IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DIAMOND AIRCRAFT INDUSTRIES, INC., a foreign corporation, Appellant, vs. ALAN HOROWITCH, Appellee. _____________________________________/	)))))))))	CASE NO.: SC11-1371

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPELLANT'S INITIAL BRIEF ON THE MERITS

Hala Sandridge
Florida Bar Number 0454362
FOWLER WHITE BOGGS P.A.
P.O. Box 1438
Tampa, FL 33601
Telephone No.:(813) 228-7411
Fax No.: (813) 229-8313
hsandrid@fowlerwhite.com
Attorneys for Appellant Diamond Aircraft Industries, Inc.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND FACTS 1

A. Horowitch Sues Diamond Under FDUTPA And Actively Litigates His Right To Do So For Seven Months. 1

B. The District Court Grants Diamond's Motion For Summary Judgment And Diamond Prevails On The Remaining Claims At Trial. 5

C. Diamond Seeks Attorney's Fees And Costs Under FDUTPA And Its Offer Of Judgment. 6

D. The Federal District Court Denies Diamond's Claim For Attorney's Fees And Costs By Concluding FDUTPA Did Not Apply And The Offer Of Judgment Was Unenforceable. 7

E. Diamond Appeals and the Eleventh Circuit Certifies Four Questions To This Court. 8

CERTIFIED QUESTIONS 11

SUMMARY OF ARGUMENT 12

ARGUMENT 15

I. SECTION 501.2105, FLORIDA STATUTES, ENTITLES A PREVAILING DEFENDANT TO AN ATTORNEY'S FEE AWARD IN A CASE IN WHICH A PLAINTIFF BRINGS AN UNFAIR TRADE PRACTICES CLAIM UNDER THE FDUTPA, BUT THE DISTRICT COURT DECIDES THAT THE SUBSTANTIVE LAW OF A DIFFERENT STATE GOVERNS THE UNFAIR TRADE PRACTICES CLAIM, AND THE DEFENDANT ULTIMATELY PREVAILS ON THAT CLAIM. 15

II. IF SECTION 501.2105, FLORIDA STATUTES, APPLIES UNDER THE CIRCUMSTANCES DESCRIBED IN THE PREVIOUS QUESTION, IT APPLIES TO THE ENTIRETY OF THE LITIGATION. 21

III. SECTION 768.79, FLORIDA STATUTES, APPLIES TO CASES THAT SEEK EQUITABLE RELIEF IN THE ALTERNATIVE TO MONEY DAMAGES; AND, EVEN IF IT DOES NOT GENERALLY APPLY TO SUCH CASES, THERE IS AN EXCEPTION FOR CIRCUMSTANCES IN WHICH THE CLAIM FOR EQUITABLE RELIEF IS SERIOUSLY LACKING IN MERIT...24

IV. UNDER SECTION 768.79, FLORIDA STATUTES, AND RULE 1.442, A DEFENDANT'S OFFER OF JUDGMENT IS VALID IF, IN A CASE IN WHICH THE PLAINTIFF DEMANDS ATTORNEY'S FEES, THE OFFER SATISFIES ALL CLAIMS BUT FAILS TO SPECIFY WHETHER ATTORNEY'S FEES ARE INCLUDED AND FAILS TO SPECIFY WHETHER ATTORNEY'S FEES ARE PART OF THE LEGAL CLAIM. 32

CONCLUSION 36

CERTIFICATE OF SERVICE 37

CERTIFICATE OF COMPLIANCE...38

TABLE OF AUTHORITIES

Page(s)

CASES

BDO Seidman, LLP v. British Car Auctions, Inc.,
802 So. 2d 366 (Fla. 4th DCA 2001)....................16

Bennett v. American Language Sys. of Boca Delray, Inc.,
857 So. 2d 986 (Fla. 4th DCA 2003)....................33

Beyel Bros. Crane & Rigging Co. of So. Fla., Inc. v. Ace Transp., Inc.,
664 So. 2d 62 (Fla. 4th DCA 1995)....................24, 25

Brown v. Gardens by the Sea South Condominium Ass'n,
424 So. 2d 181 (Fla. 4th DCA 1983)....................17

Burtman v. Porchester Holdings, Inc.,
680 So. 2d 631 (Fla. 4th DCA 1996)....................25, 26, 28

Cairns v. Franklin Mint Co.,
292 F.3d 1139 (9th Cir. 2002)....................16

Campbell v. Gordon,
959 So. 2d 223 (Fla. 2007)....................9, 32, 33, 35

CPI Mfg. Co., Inc. v. Industrias St. Jack's S.A. De C.V.,
870 So. 2d 89 (Fla. 3d DCA 2003)....................34

Diamond Aircraft Industries, Inc. v. Horowitch,
645 F. 3d 1254 (11th Cir. 2011)....................passim

DiPompeo Const. Corp. v. Kimmel & Associates, Inc.,
916 So. 2d 17 (Fla. 4th DCA 2005)....................26

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938)....................8, 9

George v. Northcraft,
476 So. 2d 758 (Fla. 5th DCA 1985)....................33

Heindel v. Southside Chrysler-Plymouth, Inc.,
476 So. 2d 226 (Fla. 1st DCA 1985)....................22

Liggett Group, Inc. v. Davis,
975 So. 2d 1281 (Fla. 5th DCA 2008)....................35

Love v. Associated Newspapers, Ltd.,
611 F.3d 601 (9th Cir. 2010)....................15, 16

Mandel v. Decorator's Mart, Inc. of Deerfield Beach,
965 So. 2d 311 (Fla. 4th DCA 2007)....................18, 21, 23

National Indemnity Co. of the South v. Consolidated Insurance Services,
778 So. 2d 404 (Fla. 4th DCA 2001)....................26

Nelson v. Marine Group of Palm Beach, Inc.,
677 So. 2d 998 (Fla. 4th DCA 1996)....................26, 27, 28

Novastar Mortgage, Inc. v. Strassburger,
855 So. 2d 130 (Fla. 4th DCA 2003)....................28

Palm Beach Polo Holdings, Inc. v. Equestrian Club Estates Property Owners Ass'n, Inc.,
22 So. 3d 140 (Fla. 4th DCA 2009)....................passim

Rustic Village, Inc. v. Friedman,
417 So. 2d 305 (Fla. 3d DCA 1982)....................17

Smith v. Bilgin,
534 So. 2d 852 (Fla. 1st DCA 1988)....................22

State Farm Mut. Auto. Ins. Co. v. Nichols,
932 So. 2d 1067 (Fla. 2006)....................24

Stewart v. Tasnet, Inc.,
718 So. 2d 820 (Fla. 2d DCA 1998)....................25

Unicare Health Facilities Inc. v. Mort,
553 So. 2d 159 (Fla. 1989)....................33

V.I.P. Real Estate Corp. v. Fla. Executive Realty Mgmt. Corp.,
650 So.2d 199 (Fla. 4th DCA 1995)....................28

Weatherby Associates, Inc. v. Ballack,
783 So. 2d 1138 (Fla. 4th DCA 2001)....................19

Winter Park Imports, Inc. v. JM Family Enterprises,
10 So. 3d 1133 (Fla. 5th DCA 2011) 30

STATUTES

§ 57.105(1), Florida Statutes 19

§ 501.203(7), Florida Statutes 1

§ 501.2105, Florida Statutes .... passim

§ 768.79, Florida Statutes. .... passim

OTHER AUTHORITIES

Fed. R. Civ. P. 54(b) 21

Fla. R. App. P. 9.210(a)(2) 38

Fla. R. Civ. P. 1.442 .... passim

STATEMENT OF THE CASE AND FACTS

A. Horowitch Sues Diamond Under FDUTPA And Actively Litigates His Right To Do So For Seven Months.

In September of 2006, Plaintiff, Alan Horowitch, brought this lawsuit in state court against Diamond Aircraft Industries, Inc. (2:1).[1] Horowitch initially sued Diamond in three counts, specific performance, breach of contract, and breach of contract of good faith and fair dealing. (2:3-5). All three counts sought damages. (2:3-5). Horowitch contended Diamond failed to sell him a "D-Jet" airplane at the price promised in an alleged contract. (2:3-6). After removing this matter to federal district court, Diamond denied it had agreed to sell Horowitch the D-Jet at a fixed price because the price and specifications were only preliminary estimates and subject to change. (3:11).

Five months later, Horowitch sought leave to file an amended complaint to include a fourth claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). (30:1). Horowitch admitted he was a resident of Arizona and Diamond was a foreign corporation. (30:Ex.A:1). Nonetheless, Horowitch insisted he was a consumer as defined by Subsection 501.203(7), Florida Statutes. (30:Ex.A:11). Horowitch sought attorney's fees under FDUTPA. (30:Ex.A:12).

[1] All record citations are to the docket number in the federal district court, which the Eleventh Circuit forwarded to this Court, followed by the appropriate page or exhibit number from that docket item.

Close to the time Horowitch filed his motion to amend, he moved to compel Diamond to produce discovery documents. (34:1). Horowitch highlighted his pending motion to amend his complaint to include his additional FDUTPA claim. (34:3, n.1). Throughout his motion, Horowitch argued the discovery he sought was relevant to his allegations that Diamond had engaged in a deceptive trade practice. (34: 2, 10, 13, 16, 19).

In opposition to Horowitch's motion to amend to add his FDUTPA claim, Diamond explained that if the alleged injury occurred exclusively outside of Florida, a court should dismiss the complaints of non-residents under FDUTPA. (37:4). Diamond reasoned that Horowitch could not pursue his FDUTPA claim because none of the parties, witnesses or evidence were located in the state and Horowitch was not a Florida resident. (37:5). Regardless, the District Court granted Horowitch's motion for leave to file the amended complaint. (38:1). The District Court simultaneously ordered Diamond to file a motion to dismiss to address the issues Diamond raised in opposition to the motion to amend. (38:2).

Horowitch filed the amended complaint, still alleging he was a resident of Arizona, that Diamond was a foreign corporation, and seeking damages and attorney's fees under FDUTPA. (41:1, 11). As instructed by the District Court, Diamond moved to dismiss Horowitch's FDUTPA claim. (46:1). Diamond reaffirmed its prior arguments including, among other matters, that Horowitch did

not have the right to proceed under FDUTPA as an Arizona resident and when the acts he criticized did not occur in Florida. (46:1). Diamond simultaneously filed an answer and affirmative defenses to Horowitch's amended complaint. (45:1). Among other things, Diamond affirmatively alleged that plaintiff could not proceed under FDUTPA because the alleged injury occurred exclusively outside of Florida, none of the parties, witnesses or evidence were located in Florida and the plaintiff was not a Florida resident. (45:14-15).

Horowitch spent over eight pages responding to Diamond's dismissal motion. (48:1-9). He claimed that Diamond wrongly argued Horowitch could not pursue his FDUTPA claim. (48:1-9). Horowitch posited that FDUTPA applied because the parties' agreement contained a Florida choice-of-law clause. (48:2-9). Among other things, Horowitch argued that FDUTPA applied to non-Florida citizens. (48:6). However, Horowitch asked the District Court to allow him to pursue a claim under the Arizona Consumer Fraud Act ("ACFA") if he could not pursue the FDUTPA claim. (48:9-10).

The District Court denied Diamond's dismissal motion. (57:1). The court noted that the complaint ambiguously described where the events occurred. (57:3). The court concluded factual findings were needed to resolve the motion, which it could not do at the time. (57:1, n.3). The court suggested that the allegations might give rise to claims under the laws of other states. (57:3).

After Horowitch filed the amended complaint, Diamond served a $40,000 offer of judgment on Horowitch pursuant to Section 768.79, Florida Statutes. (196-2). The offer did not contain a certificate of service. (196-2). The offer stated that it was "intended to settle all claims that were or could be asserted by Plaintiff against Diamond…" (196-2). Horowitch did not accept this offer.

Once discovery closed, the parties filed competing summary judgment motions. Diamond moved for summary judgment on Horowitch's entire amended complaint, including his FDUTPA claim. (93:1). Diamond continued advocating that Horowitch could not proceed under FDUTPA because he was not a Florida resident and the acts did not occur in Florida. (93:20-21).

Hedging his bets, Horowitch asserted he could pursue a claim under either FDUTPA or Arizona law. (100:14, n.8). Horowitch persisted arguing that he was entitled to pursue his FDUTPA claim and that the court should deny Diamond's motion for summary judgment on his FDUTPA claim. (100:15-20). Horowitch refused to recognize Diamond's argument that he could not pursue a claim under FDUTPA because he was an Arizona resident and the conduct about which he complained did not occur in Florida. (100:1).

In the parties' joint pre-trial statement, Horowitch maintained his right to pursue his FDUTPA claim. (105:5-6). In his statement of money damages, Horowitch insisted Diamond owed him for his attorney's fees -- which were only

available under FDUTPA. (105:13). In their statement of applicable principles of law in which there was agreement, the parties advised that, under Florida law, a consumer claim for damages under FDUTPA had three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. (105:36). The pre-trial statement noted an issue of law remaining for the court to resolve was whether Horowitch could bring a claim under FDUTPA. (105:37). Again, Horowitch persisted in pursuing his FDUTPA claim while attempting to state a claim under Arizona law as a fall-back position. (105:38).

B. The District Court Grants Diamond's Motion For Summary Judgment And Diamond Prevails On The Remaining Claims At Trial.

After the parties filed their joint pre-trial statement, and seven months after the parties had actively litigated Horowitch's right to pursue a FDUTPA claim, the District Court ruled on the parties' motions for summary judgments. (108:1). After granting Diamond's motion for summary judgment on Horowitch's specific performance claim, the court found that Horowitch could not pursue his FDUTPA claim. (108:16). The court found that because Horowitch was an Arizona resident, Diamond a Canadian company and the underlying acts occurred outside Florida, Arizona had the most significant relationship to Horowitch's claim. (108:17). The court permitted Horowitch to proceed under ACFA. (108:17).

After an interlocutory appeal and dismissal of Horowitch's remaining contract claims, the District Court held a bench trial solely on Horowitch's ACFA claim. (178:1). Diamond prevailed. (192:1-25). The District Court found that Diamond had acted in good faith and had not deceived Horowitch or engaged in misleading conduct. (192:15, 16, 20, 22-25).

C. Diamond Seeks Attorney's Fees And Costs Under FDUTPA And Its Offer Of Judgment.

Diamond filed a motion for attorney's fees and costs. (196:1). In it, Diamond argued two statutory basis for attorney's fees: Florida's Offer of Judgment Statute, Section 768.79, Florida Statutes, and Section 501.2105, Florida Statutes, found in FDUTPA. (196:3).

To support its FDUTPA fee claim, Diamond explained that fees should be awarded under FDUTPA even though the District Court found FDUTPA did not apply to this case. (196:8-9). Diamond specifically cited numerous cases from Florida courts that permitted an award of FDUTPA attorneys fees even though the court concluded FDUTPA did not apply. (196:9).

To support its offer of judgment fee claim, Diamond produced a timely-made $40,000 offer of judgment. (196-2). The offer stated that it was made "to resolve all claims that were or could have been asserted by Plaintiff against Diamond Aircraft in the Amended Complaint" and conditioned the offer on the dismissal of the pending claims with prejudice. (216:3). Given a $20,0000

limitation of liability under the purchase order form, Diamond reasoned that the offer was clearly made in a good faith effort to conclude the litigation and avoid further defense costs, citing Section 768.79(7)(a), Florida Statutes. (196:4-5). Diamond noted that Horowitch did not accept the offer and it was therefore deemed rejected after 30 days under Section 768.79(l), Florida Statutes. (196:4-5). Because Horowitch recovered nothing, Diamond's statutory entitlement to attorney's fees was triggered under Section 768.79(1). (196:4-5).

D. The Federal District Court Denies Diamond's Claim For Attorney's Fees And Costs By Concluding FDUTPA Did Not Apply And The Offer Of Judgment Was Unenforceable.

The District Court referred the matter to the Magistrate Judge for a report and recommendation. (198:n.1). Based upon Horowitch's arguments, the Magistrate Judge recommended that Diamond was not entitled to attorneys' fees. (210:1; 211:1). Diamond filed an objection to address those findings. (213:1; 214:1). The District Court adopted and affirmed the report and recommendation of the Magistrate Judge and entered an order which denied Diamond's motion for attorney's fee and reasonable costs. (216:10).

The District Court first found that its prior conclusion that FDUTPA did not apply to this case precluded Diamond from recovering attorney's fees under FDUTPA. (216:7). In reaching this conclusion, the court rejected authority from Florida courts which permits FDUTPA attorney's fees once a plaintiff invokes

FDUTPA. (216:7). Second, the District Court construed the language of the offer of judgment statute which permits offer of judgments in "any civil action for damages." (216:6-7). The District Court found Diamond's offer of judgment unenforceable because Horowitch had raised an alternative claim for specific performance, which was not a claim for money damages. (216:6-7).

E. Diamond Appeals and the Eleventh Circuit Certifies Four Questions To This Court.

Diamond timely appealed the District Court's orders to the Eleventh Circuit Court of Appeals. (218:1). After receiving briefing and entertaining oral argument, the Eleventh Circuit certified four questions to this Court. *Diamond Aircraft Industries, Inc. v. Horowitch,* 645 F. 3d 1254 (11th Cir. 2011). In doing so, the Eleventh Circuit identified several legal issues.

The Eleventh Circuit found it unclear whether Florida law would find this offer of judgment enforceable. *Id.* at 1261-1262. First, the Eleventh Circuit held that, under *Erie* principles,[2] Florida Rule of Civil Procedure 1.442's requirement for a certificate of service was procedural and thus did not apply in federal court. *Id.* at 1258. The Eleventh Circuit held that that Rule 1.442(c)(2)(F) -- which requires an offer of judgment to "state whether the proposal includes attorney's fees and whether attorney's fees are part of the legal claim" -- is substantive. *Id.* at 1258. Though it is substantive, the Eleventh Circuit was unable to determine

---

[2] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

whether the alleged failure to comply with this provision invalidated the offer of judgment. *Id.* at 1261-1262. The Eleventh Circuit specifically focused on this Court's decision in *Campbell v. Gordon*, 959 So. 2d 223 (Fla. 2007), which strictly construed the offer of judgment statute and Rule 1.442 even with respect to purely technical error. *Id.* The Eleventh Circuit noted that although *Campbell* did not directly address (c)(2)(F), its strict construction analysis might undermine prior Florida decisions enforcing offers of judgments which did not comply with (c)(2)(F). *Id.*

Next, the Eleventh Circuit questioned the District Court's conclusion that the offer of judgment statute did not apply when the lawsuit presented equitable claims. *Id.* at 1262. The Eleventh Circuit recognized that the cases which had so held were factually dissimilar from this case. *Id.* at 1263. The Eleventh Circuit concluded a different result might be had here given that Horowitch made his specific performance claim alternative to his damages claim. *Id.* Even if not, the Eleventh Circuit highlighted important policy considerations that might permit enforcement of the offer of judgment where the claim for specific performance was so substantially lacking in merit. *Id.*

Finally, the Eleventh Circuit addressed the FDUTPA attorney's fee claim and concluded that, under *Erie* principles, the fee shifting provision of FDUTPA was also substantive. *Id.* at 1259. While it generally found policy reasons to

support the application of the fee provision in a case in which a trial court had concluded on summary judgment that the substantive law applied from another state, the absence of Florida law undermined the Eleventh Circuit's ability to definitively answer the question. *Id.* at 1266. Because no Florida case law existed on this issue, the Eleventh Circuit further found itself without guidance as to the time period a prevailing party could recover fees under this scenario. Nonetheless, the Eleventh Circuit envisioned several reasons why attorney's fees should be available for the entire case, rather than limiting fees to before summary judgment. *Id.* Given its certification of the offer of judgment issues, the Eleventh Circuit certified these questions, too. *Id.* at 1267.

CERTIFIED QUESTIONS

I. **DOES FLA. STAT. § 501.2105 ENTITLE A PREVAILING DEFENDANT TO AN ATTORNEY'S FEE AWARD IN A CASE IN WHICH A PLAINTIFF BRINGS AN UNFAIR TRADE PRACTICES CLAIM UNDER THE FDUTPA, BUT THE DISTRICT COURT DECIDES THAT THE SUBSTANTIVE LAW OF A DIFFERENT STATE GOVERNS THE UNFAIR TRADE PRACTICES CLAIM, AND THE DEFENDANT ULTIMATELY PREVAILS ON THAT CLAIM?**

II. **IF FLA. STAT. § 501.2105 APPLIES UNDER THE CIRCUMSTANCES DESCRIBED IN THE PREVIOUS QUESTION, DOES IT APPLY ONLY TO THE PERIOD OF LITIGATION UP TO THE POINT THAT THE DISTRICT COURT HELD THAT THE PLAINTIFF COULD NOT PURSUE THE FDUTPA CLAIM BECAUSE FLORIDA LAW DID NOT APPLY TO HIS UNFAIR TRADE PRACTICES CLAIM, OR DOES IT APPLY TO THE ENTIRETY OF THE LITIGATION?**

III. **DOES FLA. STAT. § 768.79 APPLY TO CASES THAT SEEK EQUITABLE RELIEF IN THE ALTERNATIVE TO MONEY DAMAGES; AND, EVEN IF IT DOES NOT GENERALLY APPLY TO SUCH CASES, IS THERE ANY EXCEPTION FOR CIRCUMSTANCES IN WHICH THE CLAIM FOR EQUITABLE RELIEF IS SERIOUSLY LACKING IN MERIT?**

IV. **UNDER FLA. STAT. § 768.79 AND RULE 1.442, IS A DEFENDANT'S OFFER OF JUDGMENT VALID IF, IN A CASE IN WHICH THE PLAINTIFF DEMANDS ATTORNEY'S FEES, THE OFFER PURPORTS TO SATISFY ALL CLAIMS BUT FAILS TO SPECIFY WHETHER ATTORNEY'S FEES ARE INCLUDED AND FAILS TO SPECIFY WHETHER ATTORNEY'S FEES ARE PART OF THE LEGAL CLAIM?**

SUMMARY OF ARGUMENT

Horowitch fought for seven months to maintain his FDUTPA claim because it afforded him a means to demand attorney's fees for his ill-conceived lawsuit. Once he lost under FDUTPA on the basis that it did not apply, Horowitch behaved as though FDUTPA had never been a part of his case, except when convenient for him. Although finding strong policy reasons to enforce the FDUTPA fee provision here, the Eleventh Circuit acknowledged no Florida case has addressed whether the FDUTPA attorney's fees provision applies when the basis for a party's loss under FDUTPA is that the law of another jurisdiction applies.

There is no good legal or policy reason why this basis for Horowitch's loss should deprive Diamond of fees for its defense against this claim. No authority permits a party to seek what essentially amounts to an advisory opinion concerning its ability to pursue a claim, then shirk its duty to pay attorney's fees when told it cannot. Horowitch continuously invoked FDUTPA, refusing to relent until the Court concluded FDUTPA did not apply just days before the originally scheduled trial. Declining to award Diamond its attorney's fees under FDUTPA rewards Horowitch for bringing a claim he should not have brought, refused to give up, and pursued until the District Court ruled he could not. Failing to describe this as a win for Diamond is the classic exaltation of form over substance.

Because Diamond is entitled to its attorney's fees under FDUTPA, this Court should also find Diamond entitled to fees for defending the entire case. The Eleventh Circuit found no factually analogous decision that addressed whether attorney's fees should be calculated through the date of final judgment. But as the Eleventh Circuit recognized, Diamond effectively defended against the FDUTPA claim until Horowitch decided not to appeal the adverse final judgment. Concomitant with these facts, the statute expressly tells courts to award attorney's fees for the entire case and after all appeals have concluded. Taken together, this procedural reality and statutory language provide a substantive basis to agree with the Eleventh Circuit's recommendation that FDUTPA attorney's fees be awarded for the entire case.

The Eleventh Circuit was equally correct in its belief that Diamond should recover under its offer of judgment. Florida courts have routinely applied the offer of judgment statute to lawsuits seeking equitable relief. The few Florida cases that across-the-board refuse to do so are wrong because the plain language of the statute applies to "any civil action for damages" not "exclusively" or "solely" for damages. Alternatively, these decisions can be factually distinguished because they did not involve alternative claims for equitable relief, creating an enforcement conundrum. If the law is construed otherwise, crafty plaintiffs will always include alternative claims for equitable relief to avoid offers of judgment. As the Eleventh

Circuit noted, this is a particularly troublesome result, especially when the equitable claim is so seriously lacking in merit, as the Eleventh Circuit found was the case here.

The last question certified by the Eleventh Circuit results from this Court's directive that courts strictly construe Rule 1.442. While Diamond does not quibble with this mandate, Diamond submits that its offer complied with the Rule. Rule 1.442(c)(2)(F) requires a party making an offer to specify whether attorney's fees are included and whether attorney's fees are part of the legal claim. Diamond's offer to settle "all claims" complied with the Rule for two reasons. First, if Horowitch is correct that FDUTPA did not apply so he can avoid owing FDUTPA attorney's fees, then he cannot consistently argue that attorney's fees are part of his claim. If this second point is accepted, Florida courts hold that a party need not make a statement about a condition that is not relevant. But even if FDUTPA is part of Horowitch's claim (which Diamond contends), Subsection (c)(2)(F) is not logically triggered unless the offer of judgment is for less than all claims. Here, as the Eleventh Circuit noted, all claims were being settled, which included attorney's fees. Diamond followed the Rule.

ARGUMENT

I. SECTION 501.2105, FLORIDA STATUTES, ENTITLES A PREVAILING DEFENDANT TO AN ATTORNEY'S FEE AWARD IN A CASE IN WHICH A PLAINTIFF BRINGS AN UNFAIR TRADE PRACTICES CLAIM UNDER THE FDUTPA, BUT THE DISTRICT COURT DECIDES THAT THE SUBSTANTIVE LAW OF A DIFFERENT STATE GOVERNS THE UNFAIR TRADE PRACTICES CLAIM, AND THE DEFENDANT ULTIMATELY PREVAILS ON THAT CLAIM.

Diamond's position is quite simple. Horowitch pled FDUTPA. He sought attorney's fees under it. Horowitch fought Diamond for seven months against dismissal of his FDUTPA claim, but ultimately lost on it. Diamond won under FDUTPA, thereby triggering its right to attorney's fees under Section 501.2105, Florida Statutes.

The sole complicating factor results from the reason why Horowitch lost. The District Court determined FDUTPA did not apply under choice-of-law principles because Horowitch was not a Florida resident and the acts about which he complained did not occur in Florida. Thus, the District Court found that FDUTPA was inapplicable to the facts of this case. In turn, the District Court believed that once it concluded that Horowitch had no right to sue under FDUTPA, Diamond could not claim prevailing attorney's fees under an inapplicable statute.

While there is no Florida law that addresses this exact scenario, other courts have ruled that attorney's fees under a comparable statute should be awarded under similar circumstances. In *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601 (9th

Cir. 2010), one of the former Beach Boys band members sued defendants under a California right of publicity statute that protected the use of a celebrity's likeness. The statute authorized prevailing party attorney's fees. *Id.* at 614. The Ninth Circuit ultimately found the statute could not be applied because the law of Great Britain controlled. Love argued that the statute could not support an attorney's fees award if, under the court's choice-of-law analysis, the statutory provision did not apply to the claim. *Id.*

The Ninth Circuit rejected this argument and awarded defendants prevailing party attorney's fees under the California statute. The court noted that it reached this conclusion notwithstanding the fact that the statutory action failed because the statute's substantive law did not govern Love's claim.[3] See also *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1156 (9th Cir. 2002) (court affirms attorney's fee award against plaintiffs who invoked California's posthumous right of publicity statute even though English rather than California law was actually applied to right of publicity claim).

Florida courts have not ruled directly on this issue. Yet they have held that attorney's fees should be awarded under FDUTPA even though the court initially

[3] This line of authority does not offend Florida law given that Florida courts apply Florida's offer of judgment statute to cases tried in Florida courts even if the substantive law that governs the case is that of another state. *BDO Seidman, LLP v. British Car Auctions, Inc.*, 802 So. 2d 366 (Fla. 4th DCA 2001).

held that FDUTPA did not apply to that case. In *Brown v. Gardens by the Sea South Condominium Ass'n*, 424 So. 2d 181, 184 (Fla. 4th DCA 1983), citing *Rustic Village, Inc. v. Friedman*, 417 So. 2d 305 (Fla. 3d DCA 1982), the court held:

> The plaintiff, as appellee, attempts to support the order appealed on the basis that once the trial court had found [FDUTPA] "inapplicable," it could not then utilize the Act for the purpose of granting the prevailing defendant an attorney's fee. It is apparent that this is not the case since the Act was applied in the action. It is simply that after being applied, it did not produce a remedy for this plaintiff. To some degree, such is the result in every case where a defendant prevails. The plaintiff, having invoked the Act, is liable for an attorney's fee because he did not prevail.

The Eleventh Circuit questioned the applicability of this authority. *Diamond Aircraft*, 645 F. 3d at 1264. The court noted that Diamond cited cases which ***applied*** Florida law to find that the plaintiff could not recover under FDUTPA. *Id.* at 1264-1265. Even if this were a distinction with a difference, the District Court here did apply FDUTPA for months. Horowitch did much more than "merely" plead a claim and take no further action. Horowitch aggressively pursued his FDUTPA claim, using it as a basis for discovery and his right to attorney's fees. For months the District Court was forced to review FDUTPA to decide whether to permit Horowitch discovery and allow him to proceed under FDUTPA. Although FDUTPA did not apply, the District Court certainly "applied" it for months.

At every turn, Horowitch hedged his bets on whether he could pursue his FDUTPA claim. Horowitch fought to the very end to keep it in the lawsuit as a basis for recovery. His actions should not be rewarded simply because the District Court found that the contracts' choice-of-law principles prohibited Horowitch's pursuit of his FDUTPA claim.[4]

Diamond's position aligns with the public policy behind a FDUTPA attorney's fee award. In *Mandel v. Decorator's Mart, Inc. of Deerfield Beach*, 965 So. 2d 311, 316, n.1 (Fla. 4th DCA 2007), the Fourth District noted the need to award attorney's fees because of the serious nature of FDUTPA allegations and the resources needed to defend such a claim. This policy would be defeated if Horowitch could evade his responsibility for attorneys' fees under FDUTPA simply because his FDUTPA claim was so entirely misplaced under choice-of-law principles. Such a result rewards a plaintiff for pleading the most unmeritorious cases, while those with more meritorious FDUTPA claims that failed for insufficient proof and other reasons would remain subject to fee claims. In short, the result should be no different if a plaintiff refuses to recognize choice-of-law principles and must later be told by a court that his choice of law is wrong.

[4] Indeed, Horowitch continued to invoke FDUTPA on appeal to avoid his obligation to pay attorney's fees under Diamond's offer of judgment. Horowitch claimed Diamond's offer of judgment did not specify whether it included Horowitch's FDUTPA claim for attorney's fees and thus, he argued, the offer was procedurally defective and unenforceable. (11th Cir. ABR at 3, 31).

The Fourth District's decision in *Weatherby Associates, Inc. v. Ballack*, 783 So. 2d 1138, 1143 (Fla. 4th DCA 2001), bolsters this policy analysis. There, the plaintiff argued that the trial court improperly awarded attorney's fees pursuant to Section 57.105(1), Florida Statutes, because the parties agreed that Connecticut law would apply to any litigation arising out of the employment agreement. The Fourth District held that the choice of law provision in the agreement was irrelevant, because the trial court did not award attorney's fees pursuant to the agreement. Rather, the court awarded attorney's fees pursuant to Section 57.105(1), Florida Statutes, because plaintiff filed and pursued a baseless lawsuit in a Florida court. For this same reason, the policy behind awarding fees to a prevailing FDUTPA defendant supports awarding them no matter what the reason for dismissal.

Equally important, Horowitch could have initially pled an AFCA consumer fraud claim, but did not. He obviously chose (by way of his deliberate act to amend his lawsuit), and then continued to pursue a FDUTPA claim because he hoped recovery under it would entitle him to attorney's fees. Convincing the District Court that FDUTPA did not apply was not merely a pyrrhic victory for Diamond. By defeating Horowitch's FDUTPA claim, Diamond eliminated Horowitch's claim for attorneys' fees, which was unavailable under ACFA.

The notable irony is that if the District Court had allowed Horowitch to pursue his FDUTPA claim, he could have recovered attorney's fees if he had prevailed. The District Court refused to afford Diamond the same opportunity to recover as the prevailing party under FDUTPA. This Court should prevent this unjust result by enforcing FDUTPA's fee provision in this case.

In essence, Horowitch reasons that it makes sense to award attorney's fees against a party who invokes FDUTPA, and loses under its substantive provisions. Yet, he argues, it is not logical to award attorney's fees against a plaintiff who invokes FDUTPA and loses on his claim because, under choice-of-law principles, the statute's substantive provisions do not apply. Regardless of whether a court summons logic, equity or public policy to resolve this issue, it is inconceivable that a party can pursue a statutory claim (which supplies a basis for attorney's fees) over a defendant's objections, then later claim he does not owe attorney's fees when the court says he was wrong to pursue it. Thus, as the Eleventh Circuit concluded, once a party initiates a lawsuit under Florida substantive law which contains a fee shifting provision, even if that law is found not to apply because the law of another state applies, the fee shifting provision does not disappear. *Diamond Aircraft*, 645 F. 3d at 1265-1266. If this were not the law, plaintiffs throughout the country could raise statutory claims from other states, yet be

shielded from statutory attorney's fee awards simply by a court's conclusion that the plaintiff invoked the law of the wrong state.

This Court should answer this certified question "yes."

II. IF SECTION 501.2105, FLORIDA STATUTES, APPLIES UNDER THE CIRCUMSTANCES DESCRIBED IN THE PREVIOUS QUESTION, IT APPLIES TO THE ENTIRETY OF THE LITIGATION.

The Eleventh Circuit questioned whether fees awarded under FDUTPA could be temporally limited once the FDUTPA claim was eliminated *via* summary judgment. *Diamond Aircraft*, 645 F. 3d at 1266. Both procedural and substantive reasons mandate this result should not be the outcome here.

First, because the summary judgment ruling eliminating Horowitch's right to proceed under FDUTPA was interlocutory, the FDUTPA claim remained in the case until Horowitch failed to appeal the adverse judgment against him. Fed. R. Civ. P. 54(b). Thus, once the summary judgment was rendered against Horowitch on his FDUTPA claim, it was not "out" or "over," but remained alive for Horowtich's future use on appeal.

Second, in determining the amount of attorney's fees where a plaintiff has lost on his FDUTPA claim, the language of Section 501.2105 takes a broad view of compensable attorney time in a case involving a claim of a deceptive or unfair trade practice. *Mandel*, 965 So. 2d at 314. Section 501.2105(2) requires that the prevailing party's attorney submit an affidavit of "time spent on the case." *Id.*

Similarly, Section 501.2105(3) allows a trial judge to award a "legal fee" for hours "actually spent on the case." *Id.* This statutory language:

> contemplates recovery of attorney's fees for hours devoted to the entire litigation . . . and does not require allocation of attorney time between the chapter 501 count and other alternative counts based on the same consumer transaction unless the attorney's services clearly were not related in any way to establishing or defending an alleged violation of chapter 501.

Id. (emphasis added) citing *Heindel v. Southside Chrysler-Plymouth, Inc.*, 476 So. 2d 266, 271 (Fla. 1st DCA 1985). This means that where Chapter 501 claims are based on the same transaction as alternative theories of recovery, "no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the 501 claim or it is shown that the services related to issues, such as punitive damages, which were clearly beyond the scope of a 501 proceeding." *Id.* at 272 citing *Smith v. Bilgin*, 534 So. 2d 852, 854 (Fla. 1st DCA 1988). In short, Florida law contemplates recovery of attorney's fees for hours devoted to the entire litigation, not just the FDUTPA count, including fees incurred prior to the time Horowitch amended his complaint to include his Chapter 501 claim.

This makes sense. As the Eleventh Circuit recognized, injecting a FDUTPA claim into an ordinary breach of contract case takes it to a whole other level that requires a different defense and strategy:

> [I]t is not uncommon for litigants to inject claims of fraud and deceptive trade practices into a contractual dispute. This tactic complicates a lawsuit, raises the stakes, and increases the litigation expenses. We have encountered few cases where such claims were successful.

Diamond Aircraft, 645 F. 3d at 1265, citing *Mandel*, 965 So. 2d at 316, n.1.

The record bears out this policy concern. Diamond incurred in excess of one million dollars defending Horowitch's hyped-up allegations that Diamond acted deceptively, only to have the District Court find that, at all relevant times, Diamond acted in "good faith." (192:15-16, 25). As long as the ruling remains interlocutory and in the case until appeals conclude, FDUTPA attorney's fees should be awarded for the entire litigation.

This Court should answer this certified question to permit FDUTPA attorney's fees to accrue under Section 501.2105 until appeals conclude.

III. SECTION 768.79, FLORIDA STATUTES, APPLIES TO CASES THAT SEEK EQUITABLE RELIEF IN THE ALTERNATIVE TO MONEY DAMAGES; AND, EVEN IF IT DOES NOT GENERALLY APPLY TO SUCH CASES, THERE IS AN EXCEPTION FOR CIRCUMSTANCES IN WHICH THE CLAIM FOR EQUITABLE RELIEF IS SERIOUSLY LACKING IN MERIT.

The Offer of Judgment statute, Section 768.79, Florida Statutes, provides, in pertinent part:

> (1) In ***any civil action for damages*** filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. (emphasis added).

While the Eleventh Circuit concluded this language might apply to facts like the one at hand, it acknowledged that some Florida courts have found that this statute does not apply when equitable relief is sought, albeit on different facts. *Diamond Aircraft*, 645 F. 3d at 1262.

While this Court has not ruled directly on the issue at hand, it has given some guidance on how it would rule. In *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1073 (Fla. 2006), this Court noted the wide array of actions subject to Section 768.79. It cited *Beyel Bros. Crane & Rigging Co. of So. Fla., Inc. v. Ace Transp., Inc.*, 664 So. 2d 62, 64 (Fla. 4th DCA 1995), for this

proposition. In *Beyel Bros.*, the court held that the "any civil action for damages" language in the statute "convey[s] a clear meaning sweeping in all civil actions in which one party seeks damages from another party." This Court held the action "may arise under tort law; it may arise under contract law; it may arise under property law. If the party seeks damages from another party, then the claim is covered by Section 768.79's broad phrase, 'civil action for damages.'" *Id.*

In addition, Florida's intermediate appellate courts have held for years that the mere presence of an equitable claim in what is otherwise a civil action for damages does not preclude the application of Section 768.79. *Stewart v. Tasnet, Inc.*, 718 So. 2d 820, 821-822 (Fla. 2d DCA 1998) (court applied Section 768.79 to an equitable subrogation claim, holding that the statute applied to any action for damages regardless of whether such action is based on tort or contract law and that it encompassed a claim based on equitable subrogation); *Burtman v. Porchester Holdings, Inc.*, 680 So. 2d 631, 632 (Fla. 4th DCA 1996)(court applied Section 768.79 in an interpleader action because despite its equitable nature, the action "essentially involve[d] competing claims for money.") The *Burtman* court's application of the statute was also notwithstanding the fact that the case involved a cross-claim to set aside a fraudulent transfer, "which does not qualify under the statute as a claim for civil damages." *Id.* Nevertheless, the court noted that the fraudulent transfer issue was raised to defeat a competing claim for monetary

relief, and "th[e] action essentially involve[d] conflicting claims for money." As a result, the court properly applied the statute. *Id.*

The Fourth District employed an identical analysis in *National Indemnity Co. of the South v. Consolidated Insurance Services*, 778 So. 2d 404 (Fla. 4th DCA 2001), although it reached a different result. In *National Indemnity*, the Fourth District looked beyond the title of the relief sought for the "real issue" in the case. It said:

> We have looked to whether the "real issue" is one for damages or declaratory relief. The "real issue" in this case is insurance coverage for an underlying tort action. ***No money damages or payment of money is directly requested in this suit, as it was in Nelson,*** and we conclude that the trial court's ruling was correct.

Id. at 408. (citations omitted) (emphasis added). See also *DiPompeo Const. Corp. v. Kimmel & Associates, Inc.*, 916 So. 2d 17, 19 (Fla. 4th DCA 2005) (enforcing offer of judgment in action that sought declaratory relief and distinguishing *National Indemnity*, a declaratory judgment action where "[n]o money damages or payment of money [was] directly requested" and the real issue in the case was "insurance coverage for an underlying tort action.").

Likewise in *Nelson v. Marine Group of Palm Beach, Inc.*, 677 So. 2d 998 (Fla. 4th DCA 1996), the Fourth District addressed a case that began as a declaratory judgment followed by a counterclaim for breach of contract. *Id.* at 998-99. The central issue was the entitlement to a deposit given by a prospective

buyer in a yacht sale transaction. The trial court held that the buyer had breached the contract, entitling the seller and broker to retain the deposit as liquidated damages. *Id.* at 999. On appeal, the Fourth District rejected the buyer's argument that Section 768.79 did not apply:

> Although buyer brought this action as a declaratory judgment, the only matter at issue was money-whether seller was entitled to retain the escrowed deposit as liquidated damages or whether buyer was entitled to its return. As evidenced both by the ***real issues in dispute*** and the counterclaim which clearly framed this case as an action for damages, the offer of judgment statute properly applied.

Id. at 999 (internal citations omitted) (emphasis added).

Palm Beach Polo Holdings, Inc. v. Equestrian Club Estates Property Owners Ass'n, Inc., 22 So. 3d 140 (Fla. 4th DCA 2009), created the uncertainty the Eleventh Circuit referenced. *Diamond Aircraft,* 645 F. 3d at 1262. But, as the Eleventh Circuit highlighted, *Palm Beach Polo* is distinguishable for several reasons. *Id.* at 1263.

In *Palm Beach Polo*, the plaintiff brought several claims, including a claim for a judicial determination of whether the plaintiff was entitled to a certain number of votes in an election for a board of directors, a claim for declaratory and injunctive relief to recognize and enforce the plaintiff's implied grant by way of necessity to certain real property, and a claim for tortious interference with the plaintiff's attempts to sell the property, resulting in monetary damages. *Palm*

Beach Polo, 22 So. 3d at 142. The plaintiff also sought and obtained a temporary restraining order. *Id.*

After the defendant prevailed at trial, it moved for attorney's fees based, in part, on three proposals for settlement. The trial court found that this case was an action for damages for purposes of application of Section 768.79 and its corresponding rule and awarded attorney's fees.

On appeal, the Fourth District reversed. Notably, the court itself recognized that the offer of judgment statute can apply even when equitable relief is sought. In fact, the *Palm Beach Polo* court cited several other panel decisions which applied the offer of judgment statute to equitable claims.[5] Nonetheless, the court emphasized that the complaint contained two independent, significant claims, such that it could be characterized only as an action for both damages and non-monetary, declaratory relief. The court ultimately held that strict construction of the statute and rule should not allow application of a general offer of settlement,

---

[5] *Novastar Mortgage, Inc. v. Strassburger*, 855 So. 2d 130, 131 (Fla. 4th DCA 2003) (mortgage foreclosure action "was only about money"); *Nelson v. Marine Group of Palm Beach, Inc.*, 677 So. 2d 998, 999 (Fla. 4th DCA 1996) (declaratory action construed as an action for damages and thus statute applied); *V.I.P. Real Estate Corp. v. Fla. Executive Realty Mgmt. Corp.*, 650 So.2d 199, 201 (Fla. 4th DCA 1995) (applying statute to interpleader action, since "real issue" was entitlement to a real estate commission); *Burtman v. Porchester*, 680 So.2d 631, 632 (Fla. 4th DCA 1996) (applying statute to an interpleader action despite existence of cross-claim to set aside a fraudulent transfer, which does not qualify under the statute as a claim for civil damages).

sought to be applied to claims seeking non-monetary relief as well as actions for damages.

Unlike the case in *Palm Beach Polo*, viewing Horowitch's entire civil action, it is unquestionably one for damages. When Diamond served its offer of judgment, Horowitch had sued Diamond under four claims, all of which sought money damages. (41:7-13). Even his claim for specific performance sought "damages." (41:8). Indeed, Horowitch's basis for his specific performance request was that Diamond allegedly agreed to sell him a D-Jet for $850,000, but later sought $1,380,000 – clearly a quarrel over money. (41:7). Because the issues Horowitch raised were ones that sought damages -- including his claim for specific performance -- the offer of judgment statute applies.

Palm Beach Polo is otherwise distinguishable because it involved independent claims for equitable relief, which were not pled in the alternative.[6] The court was concerned that if the statute were read to permit a proposal for settlement to apply to a case in which there were claims for non-economic relief as well as for damages, the offeree would be forced either to accept the proposal and continue to litigate the request for injunctive and non-economic relief or to give up their non-damages claims.

---

[6] "In the instant case, the complaint contained two independent, significant claims, such that it could be characterized only as an action for ***both*** damages and non-monetary, declaratory relief." *Palm Beach Polo*, 22 So. 3d 143. (emphasis in original).

This same concern is not present when the equitable claim is stated ***in the alternative.*** Horowitch could not recover both money damages and specific performance. Acceptance of one precluded pursuit of the other. Thus, as the *Palm Beach Polo* court contemplated, Horowitch's acceptance of the $40,000 would have furthered the statute's purpose of early termination of litigation because it would have "resolve[d] those claims not seeking damages." *Palm Beach Polo,* 22 So. 3d at 145. In short, Horowitch did not face the dilemma the *Palm Beach Polo* plaintiff confronted.

Nothing in the *Palm Beach Polo* opinion suggests that the claim for monetary damages for tortious interference was made in the alternative to the equitable claims, as Horowitch's claims in this case were. See also *Winter Park Imports, Inc. v. JM Family Enterprises*, 10 So. 3d 1133 (Fla. 5th DCA 2011) (addressed whether offer of judgment statute applies where a plaintiff "seeks both monetary damages and injunctive relief as part of the same claim(s)"; court "not willing to opine" that offer of judgment statute never applies in cases involving "separate claims for monetary and non-monetary relief" where offer pertains to monetary claim).

The *Palm Beach Polo* court's ruling that "when an action seeks non-monetary relief, such as a pure declaration of rights or injunctive relief, then the fact that it *also* seeks damages does not bring it within the offer of judgment

statute" must be reviewed in this context. *Palm Beach Polo,* 22 So. 2d at 144 (emphasis in original). The court's rationale demonstrates that its ruling is inapplicable here. Specifically, the court reasoned:

> The purposes of section 768.79 include the early termination of litigation. A proposal for settlement in a case such as this one does not satisfy that purpose, as **its acceptance would not terminate the litigation nor resolve those claims not seeking damages**. Because the proposals for settlement addressed a complaint that included non-damages claims, they do not comply with the statute, and we find them invalid and reverse the trial court's order awarding fees.

Id. at 145 (emphasis added). This rationale and the resulting holding clearly cannot apply where, as here, the acceptance of an offer of judgment made under the statute would, by the terms of the offer and the very nature of the claims at issue, terminate the litigation.

Public policy supports this analysis. Section 768.79 was enacted for the important policy purpose of encouraging settlement. Allowing a party to exempt itself from the statute by simply tacking on a purported equitable claim would encourage a party to avoid valid settlement offers. Such a result would undermine the very purpose of the statute. Indeed, parties could simply file questionable claims for damages, add a claim for equitable relief, then when the party does not hit the hoped-for jackpot on its roll of the judicial dice, avoid a valid offer of judgment because of the mere pendency of the equitable claim. As the Eleventh

Circuit so aptly noted in this case, at the very least, an exception to *Palm Beach Polo* could be justified when the equitable claim is seriously lacking in merit, as the Eleventh Circuit found Horowitch's was here. *Diamond Aircraft,* 645 F. 3d at 1263. Holding otherwise puts complete control of the offer of judgment statute in the hands of plaintiffs when they craft their complaint and renders Defendants helpless to avoid this outcome.

This Court should answer the questioned certified "yes."

IV. UNDER SECTION 768.79, FLORIDA STATUTES, AND RULE 1.442, A DEFENDANT'S OFFER OF JUDGMENT IS VALID IF, IN A CASE IN WHICH THE PLAINTIFF DEMANDS ATTORNEY'S FEES, THE OFFER SATISFIES ALL CLAIMS BUT FAILS TO SPECIFY WHETHER ATTORNEY'S FEES ARE INCLUDED AND FAILS TO SPECIFY WHETHER ATTORNEY'S FEES ARE PART OF THE LEGAL CLAIM.

The Eleventh Circuit's uncertainty on this issue resulted from this Court's decision in *Campbell,* which strictly construed the offer of judgment statute and Rule 1.442 even with respect to purely technical error. This Court was presented with the argument that an offer of judgment was invalid for failure to specify that the offer was being made under the offer of judgment statute. In *Campbell*, this Court held that fee-shifting was in derogation of the common law, that both the rule and statute must be strictly construed, and that the failure of the offer to identify Section 768.79 therefore invalidated the offer. *Campbell*, 959 So. 2d at 226-227.

In grappling with the issue presented here, the Eleventh Circuit observed:

> We believe it was clear to Horowitch that acceptance of Diamond's offer would extinguish any claim to attorney's fees, and that Diamond's failure to discuss attorney's fees in the offer was therefore not prejudicial.

Diamond Aircraft, 645 F. 3d at 1261.

However, the Eleventh Circuit acknowledged an apparent conflict between earlier Florida cases, which hold that an offer of judgment that does not explicitly reference attorney's fees is viable, see *Unicare Health Facilities Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989), and *George v. Northcraft*, 476 So. 2d 758, 759 (Fla. 5th DCA 1985), and more recent cases, which hold that the statute and the rule must be strictly construed even in the face of purely technical requirements.[7] *Diamond Aircraft*, 645 F. 3d at 1260.

Although this Court's decision in *Campbell* addresses the failure to comply with a technical requirement in the statute and Rule 1.442, the issue should be treated differently here. As noted by the court in *Bennett v. American Language Sys. of Boca Delray, Inc.*, 857 So. 2d 986 (Fla. 4th DCA 2003), there is no reason why an offeror must include inapplicable conditions in the offer of judgment. This conclusion is also required by a plain reading of the rule. Rule 1.442(c)(2)(C) requires a settlement proposal to "state with particularity any ***relevant*** conditions."

---

[7] The Eleventh Circuit noted that *Unicare* and *George* were decided under a different version of Rule 1.442 with no explicit requirement that a party state whether attorney's fees were included.

(emphasis added). A plain reading of this Rule leads to the conclusion that only applicable conditions need be listed and if a condition is not listed then that condition is irrelevant and not applicable to the proposal.

This is an important distinction because of the simultaneous issue before this Court regarding whether attorney's fees are available under FDUTPA if it did not supply the substantive law in this case. If FDUTPA does not apply to this case because the substantive law of another jurisdiction controls, Horowitch certainly cannot demand that the offer reference a condition that was not relevant. FDUTPA cannot logically be "in" for one purpose and "out" for another.

Even if FDUTPA is part of the substantive law applicable to this case, Diamond complied with the express requirements of Rule 1.442. The subsections of Rule 1.442 must be read together so that each has meaning. *CPI Mfg. Co., Inc. v. Industrias St. Jack's S.A. De C.V.*, 870 So. 2d 89 (Fla. 3d DCA 2003). Subsection (c)(2)(B) requires the party making the offer to identify the claim or claims the proposed offer is intending to settle. This language contemplates that a party may serve an offer of judgment for less than all claims. In that set of circumstances, it makes sense to trigger Subsection (c)(2)(F), which requires the party to state whether the proposal includes attorney's fees and whether attorney's fees are part of the claim. But when the offer of judgment identifies "all claims" as the claims to be settled, the party making the offer has included the claim for

attorney's fees within all claims. Subsection (c)(2)(F) does not come into play unless the offer of judgment is for less than all claims.

The decision in *Liggett Group, Inc. v. Davis*, 975 So. 2d 1281 (Fla. 5th DCA 2008), supports this analysis. There, the defendant maintained that the trial court erred in awarding attorney's fees because the plaintiffs' proposal for settlement failed to state "whether attorneys' fees are part of the legal claim" as required by the rule. Because the proposal for settlement stated that it would "settle and completely resolve all claims" being made by the plaintiffs against the defendant and was inclusive of all claims for attorney's fees and costs, the court held it was sufficient to comply with the rule.

The Fifth District decided *Liggett* after *Campbell*. It demonstrates that "all claims" means "all claims," and includes attorney's fee claims. Diamond did exactly what the statute required and alerted Horowitch that the offer of judgment included Horowitch's attorney's fees claim. This Court should answer this certified question "yes."

CONCLUSION

For all the foregoing reasons, this Court should answer the certified questions as requested above.

Respectfully submitted,

____

Hala Sandridge
Florida Bar Number 0454362
FOWLER WHITE BOGGS P.A.
P.O. Box 1438
Tampa, FL 33601
Telephone No.:(813) 228-7411
Fax No.: (813) 229-8313
hsandrid@fowlerwhite.com
Attorneys for Appellant Diamond Aircraft Industries, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 31, 2011, a true and accurate copy of the foregoing has been furnished by U.S. Mail to:

William V. Custer, Esquire Georgia Bar No: 202910 bill.custer@bryancave.com Jennifer B. Dempsey, Esquire Georgia Bar No: 217536 jennifer.dempsey@bryancave.com Brian Cave LLP One Atlantic Center Fourteenth Floor 1201 West Peachtree Street, NW Atlanta, GA 30309 404 572-6600 404 572-6999 - fax Attorney for Appellee	Marc P. Ossinsky, Esquire Florida Bar No: 438588 marc@ossinskycathcart.com Christopher C. Cathcart, Esquire chris@ossinskycathcart.com Ossinsky & Cathcart, P.A. 2699 Lee Road, Suite 101 Winter Park, FL 32789 407 629-2484 407 629-4429 - fax Attorney for Appellee
James C. Hauser, Esquire Attorney's Fees in Florida 750 Live Oak Street Maitland, FL 32751 407 951-6865 407 660-3009 – fax Attorney for Appellee	

____
Hala Sandridge

CERTIFICATE OF COMPLIANCE

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

____
Hala Sandridge