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' CONSOLIDATED REPLY BRIEF ON THE MERITS

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INTRODUCTION

The inquiry in this case is whether Esperanza de Saad ("de Saad")—after pleading guilty to felony structuring to resolve money laundering charges against her—comes within the class of persons that the Florida Legislature deems entitled to millions of dollars in indemnification from the corporation whose interests she was supposed to be serving as an officer. In their initial brief, Banco Industrial de Venezuela, C.A., Miami Agency and BIV Investments and Management, Inc. (collectively, "BIV") explained why the multi-million dollar summary judgment awards to de Saad and Joseph Beeler, P.A. ("Beeler") were erroneous. De Saad knowingly broke the law for personal gain, and pled guilty to a felony. She was barred for life from the banking industry and paid a hefty $50,000 fine. Her argument for indemnification requires interpreting Florida's indemnification statute as co-extensive with Delaware's—even though Florida's Legislature included an indemnification bar for illegal conduct and conduct undertaken for personal gain not found in the Delaware law. Under the public policy adopted by Florida, Respondents were <u>not</u> entitled to summary judgment in their favor.

Respondents' Answer Briefs provide no legal authority to support the trial court's unprecedented award of indemnification for loans, loan interest, and living expenses. Similarly, de Saad is wrong to argue that summary judgment was properly awarded on the breach of contract claim. It was not. The trial court erred

by choosing between reasonable interpretations of the contract, resolving ambiguities, ignoring the obvious fact that de Saad breached the contract—at the latest—when she failed to report for work after her arrest, and disregarding her failure to mitigate damages. And finally, after requesting that the Court not reach the issue, the Answer Briefs in effect concede (through their silence and reliance on a dissenting opinion) that under the "internal affairs" doctrine, the indemnification statute in the Florida Business Corporation Act does not apply to foreign corporations like BIV. For all the reasons articulated in BIV's initial brief and herein, the trial court's Final Judgment should be reversed.

ARGUMENT

I. THE INDEMNIFICATION STATUTE DOES NOT CONTEMPLATE MANDATORY INDEMNIFICATION IN THESE CIRCUMSTANCES.

A. The Plain Language of Florida's Statute Supports BIV.

The courts below erred in concluding de Saad was entitled to mandatory indemnification as a matter of law. BIV Br. 22-37. That error stemmed from a failure to read the indemnification statute as a whole. The indemnification bar enacted by the Legislature precludes indemnification if (1) a judgment establishes that an officer's actions violated criminal law, unless the officer reasonably believed the conduct was lawful or (2) the officer's actions were for improper personal benefit. § 607.0850(7), Fla. Stat. Despite Respondents' protest that BIV is trying to "re-write" the statute, BIV in fact is just reading the statute's plain

language—language that does not exist in the Delaware statute on which Respondents' interpretation relies.

The first sentence of subsection (7) refers to both "indemnification and advancement of expenses provided pursuant to this section" generally and to specific "further indemnification or advancement of expenses."[1] Respondents ask the Court to read the word "further" into the second sentence so that it reads, "However, further indemnification or advancement of expenses shall not be made . . . ." But the Legislature did not use that language. The bar on indemnification in the second sentence is not limited to "further" indemnification; it speaks plainly and directly to "indemnification" awards generally. This Court has repeatedly emphasized the need to focus on the plain language used by the

[1]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:
>
> (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).

Legislature: When statutory language is clear and unambiguous, "the statute must be given its plain and obvious meaning." Donato v. Am. Tel. & Tel. Co., 767 So. 2d 1146, 1150 (Fla. 2000) (citations omitted); see also McLaughlin v. State, 721 So.2d 1170, 1172 (Fla. 1998). The subsection (7) indemnification bar plainly speaks to all "indemnification or advancement of expenses" and should be so interpreted by this Court.

That is precisely what the Fourth DCA recognized in Alternative Development, Inc. v. St. Lucie Club & Apartment Homes Condominium Ass'n, 608 So. 2d 822, 828 (Fla. 4th DCA 1992). While Respondents focus on trying to distinguish the facts of Alternative Development, it is the legal holding of that case that is relevant. The Fourth DCA correctly concluded that mandatory indemnification under section 607.0850(3), Fla. Stat., is limited by the indemnification bar in subsection (7). Id.; see also Colonial Guild Ltd. v. Pruitt, 2004 WL 627921, at *2 (Ohio Ct. App. Mar. 31, 2004) (same). Respondents, in seeking summary judgment, could not and did not attempt to overcome this express prohibition. De Saad knowingly broke the law, as her guilty plea shows, and acted for improper personal benefit by accepting multiple $5,000 payments for her efforts. The subsection (7) indemnification bar thus puts her outside the class

of individuals that the Legislature determined are entitled to indemnification. Accordingly, the grant of summary judgment must be reversed. [2]

Respondents misread the plain language of the indemnification statute in a second way. Indemnification can only be mandated if the officer was successful on the merits or otherwise in defense of a proceeding referred to in section 607.0850(1). Subsection (1) limits potentially indemnifiable proceedings to those in which a person is a party "by reason of the fact" she was an officer if she "acted in good faith" and in the "best interests of the corporation," and had no reason to believe the conduct was "unlawful." § 607.0850(1), Fla. Stat. Read as a coherent whole with the indemnification bar in subsection (7) for knowingly unlawful conduct and transactions entered for an improper personal benefit, subsection (1) plainly excludes certain conduct from the scope of indemnifiable transactions. It would be absurd to conclude that the Florida Legislature intended for courts to be able to mandate indemnification in situations where the corporation lacked the power to indemnify an officer—because the proceeding fell outside subsection (1) limitations. See Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 199 (Fla. 2007) (statutes must be read "to achieve a consistent whole.") City of St. Petersburg v.

[2]Respondents' reliance on § 607.0850(9) is misplaced. Beeler Br. 22-23, de Saad Br. 23. Subsection (9) does not counsel against the language of subsection (7). Subsection (9) simply provides three scenarios in which a court can award indemnification: if indemnification is mandated; if a corporation has chosen to indemnify through a bylaw, shareholder vote, or the like; and if indemnification is warranted in view of the relevant circumstances. § 607.0850(9), Fla. Stat.

Siebold, 48 So. 2d 291, 294 (Fla. 1950) (statutes will not be construed to achieve an absurd result).[3]

The Florida Legislature exercised independent judgment from the Delaware Legislature and decided that under Florida law, corporate officers who knowingly commit crimes and seek to profit at the expense of the corporation to which they owe fiduciary duties cannot later obtain indemnification. Notably, the same bar applies to officers of limited liability companies. See § 608.4229, Fla. Stat. Both statutes refer to the same set of circumstances as precluding indemnification—reflecting a consistent legislative judgment that those who knowingly violate the law or act for improper personal benefit are not eligible for indemnification.

B. Disputed Facts As To The Only Two Factors That De Saad And Beeler Addressed Should Have Precluded Summary Judgment.

Respondents confirm that the interpretation of the phrases "successful on the merits or otherwise" and "by reason of the fact" that an individual is an officer is a matter of first impression in Florida. The Delaware cases that Respondents cite cannot govern an application of the Florida statute to the stark facts of this case.

[3]The Legislature permitted a corporation to indemnify officers in certain situations and authorized courts to mandate indemnification for a subset of those situations if the corporation does not. Viewed as a "venn" diagram, permissive indemnification is thus a larger concentric circle, with mandatory indemnification as a smaller circle entirely within the larger circle. Any other interpretation leads to the absurdity that courts can mandate indemnification a corporation could not provide. Respondents suggest that BIV waived its argument on the relevance of subsection (1) to mandatory indemnification. Not so. BIV has consistently argued that it is legal error to limit the mandatory indemnification analysis to only the two elements Respondents unsuccessfully attempted to satisfy.

"Successful On The Merits Or Otherwise." Respondents told the trial court that de Saad was "successful on the merits or otherwise" in the criminal proceeding because the felony structuring charge to which she pled guilty was somehow "unrelated" to the money laundering charges. Faced with the reality that they were directly related by being part of the same criminal action, with the same defense attorneys and prosecutor and the same allegations about $20,000 in checks, and with a guilty plea conditioned on dismissal of the government's appeal on the money laundering charges, Respondents now argue for a "partial success" indemnification theory. This theory serves them no better. On this matter of first impression, this Court should hold that a guilty plea to a related felony in the same criminal proceeding, made to avoid a ruling on whether the jury's verdict or the judge's acquittal on other charges should stand, does *not* amount as a matter of law to "success[] on the merits or otherwise." § 607.0850(3), Fla. Stat.

Respondents seek to portray it as "irrelevant" that de Saad pled guilty to get the Government to dismiss its appeal. If that were the case, a party could always force indemnification from a corporation it had deceived by pleading guilty to some lesser offense, and thereby claiming "partial success." That interpretation is unreasonable. Maddox v. State, 923 So. 2d 442, 446 (Fla. 2006) (" 'a literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion' ") (quoting Holly v. Auld, 450

So. 2d 217, 219 (Fla. 1984)). Moreover, neither of the Delaware trial court decisions Respondents cite—Merritt Chapman & Scott Corp. v. Wolfson, 321 A.2d 138 (Del. Super. Ct. 1974) and Perconti v. Thornton Oil Corp., 2002 WL 982419 (Del. Ch. May 3, 2002)—involved a party pleading guilty to a superseding criminal information to avoid a ruling of guilt or innocence on a prior indictment.

Here, the Government's lead prosecutor specifically affirmed in a sworn statement that "[t]he acts to which Ms. De Saad pled guilty arose out of the same events for which Ms. De Saad was charged and convicted." App. 26 ¶ 7. Moreover, two of de Saad's defense attorneys conceded that her plea was part of a single, continuous proceeding. App. 25 at 13-14; App. 35; App. 44 at 225-226, 240-241.

BIV further offered two experts (including Marcos Jimenez, former U.S. Attorney for the Southern District) who each submitted opinions that de Saad's guilty plea did *not* amount to a "success on the merits" for her. App. 30; App. 38 The trial court simply ignored these expert opinions and the disputed issues of material fact raised by this record. This was improper. See, e.g., Edwards v. Simon, 961 So. 2d 973, 974 (Fla. 4th DCA 2007).

BIV's expert witness affidavits were admissible and should have been considered. Contrary to the suggestion in the Answer Briefs, Florida law expressly provides that an expert may render an opinion on the ultimate issue in a case. See Dinkens v. State, 976 So. 2d 660, 661 (Fla. 1st DCA 2008) ("Although

the opinions did go to ultimate issues in the case, Florida law expressly provides that an expert witness may render such opinion.") (citing Fla. Stat. § 90.703).

Florida's indemnification statute requires that de Saad be "successful on the merits or otherwise. *She was not*. She pled guilty to a felony charge to get a quid pro quo dismissal of an appeal of the money laundering charges. She was barred for life from the banking industry, and she paid a hefty $50,000 fine. *That is not success on the merits or otherwise*.

"By Reason Of The Fact." A disputed fact exists as to whether de Saad was criminally charged "by reason of the fact" that she was a BIV officer. BIV Br. 32-37. The Government recognized that she acted alone and not as an officer of BIV. App. 29. The Second Superseding Indictment made no reference to her accepting $20,000 as corporate officer, App. 23 at 11-12, and de Saad herself recognized that BIV policies expressly prohibited her conduct, App. 7 at 130. Yet, in Respondents' view, there was still a discernable "nexus" between the conduct charged and de Saad's capacity as an officer that triggered mandatory indemnification as a matter of law. Respondents are wrong.

Criminal charges stemming from conduct undertaken for personal gain in violation of corporate policy are <u>not</u> charges made "by reason of the fact" an individual is a corporate officer. <u>See</u>, <u>e.g.</u>, <u>Plate v. Sun-Diamond Growers</u>, 225 Cal. App. 3d 1115, 1126 (1990) (no indemnification where defendants were sued

for actions undertaken for personal benefit; "by reason of the fact" factor not satisfied). De Saad herself made clear that she was giving advice about Swiss bank accounts and Bahamian banks independent of BIV rather than as an officer of BIV, App. 36 at 8, 14, 22, 35, 38-39, 68-69, 78-79. She admitted that she told BIV employees to handle advice on such issues on "weekends and "vacation days," App. 37 at 153-156, and accepted the $20,000 payment solely for herself. BIV's experts (see supra at 8), likewise confirmed that there is at a minimum a dispute as to whether she was charged "by reason of the fact" she was an officer. App. 30 ¶¶ 8, 10; App. 38 ¶ 8; see, e.g., Gabor & Co. v. Gabor, 569 So. 2d 817, 818 (Fla. 3d DCA 1990) (disputed facts as to whether the defendant was charged as an officer).

Where as here, there were disputed issues as to whether de Saad's actions were "within the scope of her employment," summary judgment was improper. BIV Br. 34-35 (citing cases). Respondents' Answer Briefs offered *no* case law to dispute this black letter law.

II. SUMMARY JUDGMENT ON THE CONTRACT WAS IMPROPER

A. Two Reasonable Interpretations Preclude Summary Judgment

BIV offered an objectively reasonable interpretation of the employment contract: BIV could suspend de Saad pending clarification as to whether the charges against her had merit. BIV's interpretation was supported by the personnel manual incorporated into the contract, and gave BIV the right to suspend de Saad

until there was "conclusive" evidence as to whether she engaged in misconduct. App. 27. The courts below erroneously concluded that clarification must have occurred at some point before the charges were ultimately resolved—but failed to offer any point in time at which BIV could have known, prospectively, that the charges had been clarified. By so ruling, the Third DCA created a direct and express conflict. BIV Br. 37-41 (citing cases).

Nothing in de Saad's Answer Brief refutes the fact that, at a minimum, substantial ambiguity exists as to when the requisite "clarification" occurred---which is critical, because damages could not be awarded for the time period before such clarification of the charges took place.[4] See Langford v. Paravant, Inc., 912 So. 2d 359, 360-361 (Fla. 5th DCA 2005). Thus, summary judgment in favor of de Saad should be reversed.

B. **Material Facts In Dispute Preclude Summary Judgment**

Disputed facts exist as to whether de Saad breached her employment contract first and how to calculate mitigation of damages. The Third DCA's

[4] De Saad claims that the only reasonable reading of the contract is that the Second Superseding Indictment clarified the charges against her. De Saad Br. 36. That is both illogical and backwards looking. It makes no sense to argue that a second superseding indictment clarifies the charges against a party, as opposed to an original or first superseding indictment---especially considering that no one knows whether a third or a superseding criminal information will further clarify the charges. Thus, it was reasonable for BIV to maintain the suspension until there was conclusive evidence finally clarifying the merits of the charges.

decision to uphold a summary judgment in light of these two issues created a direct conflict warranting review. BIV Br. 42-45 (citing cases).

Nothing in de Saad's Answer Brief demonstrates a lack of disputed fact. De Saad responds instead with the bizarre assertion that BIV was "the sole breaching party." De Saad Br. 38. This utterly fails to explain how de Saad's failure, upon her arrest, to meet her contractual obligations to "devote all her time" to BIV, avoid "legal impropriety," and perform her "functions and responsibilities" was not a breach. App. 9 at § I.[5] These violations, and her felony violation of federal law in February 1998, occurred long before any "clarification" took place. Because these are explicit terms of her contract, concluding that de Saad breached these terms does not involve reading "reasonableness" into the contract; it just involves reading the contract.[6] Here, one of the basic obligations of de Saad's contract was to come to work. She stopped doing that immediately upon her arrest—and that was a breach, regardless of when the charges against her were clarified.

There was also a factual dispute as to whether de Saad could have reasonably avoided damages. Her Answer Brief ignores the Court's discussion of

[5] The disputed fact as to which party breached first was discussed below. See BIV 3d DCA Initial Brief at 43-44; BIV 3d DCA Reply Br. at 13. De Saad's assertion that BIV failed to argue this point below is flat wrong. De Saad Br. at 38.

[6] That fact makes de Saad's citation to Barakat v. Broward County Housing Authority, 771 So. 2d 1193 (Fla. 4th DCA 2000) wholly unavailing. De Saad Br. 39. Barakat stands for the unremarkable point that if a contract entitles a person to severance pay for being "terminated," then whether the termination is for cause or not does not matter. 771 So. 2d at 1194.

the doctrine of avoidable consequences last year in Systems Components Corp. v. Florida Department of Transportation, 14 So. 3d 967, 982 (Fla. 2009). As this Court explained, "[t]he doctrine of avoidable consequences, 'prevents a party from recovering those damages inflicted by a wrongdoer that the injured party could have reasonably avoided.' " Id. (citation omitted).

The doctrine of avoidable consequences is triggered upon breach, leaving de Saad accountable for "ameliorative actions that could have been accomplished through 'ordinary and reasonable care'." Systems Components, 14 So. 3d at 982. See also BIV Br. at 44 n.23 (citing cases in employment context). The Third DCA's ruling, which disregarded de Saad's failure to mitigate her damages, conflicts with System Components and warrants reversal.[7]

III. THE INDEMNIFICATION AWARD IS UNPRECEDENTED.

No court in the country except for the trial court here has indemnified a corporate officer to repay loans, made by family and friends, used for a bond to get out of prison, to repay loan interest, and for living expenses, all totaling $2 million. BIV Br. 45-46. Respondents do not dispute this, confirming that the trial court

[7] BIV noted the trial court's error in entering summary judgment while BIV had unresolved affirmative defenses, and even on appeal De Saad has no meritorious response. De Saad Br. at 40 n.21. Summary judgment is improper where affirmative defenses remain outstanding. See BIV Br. 45 n.24 (citing cases). De Saad's citation to BSP/Port Orange, LCC v. Water Mill Properties, Inc., 969 So. 2d 1077, 1078 (Fla. 5th DCA 2007) is off-base; that case addressed an affirmative defense that had never been pled.

made new law and awarded unprecedented indemnification "expenses." Instead, they argue it was helpful to have de Saad out of prison on bond. Beeler Br. 44-45; de Saad Br. 41-44. But BIV should not be saddled with pyaing the $2 million worth of loans, loan interest, and living expenses that allowed de Saad to live in California out of jail. Such amounts are simply *not* recoverable under § 607.0850(3), Fla. Stat. BIV also described how the trial court improperly used the indemnification award to punish BIV for not voluntarily indemnifying de Saad up front, even though she did not meet the standard for permissive indemnification. BIV Br. 46-47 (citing App. 46 at 69). De Saad's only response is to call the argument "specious," de Saad Br. 43, while Beeler's response is that de Saad *could* have requested an advancement of expenses by offering to repay them if later found not entitled to them. Beeler Br. 45 (citing § 607.0850(6), Fla. Stat.). But de Saad made no such request or offer, so subsection (6) was never triggered. Each of these two errors requires that the damages award be reduced, if not vacated entirely.

IV. APPLICATION OF THE INTERNAL AFFAIRS DOCTRINE IS A THRESHOLD ISSUE THAT THE COURT SHOULD ADDRESS.

All parties agree that whether Florida's indemnification statute applies to a foreign corporation is a threshold legal issue in this case; they disagree as to whether the Court should reach this issue. But if the statute does not apply to BIV, then the trial court effectively had no jurisdiction to award de Saad indemnification

damages. See, e.g., Polk County v. Sofka, 702 So. 2d 1243 (Fla. 1997); see also BIV Br. 4 n.2 & 47 n.25 (citing cases as to Court's discretion on such issues).

As BIV's Initial Brief detailed, every court that has addressed this issue, including the Fourth DCA, has concluded that indemnification is part of the "internal affairs" of a corporation and "is therefore subject to the law of the state of incorporation." Chatlos Found. Inc. v. D'Arata, 882 So. 2d 1021, 1023 (Fla. 5th DCA 2004). In fact, another court has joined the chorus of courts cited in BIV's Initial Brief. See Delay v. Rosenthal Collins Group, LLC, 2010 WL 1433362, at *2 (S.D. Ohio Apr. 7, 2010) ("This Court therefore concludes that the internal affairs doctrine applies to Plaintiff's claim for indemnification."). Unable to cite any authority for their position, de Saad's brief resorts to block quoting paragraphs of the dissenting opinion in Chatlos. De Saad Br. 48. The Court should instead follow the consistent holdings on this point: indemnification is a matter of internal corporate affairs governed by the law of the state of incorporation only. See BIV Br. at 49 (citing supporting case law); see also Delay, 2010 WL 1433362, at *2.

CONCLUSION

For the foregoing reasons and those in BIV's initial brief on the merits, the trial court's Final Judgment must be vacated in its entirety and reversed.

Respectfully submitted,

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