure bonds used to release her from detention during the criminal proceedings against her, to pay for her living expenses, and to cover accrued interest on the original loans. These are not recoverable "expenses" under Florida's indemnification statute, which unambiguously provides for indemnification only of reasonable expenses incurred in the defense of any criminal proceeding or claim. See Fla. Stat. § 607.0850(3) (if an officer is successful "in defense of any proceeding . . . or in defense of any claim, issue, or matter . . . he or she shall be indemnified against expenses actually and reasonably incurred by him or her in connection therewith") (emphases added). The Third DCA and trial court further erred in ordering BIV to pay for expenses other than the attorneys' fees and costs of de Saad's attorneys. Indeed, after an exhaustive search of decisions interpreting

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with Hospital Correspondence Corp. v. McRae, 682 S0.2d 1177, 1182 (Fla. 5th DCA 1996) and Fasano v. Hicks, 667 S0.2d 1033, 1034 (Fla. 2d DCA 1996).

indemnification statutes, BIV submits that the decision below is the first one in any court in the country to award recovery for loans, interest, or living expenses as indemnifiable expenses. These categories of expenses simply are not recoverable.

Second, the Third DCA improperly affirmed an award by the trial court that was designed to punish BIV for not indemnifying de Saad from the beginning. App. 46 at 69 (concluding that BIV had a "choice" to "stand by" de Saad in 1998, but made a "business decision" not to indemnify her to "put itself in a better light with the government"). The trial court's view was that "BIV must now pay for [its] miscalculation" in not "com[ing] forward" and indemnifying de Saad from the beginning. Id. It is legal error to suggest that BIV should be punished for not indemnifying de Saad from the beginning. The trial court never quoted, cited, or referred to the statutory standard for permissive indemnification in Florida. Permissive indemnification is only permitted where a person is charged "by reason of the fact that he or she is or was a . . . officer" and where the person acted in good faith, in the best interests of the corporation, and without knowledge that his or her conduct was unlawful. Fla. Stat. § 607.0850(1). De Saad's conduct fell far short of this standard that must be satisfied before a corporation in BIV's position can provide permissive indemnification under subsection (1). The trial court's misunderstanding and misapplication of the law to "punish" BIV for a "miscalculation"—and the Third DCA's order affirming this—require reversal.

IV. BECAUSE BIV IS A FOREIGN CORPORATION, IT IS NOT SUBJECT TO THE INDEMNIFICATION OBLIGATIONS THAT FLORIDA LAW IMPOSES ON FLORIDA CORPORATIONS.

When this case began, BIV moved to dismiss de Saad's indemnification claim on the basis that Florida's Business Corporation Act does not apply to foreign corporations such as BIV. The trial court correctly granted BIV judgment on the pleadings on this issue. The Third DCA's reversal of that threshold decision was erroneous. De Saad, 843 So. 2d at 954.[25]

In its decision, the Third DCA recognized that the indemnification statute only applies to domestic corporations: The term "corporation," used in the statute, is defined to include only non-foreign corporations. § 601.01401, Fla. Stat. But then the Third DCA erroneously concluded that because BIV has a "certificate of authority to transact business in Florida," it is therefore subject to Florida's indemnification statute. De Saad, 843 So. 2d at 954. The Third DCA based its flawed conclusion on the language of § 607.1505(2), Fla. Stat., which states that foreign corporations with a certificate of authority have the same rights, duties, restrictions, penalties, and liabilities as domestic corporations. But the Third DCA ignored the critical next provision, § 607.1505(3), Fla. Stat., which states that a

[25] BIV has briefed this threshold issue last because it recognizes that the Court has discretion over whether to consider it. Boca Burger, 912 So. 2d at 563; Murray, 872 So. 2d at 223 n.5. Given its importance to the thousands of foreign corporations operating in Florida, and the split of authority discussed below, this issue is one of great importance and, respectfully, should be addressed. The Third DCA's opinion is an outlier among all courts to have addressed this issue.

foreign corporation may not be regulated by Florida as to its organization or internal affairs. The Third DCA thus effectively read § 607.1505(3) out of the statute anytime a matter of internal affairs implicates a liability against a corporation—such as an indemnification liability. [26]

Notably, the Fifth DCA has taken a different position. In addressing the analogous provision for non-profit corporations, § 617.1505(3), the Fifth DCA recognized that corporate indemnification is a matter of "internal affairs" and "is therefore subject to the law of the state of incorporation." Chatlos Found., Inc. v. D'Arata, 882 So. 2d 1021, 1023 (5th DCA 2004) (holding that New York law governed indemnification claim because non-profit corporation was incorporated in New York). Chatlos Foundation is consistent with decisions from around the country that regularly reach the same conclusion: indemnification is a matter of internal corporate affairs governed by the law of the state of incorporation. See, e.g., Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 64 F.3d 1282, 1289 n.20 (9th Cir. 1995) ("Indemnification, as an internal corporate affair, is governed by the law of the state of incorporation."); Forcine Concrete & Const. Co., Inc. v. Manning Equip. Sales &

[26] De Saad's indemnification claim was brought under Section 607.0850, Fla. Stat. Her employment contract, which is with BIV-Miami Agency, states that both the contract and the employer-employee relationship is governed by Florida law. Chapter 607, the Florida Business Corporation Act, governs corporate structures, obligations, and responsibilities and does not govern the "employer/employee relationship," which is generally governed by Chapter 448, Part I (448.01-448.110).

Serv., -- F. Supp. 2d --, 2010 WL 935750, at *3 (E.D. Pa. Mar. 16, 2010) (because Pennsylvania statute specified that the law of the state of incorporation governs questions relating to a corporations "internal affairs," court looked to indemnification obligation under Michigan law, where the corporation was incorporated); Miller v. U.S. Foodservice, Inc., 405 F. Supp. 2d 607, 615-16 (D. Md. 2005) ("Indemnification, as an internal corporate affair, is governed by the law of the state of incorporation."); Gregorio v. Excelergy Corp., 2008 WL 2875430, at *4 (Mass. Super. Ct. July 19, 2008) (under Massachusetts law establishing that "the state of incorporation dictates the governing law in claims involving the internal affairs of a corporation," an indemnification claim against a Delaware corporation was controlled by the Delaware Corporations Act).

The holdings in these decisions are not only consistent but also make good policy sense. Many corporations are authorized to transact business in multiple jurisdictions around the country and world. The Third DCA's interpretation brings with it unintended consequences, including that foreign corporations with a certificate of authority in Florida cannot predict whether Florida law or the law of their state of incorporation govern their indemnification obligations—even when the two sets of indemnification law impose inconsistent or unpredictable obligations, and that foreign corporations with a certificate of authority in Florida face a risk of indemnification demands and law suits filed under Florida law

anytime Florida law is "friendlier" to their claim than the law of the state where the corporation is incorporated.[27] BIV should not be subject to Florida's indemnification obligations, just as it is not subject to any other provision of the Florida Corporation Code regulating the organization or internal affairs of a corporation—which are subject to regulation by the state of incorporation only.

V. CONCLUSION

For all of the foregoing reasons, the trial court's Final Judgment must be vacated in its entirety and reversed.

[27] Cf. Nat'l Rifle Ass'n of Am. v. Linotype Co., 591 So. 2d 1021, 1022 (Fla. 3d DCA 1991) (holding that certificate of authority in § 607.1505 does not make corporation a citizen of Florida, and explaining that "[t]o equate the two would force our courts to retain causes of action arising elsewhere, having no connection whatsoever with the state of Florida, and would encourage potential plaintiffs to use the Florida courts to sue any sizeable corporation doing some business in Florida even though the cause of action has nothing to do with the state").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210 (a)(2).

By: _____
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I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Initial Brief on the Merits and Appendix thereto was served via Federal Express this 12th day of April, 2010, on:

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