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IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA
Case No. 3D2023-1966

GILLY VENDING, INC.,

Appellant,

vs.

THE VENDING STATION. INC.,

Appellee.
_______________________________/

ANSWER BRIEF OF APPELLEE THE VENDING STATION, INC.

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STATEMENT OF THE CASE AND FACTS

This is an appeal of a final judgment entered in a non-jury trial on breach of contract claims and counterclaims between Appellant Gilly Vending Inc. ("Gilly") and Appellee the Vending Station Inc. ("TVS"), relating to an agreement between the parties to service vending machines on the campus of the University of Central Florida ("UCF"). The trial court entered final judgment in favor of TVS on its breach of contract counterclaim, and awarded TVS lost profits on the contract breached by Gilly. In this appeal, Appellant challenges only (1) the trial court's calculation of lost profits and setoff on TVS's counterclaim for breach of contract and (2) the trial court's interpretation of the portion of the contract breached by the Appellant.

I. Factual Background

Gilly and TVS are competing companies that operate and service vending machines. In April 2010, UCF issued a Request for Proposals ("RFP") seeking companies to bid to provide vending services on UCF's campus. R. 1007-39; 1189, 1372. Both Gilly and TVS responded to the RFP, and Gilly was eventually awarded the contract. R. 792-985, 1188-90, 1194, 1372.

Although TVS was not knowingly a part of Gilly's proposal to UCF, and had not authorized Gilly to represent to UCF that TVS was part of Gilly's proposal, Gilly improperly used TVS's warehouse address in its bid as Gilly's base of operations. R. 1199. Gilly's initial proposal represented to UCF that its local base of operations was located at 3220 Packard Avenue St. Cloud, Florida. R. 1196. That address had long been improperly associated by Google with TVS. R. 1196. However, the address is not affiliated with TVS and is instead the address to a residential mobile home. R. 1196. The address is also not associated with Gilly.

UCF questioned the address in correspondence to Gilly, noting that when it researched the address an "interesting structure" appeared. R. 786. In the same correspondence, UCF expressed concern that Gilly's real base of operations was located in Miami, a significant distance from UCF. R. 786. Amit Biegun, Gilly's CFO, emailed TVS's CEO on June 22, 2010, and requested TVS's Orlando warehouse address. R. 776. After Mr. Sharp questioned why Gilly wanted the address, Mr. Biegun falsely stated that he needed it "for a presentation." R. 776. Mr. Sharp provided the TVS warehouse address and Gilly then responded to UCF's correspondence

identifying its local base of operations as the address for TVS's warehouse. R. 777, 788. However, Gilly did not advise UCF that the warehouse it identified belonged to TVS and not Gilly. R. 777, 788. In fact, Gilly did not have any warehouses in Central Florida, and also did not have any employees outside of Miami. R. 1195, 1297-98.

After UCF concluded the RFP process and selected Gilly for a contract award, Gilly and UCF finalized a contract to provide the services contemplated by the RFP in September 2010 (the "UCF Contract"). R. 993-99. The UCF Contract provided in part that "under no circumstances shall [Gilly] assign to a third party any right or obligation of [Gilly] pursuant to this Agreement without prior written consent of the University. R. 1000.

After receiving the contract award, Gilly sought TVS's help to fulfill the UCF Contract. In November 2010, Gilly and TVS entered into a subcontractor agreement wherein TVS agreed to service and restock the vending machines Gilly supplied to UCF pursuant to its contract (the "Subcontract Agreement"). R. 750-57. Prior to entering into the Subcontract Agreement, TVS's owner, Dennis Sharp, obtained assurances from Gilda Rosenberg, Gilly's CEO, that UCF

was aware of the Subcontract Agreement. R. 1200. Additionally, the Subcontract Agreement expressly acknowledged that Gilly had the legal and contractual authority to enter into the agreement, stating "4.3 Warranty. GV and Subcontractor warrant that it has the contractual and legal authority to enter into this Agreement." R. 753.

However, Gilly never notified UCF that it intended to utilize TVS as a subcontractor, and took steps to hide from UCF the fact that TVS would act as a subcontractor to Gilly. In fact, after the execution of the Subcontract Agreement, Gilly continued its pattern of deception and attempted to hide the existence of the Subcontract Agreement from UCF, including by requesting TVS employees to not wear TVS uniforms during a UCF site visit. R. 1201.

Despite Gilly's efforts, UCF subsequently became aware of the Subcontract Agreement, and on January 5, 2011, UCF's legal counsel requested clarification from Gilly via email as to whether any contractual services had been subcontracted by Gilly. R. 991. Gilly did not clearly answer UCF's question despite follow-up questions from UCF's counsel. R. 990. On January 12, 2011, Mr. Sharp of TVS emailed Gilly CFO Amit Biegun expressing concern that UCF was not aware that TVS is a subcontractor to Gilly on the UCF

Contract. R. 1061. Mr. Biegun advised Mr. Sharp that "[t]here should be no reason for concern." R. 1061.

After weeks of less than straightforward answers to the questions emailed by UCF's legal counsel, on January 24, 2011, UCF advised Ms. Rosenberg that it was in possession of the Subcontract Agreement, and further discussions regarding the Subcontract Agreement ensued. R. 989-91. UCF advised Gilly in writing on January 26, 2011, that it was in breach of the UCF Contract because it had failed to obtain UCF's written approval prior to entering into the Subcontract Agreement. R. 992. UCF's letter stated in part:

> The University of Central Florida did NOT give its prior written consent to the subcontract between Gilly Vending and The Vending Station, as required by the UCF Contract. Thus, Gilly Vending clearly breached Art. 5 of the UCF Contract.
>
> You have hereby received the required advance written notice that clearly describes your breach.
>
> Pursuant to Art. 6 of the UCF Contract, the University of Central Florida hereby informs you of its intention to terminate the UCF Contract upon the expiration of the thirty (3) day time frame following this advance written notice, unless the breach is cured.

R. 992.

Two weeks later, Gilly requested UCF approve TVS as a subcontractor. R. 1040-41. After UCF declined to approve TVS as a subcontractor, Gilly thereafter attempted to renegotiate the Subcontract Agreement with TVS such that TVS would still service UCF's vending machines, but would not be a "subcontractor." R. 1042-56; 1062-68. Mr. Sharp repeatedly expressed concern to Gilly's CEO and CFO that he had been misled and had been assured that UCF was aware of TVS's status as a Gilly subcontractor. R. 1068. TVS ultimately agreed to the change in terms proposed by Gilly, provided that UCF be advised of the relationship between the parties. R. 1071-73.

Gilly chose not to advise UCF of the proposed new relationship between the parties, and on April 5, 2011, advised UCF it was "cancelling" its agreement with TVS. R. 1074. Gilly's correspondence to UCF stated:

> As you may already know, I serve as counsel to Gilly Vending, Inc. with respect to UCF. I have been assisting Gilly in cancelling its agreement with the Vending Station in order to ensure that Gilly and its employees directly service UCF, pursuant to your instructions.
>
> I wished to briefly confirm that Gilly has terminated its agreement with The Vending

> Station and will be filling all snack machines utilizing Gilly employees going forward. Gilly will effect a full transfer of route servicing to Gilly employees in the coming days.
>
> My client is pleased that these improvements are aligned with the strategy of the University, and the purchasing department's desire to ensure that Gilly directly serves UCF and has operational accountability. Gilly is a proud partner of UCF and looks forward to continue growing its relationship with UCF, and the many wonderful students, faculty and employees that make up the UCF community.

R. 1074. Gilly's correspondence to UCF therefore made clear that it was terminating its Subcontract Agreement with TVS not based on any issues with TVS's performance, but instead based on UCF's decision not to approve TVS as a subcontractor.

Also on April 5, 2011, TVS received a letter purporting to terminate the subcontract agreement between Gilly and TVS. R. 758-59. Gilly's termination notice did not identify the true reason for termination, as stated in Gilly's correspondence to UCF, but instead stated the following purported grounds for termination:

> This termination is being made immediately pursuant to Section 1.3 for the purposes of client retention, this termination is also for cause as a result of breaches of Sections 5.6, 5.7 and 2.5 of the Agreement by TVS, amongst other irreparable breaches.

R. 758-59. The cited provisions of the Subcontract Agreement provide as follows:

> 1.3 Termination. The Agreement may be terminated by either party with cause, upon thirty (30) days prior written notice. The Agreement may also be terminated by GV immediately in order to retain client, if service problems are not attended according to this Agreement, or per the Request for Proposal #1027RCSA ("RFP"), attached as Exhibit ''A", SUBCONTRACTOR will surrender all equipment that is the property of GV immediately to GV and GV will take over and operate the vending machines. Additionally, Section 2.22 of the RFP Cancelation/Termination of Contract clause established by UCF shall be honored by both parties.
>
> 2.5 Security Deposit. SUBCONTRACTOR shall provide GV a performance bond before installation.
>
> 5.6 Confidentiality. During the Term, or any Renewal Term, and for a period of three (3) years from the date of Termination of this Agreement, SUBCONTRACTOR agrees to keep confidential and to cause their Representatives to keep confidential, specific terms of VSA Subcontractor became privy to, including but not limited to, discussions, information, negotiations, financial information and business terms, between the parties hereto.
>
> 5.7 Non-Compete. During the Term, or any Renewal Term, and, for a period of two (2) years from the date of Termination of this Agreement,

> SUBCONTRACTOR shall, and shall cause their Representatives, to refrain from direct or indirect participation and solicitation of Client or locations serviced pursuant to the VSA and RFP excluding Client RFP or Bids wherein SUBCONTRACTOR will include GV as a minority USG partner.
>
> 5.9 Interference in Operations. Subcontractor shall not disrupt or influence any of GV's employees or independent contractors or distributors in any capacity that will affect GV's operations and/or contracts.

R. 758-59.

Prior to the termination notice, Gilly had never alleged that TVS failed to comply with the Subcontract Agreement or identified any TVS service issues. R. 1204-06. Likewise, UCF never complained about TVS services. R. 1204-06. Following Gilly's wrongful termination of TVS, Gilly performed the UCF Contract for the remainder of the five-year term, and an additional three-year term. R. 1413, 1448.

A. Initiation of the Proceeding

Gilly initiated the proceeding below in May 2011. R. 23–44. After multiple amendments, the case proceeded to trial on Appellant's fourth amended complaint and TVS's counterclaims. R. 572-98. The specific claims tried included Appellant's claim for breach of contract

for unpaid commissions and TVS's counterclaims for (1) breach of contract as to the right to provide services; (2) breach of contractual warranty; (3) fraud in the inducement; (4) fraudulent misrepresentation; (5) negligent misrepresentation; and (6) violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), §§ 501.201–.213, Fla. Stat. (2014). R. 1147–49.

B. Trial Testimony Regarding Lost Profits

A significant amount of testimony at trial pertained to the profits lost by TVS as a result of Gilly's wrongful termination of the Subcontract Agreement. Dennis Sharp, TVS's longtime owner and CEO, testified regarding the profits TVS would have received from the Subcontract Agreement had Gilly not breached the agreement. R. 1187-1284. Mr. Sharp has owned and operated TVS for more than 25 years, and is well versed on issues of commissions, profit, and sales volume. R. 1187-88; 1219.

The Subcontract Agreement required TVS to service machines on UCF's campus in exchange for 52% of the vending machine revenue for the first three years, 53% of the vending machine revenue in years four and five, and 54% of the revenue in years six through

eight. R. 751. The remainder of the revenue was to be paid to Gilly (48% in years 1-3, 47% in years 4-5, and 46% in years 6-8). *Id.*

To determine the amount of profits TVS lost as a result of Gilly's breach of the Subcontract Agreement, Mr. Sharp first identified the amount of revenue Gilly actually received from the UCF Contract. R. 1219-41. Mr. Sharp relied on Gilly's sales volume records for 2011-2015 provided by Gilly for the UCF Contract, which were produced to TVS in discovery. R. 1077. These sales volume reports demonstrated combined snack and ice cream sales volume ranged from $182,607 to $274,216 annually from 2011-2015. *Id.* Additionally, Gilly's CFO testified that during TVS's four-month performance of the Subcontract Agreement, TVS's revenues were $115,000 ($28,750 per month). R. 1301-02. Extrapolating such revenues for a 12-month period would yield $345,000 in annual revenue ($28,750 x 12=$345,000).[1]

Having identified the total amount of revenue received from the UCF Contract, Mr. Sharp then testified as to the expenses TVS would

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[1] Gilly's CFO also estimated in September 2010 during negotiations on the Subcontract Agreement that UCF's vending volume would be $368,000 annually, and that TVS's profit would be approximately 18%. R. 1080.

have incurred servicing the contract during a lengthy direct and cross-examination. Mr. Sharp further testified that TVS's cost of goods sold for the first year of the contract was 31%, and its cost of goods sold would increase to 33% in the third year of the Subcontract Agreement. R. 1264-65. Mr. Sharp further testified that TVS's cost to employ drivers was 7%, and that credit card fees were 5.4% for each credit card purchase, but given the mix of credit card and cash sales the credit card fee averaged .7% of all sales. R. 1270-71.

After compiling all anticipated TVS expenses, Mr. Sharp testified that TVS's anticipated profit for the Subcontract Agreement was 13.3% of revenue in the first two years of the contract, before accounting for sales tax. R. 1216-41. After deducting sales tax of 6.5%, TVS's anticipated profit on the contract amounted to 6.8% of the revenue from the UCF relationship. R. 1084, 1490. Mr. Sharp further testified that during the four months TVS actually serviced the UCF relationship pursuant to the Subcontract Agreement, TVS's profits were consistent with the 13% pre-sales tax profit number. R. 1280. The lost profits damages award was thereafter derived by multiplying the anticipated profit percentage by Gilly's UCF sales volume information for the years 2011-2015.

On cross-examination, Gilly's counsel contended that a portion of TVS's overhead and other fixed costs should be attributed to the Subcontract Agreement to determine lost profits, but TVS's overheard and fixed costs would not increase through servicing of the Subcontract Agreement. R. 1276-77. In other words, Mr. Sharp's lost profits calculation included only costs that would actually increase by virtue of servicing the Subcontract Agreement.

Gilly presented the testimony of its CFO to attempt to rebut Mr. Sharp's testimony regarding TVS's expenses to perform the Subcontract Agreement. Mr. Biegun testified that in his opinion credit card fees should be 3.5% of total sales (R. 1306), and that TVS would also have incurred a fixed monthly cost of $11 to $12 per month for cashless devices to be installed on Gilly's machines. R. 1307-08. Mr. Biegun's ultimate testimony was that TVS would have made only one to one-and-a-half percent profit as a result of the Subcontract Agreement. R. 1302, 1306. Notably, Mr. Biegun's testimony differed strikingly from his earlier written representations to Mr. Sharp that TVS's profit percentage on the Subcontract Agreement would be 18%. R. 1080, 1278.

C. The Final Judgment

Following a two-day bench trial, the trial court entered final judgment in favor of TVS. R. 1711-17. The trial court made detailed factual findings in its final judgment, and determined that Gilly breached the Subcontract Agreement in two respects. The trial court also rejected Gilly's arguments that TVS had breached the Subcontract Agreement, and included the following specific findings:

> 8. Gilly's failure to notify UCF that they had a subcontract with TVS is a material breach of the November 1, 2010 Vending Subcontractor Agreement, specifically Section 4.3 where Gilly warrants that it has the contractual and legal authority to enter into the agreement. Gilly breached this warranty because Gilly could not enter into an agreement with TVS according to UCF's request for proposal without first getting the written consent from UCF.
>
> 9. Gilly is also in breach as to Section 1.3 of the Vending Subcontractor Agreement which addresses termination. When Gilly did terminate the Vending Subcontractor Agreement, they did not properly terminate with cause and did not provide thirty (30) days prior written notice. The April 5, 2011 letter from Shutts & Bowen on behalf of Gilly purporting to terminate the Vending Subcontractor Agreement cites to several provisions as a basis to justify a for cause termination. Specifically, the termination letter cites to Sections 1.3, 5.6, 5.7 and 2.5 of the Vending Subcontractor Agreement, which are addressed below.

10. Section 5.6 of the Vending Subcontractor Agreement is entitled "Confidentiality." There is no evidence that TVS breached any confidentiality agreements. Even if the evidence is taken as true that Mr. Sharp provided UCF with the Vending Subcontractor Agreement, that is not a breach of the "Confidentiality" provision. There is no evidence that TVS disclosed, breached, disseminated any secret or proprietary information or contractual information regarding the UCF Contract and Gilly cannot therefore rely on Section 5.6 to justify a for cause basis for termination.

11. Section 5.7 of the Vending Subcontractor Agreement is entitled "Non-Compete" and provides that during the terms of the contact period between Gilly and TVS and for two years after the termination, TVS shall refrain from direct or indirect solicitation of UCF pursuant to the UCF Contact, including bids. There is no evidence that TVS contacted UCF to get them to hire TVS or fire Gilly, so the Court finds that Section 5.7 does not justify a for cause termination. In the next paragraph of the Shutts & Bowen letter, they erroneously reference the Turnpike contract with Areas in relation to Section 5.7, but Section 5.7 of the Vending Subtractor Agreement has nothing to do with the Turnpike.

12. Section 5.9 of the Vending Subcontractor Agreement is not listed as an affirmative defense, but Gilly relied on this section during the trial of this matter to support terminating the contact for cause due to TVS' alleged interference between Gilly and Areas, USA's Turnpike contract. Section 5.9 of the Vending Subcontractor Agreement is entitled

"Interference in Operations" and says Subcontract, meaning TVS, "Shall not disrupt or influence any of [Gilly's] employees or independent contractors or distributors in any capacity that will affect [Gilly's] operations and/or contracts." There is no evidence that TVS contacted Areas to have them fire Gilly, that they tried to muscle them out of the Turnpike. The Court therefore finds that Section 5.9 is not a valid basis to justify a for cause termination and also finds that this was not listed as an affirmative defense.

13. Section 1.3 of the Vending Subcontractor Agreement entitled "Termination" references cause, but there were no complaints lodged against TVS's services at UCF.

14. Section 2.5 of the Vending Subcontractor Agreement, entitled "Security Deposit," required TVS to provide Gilly with a performance bond before installation. Following execution of the Vending Subcontractor Agreement and through January 2011, Gilly and TVS were negotiating an alternative to a bond and having Gilly accept a letter of credit in lieu of a bond. The communications between the two parties were ongoing at the time of termination, so the issue was still being negotiated. At no time did Gilly notify TVS that their lack of bond was jeopardizing the contract and that they were going to terminate. Gilly was trying to accommodate TVS.

15. The evidence showed that the real reason Gilly terminated the Vending Subcontractor Agreement was that Ms. Rosenberg of Gilly was angry when she happened to be at a Turnpike rest station and saw that TVS was servicing the

> area that Gilly had contracted to service for Areas. At that point, she determined that Mr. Sharp was not a friend but an enemy. Shortly thereafter, her lawyers terminated the Vending Subcontractor Agreement.
>
> 16. Ms. Rosenberg also believes that TVS sent UCF a copy of the Vending Subcontractor Agreement but no evidence was produced at trial as to how UCF received the Vending Subcontractor Agreement. It was clear, as evidenced by the email from Mr. Sharp to Gilly's CFO mentioned above, that Mr. Sharp was concerned about his reputation and with the relationship with UCF.
>
> 17. Section 4.2 of the Vending Subcontractor Agreement, entitled Damage Limitation, specifically says that Gilly shall not be liable for consequential damages if UCF cancels its request for proposal/UCF Contract for no cause. Under the facts of this case, Section 4.2 does not apply.

R. 1712-15. Having found that Gilly breached the Subcontract Agreement, the court determined that TVS was entitled to recover consequential lost profits as damages for the period of 2011-2015, and determined the total amount of such lost profits to be $86,189.13. R. 1711.

Next, the Court determined that Gilly was entitled to a setoff of $5,400 against the lost profits award as a result of its claim for

breach of contract relating to unpaid commissions for March and April of 2011. The trial court found in pertinent part:

> 19. Gilly also asserted a claim for breach of contract for unpaid commissions for part of March and part of April, plus a five percent (5%) late fee less the amount for lost merchandise that had to be thrown away after the Vending Subcontractor Agreement was terminated through no fault of TVS. Based on the evidence presented at trial, the unpaid commissions plus the late fee totaled $10,400 and the lost merchandise totaled $5,000, resulting in total damages to Gilly of $5,400 and that amount should be set off against the amount of damages suffered by TVS.

R. 1715. Finally, the court ruled that TVS was entitled to prejudgment interest on the damages award and entered judgment in the amount of $132,600.69. R. 1716-17.

D. Appellant's Motion for Rehearing and Notice of Appeal

Gilly moved for rehearing, arguing that TVS failed to provide a methodology for the trial court to determine lost profits, and failed to provide proof of lost profits. R. 1130-33. Gilly's motion did not provide any specificity as to errors alleged to have been made by the trial court, and did not advise the court of any mathematical errors with respect to the actual calculation of lost profits. *Id.* Likewise, Gilly's motion did not identify any errors in the setoff or prejudgment

interest calculations. TVS responded to the motion for rehearing (attaching the trial transcript as an exhibit), and the trial court subsequently denied Gilly's motion. R. 1135-1648, 1718.

Gilly timely filed its notice of appeal. R. 1698-1708. On appeal, Gilly challenges only (1) the trial court's calculation of lost profits and setoff on TVS's counterclaim for breach of contract for the right to provide services, as well as the prejudgment interest calculated on the lost profits award, and (2) the trial court's interpretation of Section 1.3 of the Subcontract Agreement.

SUMMARY OF ARGUMENT

The trial court's final judgment should be affirmed for several reasons.

First, the trial court's lost profits award complies with Florida law. Contrary to Appellant's argument, the trial court utilized an appropriate methodology to determine the amount of the lost profits award, and sufficient evidence of lost profits was provided. Applicable case law provides that lost profits are calculated by subtracting the non-breaching party's performance costs from the contract price, and that is precisely the methodology applied by the trial court below.

Appellant's related claim - that the contract revenue amounts relied upon by the trial court stated volume in part based on number of units sold instead of based on revenue - was not raised below, and no testimony was introduced to rebut the use of the document for purposes of determining annual contract revenue. Likewise, Appellant's argument that there were errors in the mathematical calculations made to arrive at the lost profits award was not raised below. In fact, record evidence, including testimony from Appellant's CFO, demonstrates that the final judgment likely understates the amount of lost profits. Even if such arguments were preserved and have merit, the appropriate remedy is to revise the final judgment to correct any apparent mathematical errors.

Second, the trial court's interpretation of the relevant contractual language was not erroneous. The trial court appropriately applied principles of contract interpretation and interpreted Section 1.3 of the Subcontract Agreement in a reasonable manner that gives meaning to all provisions of the contract and does not lead to absurd results. Gilly's alternative interpretation is not supported by the plain language of the agreement, renders portions of the contract meaningless, and would lead to absurd results.

For the reasons described herein, this Court should affirm the trial court's final judgment.

STANDARD OF REVIEW

I. Lost Profits

A trial court's determination as to the *method* of calculating damages is reviewed *de novo*, while findings of fact regarding the amount of damages sufficiently proven are subject to review for clear error. *Katz Deli of Aventura, Inc. v. Waterways Plaza, LLC,* 183 So. 3d 374, 380 (Fla. 3d DCA 2013) (citing *RKR Motors, Inc. v. Associated Unif. Rental & Linen Supply, Inc.,* 995 So. 2d 588, 591 (Fla. 3d DCA 2008); *Universal Beverages Holdings, Inc. v. Merkin,* 902 So. 2d 288, 290 (Fla. 3d DCA 2005)).

"Substantial evidence" means "relevant evidence [that] a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). Evidence is "competent" if it is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Id.*

II. Contractual Interpretation

"The interpretation of a contract involves a pure question of law for which this court applies a de novo standard of review." *Lazzari v. Guzman*, 314 So. 3d 374, 376 (Fla. 3d DCA 2020) (quoting *Dirico v. Redland Estates, Inc.*, 154 So. 3d 355, 357 (Fla. 3d DCA 2014)).

ARGUMENT

I. The Trial Court's Lost Profits Award Should be Affirmed

Gilly argued below that lost profits were not an appropriate measure of damages for Gilly's breach of the Subcontract Agreement. However, on appeal, both parties agree that the appropriate measure of damages for breach of a services contract is the non-breaching party's lost profits. IB at 24. The parties further agree that "[l]ost profits are calculated by subtracting the non-breaching party's costs from the contract price." IB at 25 (citing *Marbella Park Homeowners Ass'n, Inc. v. My Lawn Serv., Inc.* 12 So. 3d 807, 808 (Fla, 3d DCA 2009). Accordingly, Gilly no longer contests that lost profits are the appropriate measure of damages for its breach of the Subcontract Agreement, and instead takes issue only with the trial court's actual calculation of TVS's lost profits.

A. Applicable Standard.

The Florida Supreme Court has recognized that for a business to recover lost profits the party must prove that "1) the defendant's action caused the damage and 2) there is some standard by which the amount of damages may be adequately determined." *W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348, 1350–51 (Fla. 1989). "Lost profits must be established with a reasonable degree of certainty and must be a natural consequence of the wrong." *Sostchin v. Doll Enterprises, Inc.*, 847 So. 2d 1123, 1128 (Fla. 3d DCA 2003) (internal citations omitted). Importantly, while the projected profits cannot be mere speculation or conjecture, *the inability to prove a precise damages amount will not prevent a plaintiff from recovering so long as it is clear that some loss resulting from the defendant's actions is certain*. *Katz Deli of Aventura, Inc. v. Waterways Plaza, LLC*, 183 So. 3d 374, 382 (Fla. 3d DCA 2013) (internal citations omitted and emphasis added). Rather, there must be "some standard by which the amount of damages may be adequately determined." *Sostchin*, 847 So. 2d at 1128.

The trial court below aptly recognized the relevant lost profits evidentiary standard prior to closing arguments in the proceeding

below, and summarized the holdings of relevant case law, including *Sostchin*. R. 1464-65 (recognizing that lost profits must be supported by competent evidence sufficient to satisfy the mind of a prudent and impartial person as to the amount of profit lost, and that the loss of profits must be established with a reasonable degree of certainty and must be a natural consequence of the wrong).

B. The Trial Court Utilized an Appropriate Methodology and Sufficient Evidence of Lost Profits Was Provided.

Contrary to Gilly's assertions, the trial court utilized an appropriate methodology to determine the amount of lost profits award. As Gilly recognized in its Initial Brief, "[l]ost profits are calculated by subtracting the non-breaching party's performance costs from the contract price." *Marbella Park Homeowners Ass'n, Inc. v. My Lawn Serv., Inc.,* 12 So. 3d 807, 808 (Fla. 3d DCA 2009). That is precisely the methodology applied by the court below. Although Gilly argues on appeal that the court utilized an incorrect methodology, Gilly's arguments do not actually relate to the methodology used by the trial court to determine lost profits. Instead, its arguments relate to the evidence presented and the calculations relied upon by the trial court. To be sure, all parties to

this appeal agree that calculating lost profits requires deducting from anticipated contract revenue the costs expected to be incurred by the non-breaching party in performing the contract. Disagreements as to what amount of costs to deduct from the revenue figure are disagreements of fact and evidence, not methodology. This Court has recognized that "[w]hen the correct methodology has been utilized . . . our review is limited to a determination of whether the damages award is supported by competent substantial evidence." *Del Monte Fresh Produce Co. v. Net Results, Inc.*, 77 So. 3d 667, 673 (Fla. 3d DCA 2011).

Gilly provides two arguments in support of its contention that the trial court applied the wrong methodology. First, Gilly argues that TVS failed to provide sufficient evidence to support the expense percentages adopted by the trial court. Second, Gilly argues that TVS should have apportioned certain of TVS's fixed costs to the Subcontract Agreement for purposes of computing lost profits. Each of Gilly's arguments is discussed in turn below.

The contract performance costs that would have been incurred by TVS were substantiated by extensive testimony from TVS's owner, Dennis Sharp, who relied on his numerous years of experience in the

industry, as well as his specific experience servicing the UCF Contract. Mr. Sharp testified extensively regarding TVS's general profit as a percentage of revenue, and associated expense percentages, for servicing contracts similar to the Subcontract Agreement, as well as the profit percentage experienced by TVS *for the actual Subcontract Agreement at issue* during the period of time TVS serviced the UCF Contract pursuant to the Subcontract Agreement prior to Gilly's breach. R. 1280.

Mr. Sharp specifically testified regarding TVS's cost of goods sold, credit card fees, transportation and labor costs, and manufacturer rebates, and testified that TVS's expected pre-sales tax profit for revenue on the UCF Contract was 13%. R. 1216-41. Mr. Sharp further testified that during the time TVS serviced the UCF relationship pursuant to the Subcontract Agreement TVS's profits were consistent with the 13% profit number. R. 1280. Mr. Sharp also noted during cross-examination the percentage attributed to cost of goods sold was expected to increase by two percent in the last three years of the contract. R, 1264-65.

Based on Mr. Sharp's testimony, the following calculation was appropriate to determine lost profits as a percentage of revenue under the UCF Contract:

Costs as Percentage of Revenue	**2011**	**2012**	**2013**	**2014**	**2015**
Commission Payable to Gilly	48%	48%	48%	47%	47%
Cost of Goods Sold	31%	31%	33%	33%	33%
Labor	7%	7%	7%	7%	7%
Auto Fuel[2]	3%	3%	3%	3%	3%
Credit Card Fee (Average Across All Sales)	0.7%	0.7%	0.7%	0.7%	0.7%
Total Costs as Percentage of Revenue	89.7%	89.7%	91.7%	91.7%	90.7%
Plus: Manufacturer Rebate	3%	3%	3%	3%	3%
Expected Profit as Percentage of Revenue	13.3%	13.3%	11.3%	12.3%	12.3%
Less: Sales Tax	6.5%	6.5%	6.5%	6.5%	6.5%

[2] Gilly recognizes in its Initial Brief that no specific testimony was provided regarding the cost of auto fuel, but TVS voluntarily included a deduction for auto fuel in its proposed calculation of lost profits to the trial court. Gilly received the benefit of the cost of auto fuel being included in the lost profits calculation, and TVS does not oppose removing auto fuel costs from the lost profits calculation to the extent urged by Gilly.

Expected Profit as Percentage of Revenue Net of Sales Tax	**6.8%**	**6.8%**	**4.8%**	**5.8%**	**5.8%**

R. 1084.

Gilly argues that application of the above percentages to Gilly's actual revenue from the UCF Contract was not sufficient to support a lost profits award, and that instead TVS had to provide "documents or invoices showing TVS's sales, revenue, or costs and expenses." IB at 27. However, TVS could clearly not provide such documents for a contract that it was prevented from servicing due to Gilly's breach, and Mr. Sharp's testimony regarding its standard costs as a percentage of revenue certainly complies with the applicable requirement that there be "some standard by which the amount of damages may be adequately determined." *Sostchin*, 847 So. 2d at 1128. Indeed, this Court previously stated that "the inability to prove a precise damages amount will not prevent a plaintiff from recovering so long as it is clear that some loss resulting from the defendant's actions is certain. *Katz Deli*, 183 So. 3d at 382.

The decisions in *E. T. Legg & Assocs., Ltd. v. Shamrock Auto Rentals, Inc.*, 386 So. 2d 1273 (Fla. 3d DCA 1980), and *Levitt-ANSCA*

Towne Park P'ship v. Smith & Co., 873 So. 2d 392, 396 (Fla. 4th DCA 2004) do not support Gilly's argument. In *E. T. Legg*, this Court considered the trial court's rejection of a jury verdict including lost profits on the basis that "the only evidence presented pertained to income or gross receipts, not profits, and testimony concerning expenses did not establish specific dollar amounts." *E. T. Legg*, 386 So. 2d at 1274. While this Court agreed that the trial court correctly questioned the jury verdict, it remanded for a new trial as to damages. *Id.* Here, Mr. Sharp provided extensive testimony regarding the costs that would be incurred by TVS to perform the contract, and specific dollar amounts are easily calculated based on applying the percentage costs testified to by Mr. Sharp to contract revenue. Indeed, Gilly's own CFO also testified as to the costs to perform the Subcontract Agreement in terms of a percentage of contract revenue.

In *Levitt-ANSCA,* the court rejected a lost profits award that it determined was "too speculative to have been submitted for jury consideration," as it appeared the claimed lost profits amount would result in an implausible multimillion dollar windfall. *Levitt-ANSCA*, 873 So. 2d at 396. That is clearly not the case here. Likewise, the

Fourth District's statement that application of a percentage of work performed is not appropriate to determine the amount of costs and profits in a construction contract, is not relevant here. The lost profits calculation utilized below is not based on a percentage of work performed, but instead on actual costs incurred by TVS expressed as a percentage of revenue.

Next, Gilly argues that Mr. Sharp should have allocated a portion of TVS's fixed costs, i.e., its existing overhead, to determine lost profits. However, Mr. Sharp testified that the executive salaries Gilly sought to include for lost profits purposes were not related to the Subcontract Agreement (R. 1277-78), and that TVS's overhead would not increase as a result of the Subcontract Agreement.[3] Instead, all such costs would have been borne by TVS regardless of whether the Subcontract Agreement was in place. R. 1277-78.

The purpose of a lost profits award is to place the non-breaching party in the position he would have been if the contract had been completely performed. *Sundie v. Lindsay*, 166 So. 2d 152, 153 (Fla.

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[3] Mr. Sharp further testified that he leased space to other tenants, and that fixed expenses related to the TVS building were offset by such lease payments. R. 1277.

3d DCA 1964). This Court in *Del Monte* recognized that in computing lost profits, the non-breaching party should "deduct from anticipated contract revenue *the costs incurred in performing the contractual services*." *Del Monte,* 77 So. 3d at 674 (emphasis added); *see also Marbella Park Homeowners Ass'n, Inc. v. My Lawn Serv., Inc.*, 12 So. 3d 807, 808 (Fla. 3d DCA 2009) ("Lost profits are calculated by subtracting the non-breaching party's performance costs from the contract price.").

While any additional overhead or personnel expenses incurred by TVS to service the Subcontract Agreement would certainly be relevant to a lost profits calculation, the threshold question should be whether any additional overhead or personnel expenses would have been incurred to perform the contract that was breached. *See Murray v. Dep't of Transp.,* 687 So. 2d 825, 827 (Fla. 1997) (recognizing trial court had discretion to award business damages based on lost profits in an eminent domain proceeding without deducting fixed costs that would remain unchanged); *c.f.* § 672.708(2), Fla. Stat. (providing that lost profits for breach of contract for the sale of goods includes reasonable overhead)*; see also RKR Motors, Inc. v. Associated Unif. Rental & Linen Supply, Inc.,* 995

So. 2d 588, 594 (Fla. 3d DCA 2008) (requiring apportionment of fixed costs where there "was no testimony that the fixed costs were not related to the performance of the contracts at issue," but also holding that "[r]equiring a deduction of a share of fixed costs *related to the performance of a contract* allows for a true measurement of the amount the non-breaching party would have earned on the contract had there been no breach, which is the proper measure of damages.") (emphasis added).[4] Allocating a portion of existing overhead, or

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[4] To the extent Appellant argues *RKR* requires reversal, this case is instead analogous to *Knight Energy Servs., Inc. v. C.R. Int'l Enterprises, Inc.,* 616 So. 2d 1079, 1081 (Fla. 4th DCA 1993), which this Court distinguished from both *RKR* and the Fourth District's decision in *Boca Devs., Inc. v. Fine Decorators, Inc.,* 862 So. 2d 803, 804 (Fla. 4th DCA 2003). The Fourth District's decision in *Knight* recites the following testimony as supporting the conclusion that existing overhead should not be allocated for calculating lost profits:

> A. Well, like I tried to explain to [defense counsel], our business already has a fixed overhead in it no matter if that person is already there, or if you're talking, make [sic] a telephone call to order something, it's no extra. You're already paying that person's salary. The phone bill is already being paid. So there is no additional costs being associated with it.

Knight, 616 So. 2d at 1080 (alteration in original). Based on this testimony, the Fourth District in *Knight* concluded overhead did not need to be apportioned for lost profits purposes. *Id.* at 1080-81. Because this testimony in *Knight* established the fixed costs were

personnel expenses, which would not have increased due to the breached contract, would obviously not make a non-breaching party whole. Instead, such an allocation would improperly reduce the measure of lost profits due to the non-breaching party.

For example, Gilly urged the trial court to assign a portion of TVS executive compensation to the UCF Contract. Gilly provided no evidence, however, that TVS executive compensation would have changed in any way as a result of the UCF Contract, and permitting Gilly to reduce the damages for its breach by applying fixed expenses that would not have increased by virtue of the UCF Contract will not adequately compensate TVS for Gilly's breach. Certainly, any increase in TVS executive compensation as a result of the UCF Contract would appropriately be considered for lost profits purposes, but record evidence demonstrates no such change in compensation occurred. Perhaps most importantly, Mr. Sharp testified that TVS was merely providing labor to fill the UCF vending machines, and was

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not involved in performing the projects under contract, both this Court in *RKR* and the Fourth District in *Boca* found *Knight* to be distinguishable. *RKR*, 995 So. 2d at 592 (citing *Boca*, 862 So. 2d at 805–06).

not providing any "overall management" for the contract. R. 1277-78. Such overall management of the contract was to be provided by Gilly, and apportionment of salaries for TVS owners/executives would have improperly reduced TVS's lost profits award, as the fixed costs at issue were not related to the performance of the Subcontract Agreement. *See RKR Motors, Inc.,* 995 So. 2d at 594 (requiring apportionment of fixed costs where there "was no testimony that the fixed costs were not related to the performance of the contracts at issue"). Moreover, Gilly received the benefit of TVS knowing it would not incur any additional fixed costs during negotiations on the Subcontract Agreement. If TVS actually would have incurred additional fixed costs to perform the contract, it likely would have priced the Subcontract Agreement differently and negotiated a lower commission to Gilly.

The lost profits analysis urged by Gilly (including the application of fixed costs that are unaffected by a breached contract) would be more appropriate when applied to a company as a whole. *See, e.g., Sostchin*, 847 So. 2d 1123 (considering lost profits analysis in relation to loss of an entire enterprise, rather than as to specific contract); *Murray,* 687 So. 2d at 827 (recognizing that deduction of

managerial salaries to determine lost profits is appropriate when considering the total destruction of a business). The calculation of lost profits for a particular contract is a far different analysis than lost profits for a company as a whole. To determine lost profits for a company as a whole, overhead and fixed costs must be considered, as they are certainly attributable to the company. However, apportioning already existing and unchanged overhead and fixed costs to a new contract to determine lost profits improperly reduces the lost profits for a contract such as the one at issue, and would not make TVS whole based on the breach that occurred.

Gilly also cites *Crain Auto. Grp., Inc. v. J & M Graphics, Inc.*, 427 So. 2d 300 (Fla. 3d DCA 1983), in support of its argument. In *Crain,* the Court reversed a final judgment including a lost profits award after noting that "hopes and expectations and [a party's] guesses are too speculative to support an award of lost profits." *Id.* at 302. The court specifically referenced the fact that lost profits were based on testimony that one of the parties "*hoped* for sales of one million dollars of his new product during the first year" and "*expected* to spend 15% of first year sales on advertising" as long as he was satisfied with the contractor's performance. *Id.* at 301-02.

Accordingly, the court found the alleged losses were not capable of reasonably certain ascertainment. The court included a final note that the non-breaching party failed to explain what calculations and deductions went into his estimate, and noted that "no allowance was made for salaries or overhead." *Id.* 302. In contrast to *Crain,* substantial evidence was provided as to the revenue and expenses TVS would have realized from the Subcontract Agreement, and a specific allowance was made for all costs that would have been incurred to perform the Subcontract Agreement, including salaries for delivery drivers that would have increased by performing the Subcontract Agreement. R. 1270-71.

Based on the testimony provided below, apportioning TVS's already existing and unchanged overhead and fixed costs to determine lost profits resulting from Gilly's breach would not make TVS whole.[5]

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[5] To the extent this Court determines that TVS's pre-existing fixed costs should nevertheless be apportioned to the Subcontract Agreement to determine lost profits, the appropriate remedy is remand to the trial court to determine the appropriate amount of such apportionment. *See Boca,* 862 So. 2d at 805 (remanding for new trial to establish appropriate apportionment of overhead, recognizing that "if the judge had correctly ruled that overhead had

C. Arguments Regarding Documented Revenue Amounts and Mathematical Calculations Were Not Raised Below.

Gilly asserts, for the first time on appeal, that there are errors in the mathematical calculation utilized at trial to arrive at the damages award, and also asserts for the first time that the UCF Vending Volume Information document Gilly produced in discovery does not include gross revenue in dollars for the snack items at issue (except for ice cream), and instead only includes unit volume for the non-ice cream items. IB at 27, R. 1217-18, 1220. In addition to the fact that such a claim was never made below, the claim is contradicted by trial testimony. Indeed, although the figures in the UCF Vending Volume Information document were discussed at length as providing Gilly's annual revenue from the contract in dollars, the record is devoid of any testimony or statement from Gilly or its counsel objecting to, or opposing, that viewpoint.

Moreover, as noted previously, Gilly's CFO, Amit Biegun, testified that during TVS's four-month performance of the Subcontract Agreement, TVS's revenues were $115,000 ($28,750 per

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to be deducted, [plaintiff] would have been able to establish the amount of that overhead.").

month). R. 1301-02. Accordingly, the testimony of Gilly's own CFO supports a revenue expectation from the Subcontract Agreement of $345,000 per year, almost twice as much as the sales volume shown on Gilly's UCF Vending Volume Information, without accounting for inflation. Compare R. 1301-02 to R. 1077. Accepting such a revenue expectation instead of Gilly's Vending Volume Information would almost double TVS's lost profit calculation. Thus, if Gilly's new claims on appeal are accepted, TVS's lost profit award should actually be increased based on the revenue experienced by TVS during the first four months of the Subcontract Agreement. The appropriate lost profits calculation based on the revenue amounts testified to by Mr. Biegun support the following calculations:

Year	**2011**	**2012**	**2013**	**2014**	**2015**	**Total**
Expected Profit as Percentage of Revenue (Net of Sales Tax)	6.8%	6.8%	4.8%	5.8%	5.8%	
Expected Annual Revenue Based on Actual	345,000	345,000	345,000	345,000	345,000	

Revenue First 4 Months of Contract						
Lost Profits	23,460	23,460	16,560	20,010	20,010	**$103,500**

Accordingly, accepting Gilly's argument that its UCF Vending Volume Information exhibit did not include actual revenue numbers and should not be relied upon, the lost profits calculation could be increased from $86,189.13 to $103,500 for the 2011-2015 period, based on the record testimony of Gilly's CFO regarding actual revenue for a portion of the contract term. Gilly therefore cannot demonstrate any prejudice even if this claim, raised for the first time on appeal, was correct.[6] TVS does not oppose amendment of the final judgment to reflect $103,500 as the lost profits amount.

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[6] Notably, Gilly moved for rehearing of the trial court's final judgment, but its only arguments related to the *method* the trial court utilized for its lost profits analysis, and Gilly never raised any issues with the trial court's mathematical calculation of the lost profits award below. Instead, Gilly contests the trial court's mathematical calculations for the first time on appeal. This Court, and other courts, have recognized that generally parties are not permitted to raise issues for the first time on appeal in order to afford the trial court an opportunity to correct the alleged error before the aggrieved party seeks reversal on appeal. *See Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 324 (Fla. 1st DCA 2011).

D. Even if the Trial Court's Mathematical Calculation of Damages Was Erroneous, the Appropriate Remedy is to Revise the Damages Award.

Even assuming Gilly preserved its arguments that (1) its UCF Volume Information Sheet stated revenue amount in dollars only for ice cream, and (2) errors existed in the mathematical calculations relied upon by the trial court, such calculations do not relate to the sufficiency of the evidence. Accordingly, such calculations can be corrected on appeal, or this case can be remanded for such calculations to be corrected by the trial court on remand.

Appellant makes a passing argument that this Court has no choice but to enter judgment against TVS if it determines the mathematical calculations relied upon by the trial court are erroneous. As support for this argument Gilly relies upon the decision in *Levy v. Ben-Shmuel,* 255 So. 3d 493 (Fla. 3d DCA 2018). This Court stated in *Levy* that "as a general rule, [] where this court determines, on appeal from a properly preserved claim, that a party failed to meet its burden of establishing the correct measure of damages at trial, that party is not entitled on remand to a new trial on damages, unless that party's failure to meet its burden was the result of judicial error." *Id.* at 494. *Levy* further recognized that "the

generally prevailing rule is that a party will not be permitted a new trial on remand *to remedy its own failure to present sufficient evidence to support its claim.*" *Id.* at 495 (quoting *Cellnet 7, Inc. v. Lainez*, 215 So. 3d 137, 140 n.5 (Fla. 3d DCA 2017)). The Court in *Levy* also recited its agreement that a party should not have a second bite at the apple "*when there has been no proof at trial concerning the correct measure of damages.*" *Id.* at 496.

Levy is not applicable here for several reasons. First, Gilly's claim was raised for the first time on appeal, and may not have been appropriately preserved.[7] Second, TVS provided sufficient evidence to support its lost profits claim. With respect to the accuracy of mathematical calculations, Gilly's argument is not that a lack of evidence exists, but instead that the trial court relied upon incorrect mathematical calculations to calculate the lost profits amounts indicated by the evidence. Such calculations, based on the evidence

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[7] Gilly did not file a motion for remittitur as permitted by Rule 1.530(h), and in its motion for rehearing only made a passing reference that "TVS' failure to provide the Court with a method to its calculations, or providing competent proof of the lost profits, is certainly grounds for a re-hearing on the issue." R. 1133. Gilly thus never advised the trial court that it believed the mathematical calculation relied upon by the trial court was incorrect.

presented at trial, can certainly be corrected on appeal to the extent deemed necessary. Additionally, such mathematical calculations are presumably the type of judicial error *Levy* expressly recognizes would permit correction of a damages award, or remand for entry of a new damages award. While *Levy* was intended to prevent litigants who wholly failed to present evidence to support that they had suffered damages from obtaining a new trial on damages after appeal, that is not the case here.

Accordingly, if this Court accepts Appellant's argument that the trial court's mathematical calculations supporting the lost profits award below were erroneous, and determines that such argument was preserved, the appropriate remedy is correction of the final judgment to include the correct lost profits amount indicated by the evidence. As noted previously, Gilly claimed for the first time on appeal that its UCF Sales Volume Information Sheet did not include revenue figures, but instead included the number of items sold. Nevertheless, Gilly's CFO testified that for the first four months of the UCF Contract TVS's revenues were $115,000 ($28,750 per month), or $345,000 annually. Utilizing this revenue figure in place of the revenue figures detailed below from Gilly's UCF Volume Information

sheet yields a lost profit amount of $103,500, as discussed in detail in section I.D of this brief. If this Court determines correction of the lost profits amount is appropriate, there is more than sufficient evidence in the record to revise the lost profits amount.[8] Indeed, even Gilly argues that the appropriate lost profits amount if the UCF Sales Volume Information Sheet is used is $69,666.80. IB at 37.

II. The Trial Court's Interpretation of the Relevant Contractual Language is Not Erroneous.

The trial court appropriately interpreted the termination provisions contained in Section 1.3 of the Subcontract Agreement. While Gilly argues Section 1.3 is clear and unambiguous, Gilly's argument is belied by its disagreement with the interpretation given to the section by TVS and the trial court. The interpretation of Section 1.3 urged by Gilly is certainly not consistent with its plain language, and at best the provision is ambiguous. Moreover, the interpretation urged by Gilly is inconsistent with the intent of the parties and common sense and would lead to an absurd result. On the other hand, the interpretation afforded to Section 1.3 by TVS and

[8] If the lost profits amount is revised, the appropriate setoff amount and prejudgment interest can likewise be easily calculated based on the record evidence in this case.

the trial court is consistent with its plain language and the intent of the parties, and does not lead to absurd results.

A. Principles of Contractual Interpretation

It is well-settled that "[w]here the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." *Super Cars of Miami, LLC v. Webster*, 300 So. 3d 752, 755 (Fla. 3d DCA 2020) (quoting *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015)). However, where a contract, or one of its terms is ambiguous, the trial court must interpret the meaning of the contract in accordance with applicable principles of contract interpretation.

As this Court has stated, "a cardinal principle of contract interpretation is that the contract must be interpreted in a manner that does not render any provision of the contract meaningless." *Super Cars of Miami, LLC v. Webster*, 300 So. 3d 752, 755 (Fla. 3d DCA 2020) (quoting *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n, Inc.*, 169 So. 3d 197, 203 (Fla. 1st DCA 2015) (citations omitted)). Accordingly, a court "must construe the provisions of a contract in conjunction with one another so as to give reasonable meaning and effect to all of the provisions." *Super Cars of Miami*, 300

So. 3d at 755 (quoting *Aucilla Area Solid Waste Admin. v. Madison Cty.*, 890 So. 2d 415, 416-17 (Fla. 1st DCA 2004) (citation omitted)); *see also Horizons A Far, LLC v. Plaza N 15, LLC*, 114 So. 3d 992, 994 (Fla. 5th DCA 2012) ("In interpreting a contract, '[c]ourts are not to isolate a single term or group of words and read that part in isolation; the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.'").

Additionally, "[i]f an agreement is ambiguous, the court should follow a construction that best comports with logic, reason, and the purposes underlying the parties' agreement." *Philip Morris Inc. v. French*, 897 So. 2d 480, 488 (Fla. 3d DCA 2004); *see also Wright & Seaton, Inc. v. Prescott*, 420 So. 2d 623, 629 (Fla. 4th DCA 1982) ("The court should arrive at [a contract] interpretation consistent with reason, probability, and the practical aspect of the transaction between the parties.").

It is likewise well-settled that contracts should be interpreted to avoid an absurd result. In fact, this court has held that "even an unambiguous contract cannot be interpreted to achieve absurd results." *Philip Morris Inc.*, 897 So. 2d at 489; *Am. Employers' Ins. Co. v. Taylor*, 476 So. 2d 281 (Fla. 1st DCA 1985) (contracts should

be interpreted so as to avoid an absurd result); *James v. Gulf Life Ins. Co.*, 66 So. 2d 62, 63 (Fla. 1953) ("The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other. So that interpretation and probable contract should be adopted, and a construction leading to an absurd result should be avoided.").

B. The Trial Court Appropriately Interpreted Section 1.3 of the Subcontract Agreement.

The trial court's interpretation of Section 1.3 is reasonable, but Gilly's interpretation of the contract would violate numerous principles of contractual interpretation, would render portions of the same section superfluous, and would lead to an absurd result. The trial court appropriately rejected this interpretation and instead applied a reasonable interpretation of Section 1.3 that comports with its plain language, common sense, and the intent of the parties, and does not lead to absurd results.

Section 1.3 states in its entirety:

> 1.3 <u>Termination</u>. The Agreement may be terminated by either party with cause, upon

> thirty (30) days prior written notice. The Agreement may also be terminated by GV immediately in order to retain client, if service problems are not attended according to this Agreement, or per the Request for Proposal #1027RCSA ("RFP"), attached as Exhibit "A", SUBCONTRACTOR will surrender all equipment that is the property of GV immediately to GV and GV will take over and operate the vending machines. Additionally, Section 2.22 of the RFP Cancelation/Termination of Contract clause established by UCF shall be honored by both parties.

R. 754. While Section 1.3 begins by stating that either party may terminate the agreement "with cause" by giving 30 days written notice, Gilly's reading of the immediately following sentence would permit Gilly to terminate the agreement at any time "in order to retain client." Thus, under Gilly's interpretation, Gilly would not actually have to terminate TVS for cause, or provide the required written notice, and could instead terminate the Subcontract Agreement any time it desired simply by stating it was terminating the contract "in order to retain" UCF as a client. Such an interpretation is certainly not consistent with the statute's plain language, and it is also not an appropriate interpretation when appropriate principles of contractual interpretation are applied.

As noted previously, "a cardinal principle of contract interpretation is that the contract must be interpreted in a manner that does not render any provision of the contract meaningless." *Super Cars of Miami, LLC,* 300 So. 3d at 755. If the second sentence of Section 1.3 permitted Gilly to terminate the Subcontract Agreement at any time, and without cause, so long as Gilly stated it was terminating the agreement to retain UCF as a client, the remaining provisions of the termination section are rendered meaningless.

The more reasonable and common-sense interpretation of the provision is that Section 1.3 permitted Gilly to terminate the contract for cause in order to retain UCF if TVS failed to attend to service problems according to the Subcontract Agreement, or the underlying Request for Proposals. That is, if TVS failed to meet the standards it had agreed to in the Subcontract Agreement and the RFP, the underlying document that governed Gilly's relationship with UCF, it was subject to immediate termination for cause. While Gilly's reading of Section 1.3 is more convenient for its purposes in this case, Gilly's reading is nonsensical.

Gilly's recitation of case law discussing the use of the term "or" does not support its interpretation of Section 1.3. TVS certainly agrees that the term "or" indicates alternatives, but Gilly misunderstands the alternatives provided in Section 1.3. Section 1.3 permitted Gilly to terminate the Subcontract Agreement immediately in order to retain UCF if services problems are not attended according to this Agreement, **or** per the Request for Proposal #1027RCSA ("RFP") attached as Exhibit "A" . . ." Accordingly, Section 1.3 provided for immediate termination to retain the client if TVS failed to meet the service standards identified in the Subcontract Agreement, and alternatively provided for immediate termination if TVS failed to meet the service standards identified in the RFP.

Notably, both the Subcontract Agreement and the RFP established service standards that had to be complied with by TVS and established standards for addressing service problems. With respect to the RFP, the Subcontract Agreement expressly required TVS to provide service in compliance with the requirements of the RFP, and stated in pertinent part:

> 2.1 Terms of Operation. SUBCONTRACTOR will adhere to the terms and conditions of the RFP, VSA and this Agreement. Repairs shall be

> responded to in the same day if the call is in before 2pm of notification of malfunction. If a repair cannot be made in a timely manner then exchange of equipment will be made. There will be $100 fee per day for equipment that is not responded to be repaired or filled within 24 hours. Vandalized equipment shall be replaced within 24 hours.
>
> 2.2 Costs of Operation. SUBCONTRACTOR will bear all costs of preparation, installation and servicing the Client in the normal course under the terms and conditions of the RFP, VSA and this Agreement Specifically, SUBCONTRACTOR will provide and bear the costs of required ice cream equipment, all credit card monthly processing fees, labor, products, refunds, sales tax, federal taxes, occupational licenses and maintenance of the equipment located on the Premises.

R. 751. The language of Section 1.3, permitting Gilly to terminate the Subcontract Agreement immediately in order to retain UCF as a client if services problems were not attended to according to the Subcontract Agreement **or** the RFP thus certainly makes sense given the remainder of the Subcontract Agreement.

Gilly's interpretation of Section 1.3 is also nonsensical given the reference in the section stating "[a]dditionally, Section 2.22 of the RFP Cancelation/Termination of Contract clause established by UCF

shall be honored by both parties." R. 1026. Section 2.22 of the RFP states:

> 2.22. Cancellation /Termination of Contract
>
> Any contract established as a result of this RFP may be unilaterally canceled by UCF for refusal by Proposer to allow public access to al I documents, papers, letters or other material subject to the provisions of Chapter 119, Florida Statutes, and made or received by the Proposer in conjunction with this RFP or the resulting contract. UCF also may terminate such contract resulting from this RFP, if any, without cause on thirty (30) days advanced written notice to the Proposer. The parties to such contract may terminate the contract at any time by mutually consenting in writing. Either party may terminate such contract immediately and also for breach by the other that remains substantially uncured after thirty (30) days' advanced written notice to the breaching party, which notice describes the breach in detail sufficient to permit cure by the breaching party.

R. 1026. Under Gilly's interpretation, Section 1.3 unnecessarily states twice that the Subcontract Agreement is subject to termination per the Request for Proposals. This interpretation again clearly violates the well-established principle that contracts should be interpreted in a manner that does not render any provision of the contract meaningless.

Likewise, Gilly's recitation of case law supporting comma use does not support its argument. The second sentence of Section 1.3 is a run-on sentence under any possible interpretation, and clearly does not appropriately utilize commas.

Perhaps most importantly, Gilly's interpretation of Section 1.3 would lead to absurd results. Under Gilly's interpretation of Section 1.3, Gilly could violate its contract with UCF by failing to obtain approval to enter into the Subcontract Agreement, and once caught, could then immediately terminate the Subcontract Agreement without cause so long as it stated that it was terminating the agreement to retain UCF as a client. Gilly's argument that it was permitted to terminate the Subcontract Agreement to cure its own breaches of both the Subcontract Agreement, and its agreement with UCF, defies common sense.

As noted previously, Gilly breached Section 5 of its contract with UCF by failing to obtain UCF's written consent to subcontracting with TVS. The section states in pertinent part:

> **5. ASSIGNMENTS**. Under no circumstances shall the Contractor assign to a third party any ·right or obligation of Contractor pursuant to this Agreement without prior written consent of the University.

R. 1000. Gilly also breached Section 4.3 of the Subcontract Agreement, which stated, "4.3 Warranty. GV and Subcontractor warrant that it has the contractual and legal authority to enter into this Agreement." Interpreting Section 1.3 as permitting Gilly to immediately terminate the Subcontract Agreement in order to cure its own breach of its agreement with UCF, and by extension cure its own breach of Section 4.3 of the Subcontract Agreement, is certainly the type of absurd result that must be avoided in contract interpretation. In fact, such a result must be avoided even if Section 1.3 were unambiguous. *See Philip Morris Inc.*, 897 So. 2d at 489 ("Moreover, even an unambiguous contract cannot be interpreted to achieve absurd results."); *Am. Employers' Ins. Co.*, 476 So. 2d 281 (contracts should be interpreted so as to avoid an absurd result).

In sum, the trial court appropriately interpreted the provisions of Section 1.3 of the Subcontract Agreement, and such interpretation complies with applicable principles of contractual interpretation. As the trial court also recognized, there was no evidence that any complaints were lodged against TVS's services at UCF, and therefore no basis for Gilly to immediately terminate the Subcontract Agreement pursuant to Section 1.3 of the agreement.

CONCLUSION

For the foregoing reasons, TVS respectfully requests this Court affirm the trial court's final judgment and grant other relief as is just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served upon the following this 8th day of August, 2024:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the type size and style used in this brief is double-spaced 14-point Bookman Old Style, and that this brief contains 10,915 words, calculated pursuant to Florida Rule of Appellate Procedure 9.045(e).

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