IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1737

VICTOR K. BORDEN, et al.,

Petitioners,

vs.

EAST-EUROPEAN INSURANCE COMPANY, ALFA INSURANCE PLC,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL
CASE NO. 2D03-5145

HOLLAND & KNIGHT LLP
Steven L. Brannock
Paul Parrish
Maegen E. Peek
100 North Tampa Street
Tampa, FL 33602-3644
(813) 227-6611

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INTRODUCTION

This case involves the purchase of marine insurance by a Honduran resident, Victor Borden ("Borden"), from the Respondent, a Russian insurance company named Alfa Insurance PLC ("Alfa"). The policy at issue insured three vessels owned by Borden and located in Honduras. Under the terms of the policy, the vessels were restricted to sheltered waters in Honduras and the Caribbean. When one of the vessels sank in international waters, Borden filed an insurance claim to recover from Alfa. Alfa denied coverage because, among other things, the vessel sank in international waters, far from waters covered under the policy. Borden then filed this suit against Alfa and others in Florida.

Alfa moved to quash service of process, arguing that Florida courts lack jurisdiction over Alfa. The circuit court denied the motion. Alfa then appealed the denial. On appeal, the Second District Court of Appeal reversed the circuit court, holding that the Florida Unauthorized Insurer's Process Law ("UIPL"), Fla. Stat. § 626.906, only applies to Florida residents seeking to sue an insurance company. *East-European Ins. Co. v. Borden*, 884 So. 2d 233, 238 (Fla. 2d DCA 2004). The Second DCA certified the conflict between its holding and the holding of the Third DCA in *Winterthur International Ltd. v. Palacios*, 559 So. 2d 1214 (Fla. 3d DCA 1990) to this Court. *Id.*

In this appeal we demonstrate that the Second DCA's reversal of the circuit court was proper because Florida courts lack personal jurisdiction over Alfa. Florida courts lack jurisdiction both because the UIPL does not apply to non-residents like Borden and because Alfa has not purposely availed itself of a business opportunity in Florida, as required by the Due Process Clause of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Factual Background

East European Insurance Company, now known as Alfa Insurance PLC ("Alfa"), is an insurance company located in Moscow, Russia.[1] Alfa App.2 & 8, at attached exhibit; Alfa App.10, Ex.13.[2] Alfa has no contacts with the State of Florida: no office, no employees, no mailing address, no telephone listing, no real or personal property (owned or leased), no agent for service of process, no advertising or marketing, no bank account, and no business records are located in Florida. Alfa App.2 & 8, attached exhibit; Alfa App.13. Neither does Alfa insure any Florida resident or property in Florida, nor has it ever issued any insurance

[1] Alfa has never been known as Avest Insurance Company (the name of the insurance company that appears on a Notice of Recission created by Barnhardt).

[2] Citations to the appendix submitted by Alfa in the Second DCA will be "Alfa App. [number of the tab under which the document is located], Ex. [if the tab number has sub-exhibits] at p.[if there is a specific page or paragraph number]." If Alfa cites to the appendix submitted by Borden or Ocean, the citation will reflect which appendix the cite references. For example, "Borden App." or "Ocean App."

policy to Florida resident. *Id.* Finally, Alfa has no "salesmen, representatives, dealers, franchises, jobbers, wholesalers, distributors, brokers, or agents of any nature in the State of Florida." *Id.*

Alfa became the insurer for the three vessels owned by Victor Borden ("Borden"), a resident of Honduras, only after Alfa was contacted by 2K Shipping and Trading Limited ("2K"), an insurance brokerage firm located in Turkey. The chain of events leading to the formation of the insurance contract began when Borden's daughter, Sylvia, contacted Ocean Insurance Management, Inc. ("Ocean"), a Tampa company, seeking coverage for her father's vessels. Sylvia lives in Tampa and had used Ocean in the past as a broker to find insurance for her father's vessels. Alfa App.10, Ex.1 at ¶4. Ocean attempted to procure insurance through either of the companies that had insured the vessels in the past, but the companies no longer wanted to insure the vessels. Hence, Ocean notified Sylvia that it would have to search for insurance with other carriers. Alfa App.10, Ex.1 at ¶4; Alfa App.10, Ex.4. Ocean then contacted Barnhardt Marine Insurance, Inc. ("Barnhardt"), a Florida corporation located in Jacksonville, Florida. Barnhardt, in turn, contacted Marine Insurance Consultants International ("MICI"), a brokerage firm located in Britain. MICI contacted Southern Seas (UK) Ltd. ("Southern Seas"), also a brokerage firm located in Britain, who then contacted 2K Shipping and Trading Limited ("2K"), a brokerage firm located in Turkey. Finally, 2K

contacted Alfa, a Russian corporation located in Moscow. *East-European*, 884 So. 2d at 234; Alfa App.6 at admission 9. In short, Alfa received a request from a Turkish broker to insure Honduran vessels owned by Honduran resident, located in Honduras, and restricted to sailing in Honduran waters.

Alfa requested information about the Honduran vessels from 2K. 2K sent the request down the line, through the chain of brokers. Later, an answer circulated its way back up the chain to 2K and from 2K to Alfa. When this information proved satisfactory, Alfa notified 2K of the terms of the policy and 2K passed that information back down the chain. Alfa App.10, Ex.2 at 12, 17.

Eventually, a policy was issued by Alfa in Russia and sent to 2K in Turkey to be sent down the line to the insured, Borden. Alfa App.3 at p.50, reflecting that policy was "issued" in Moscow. Premium payments were also sent up the chain of brokers. Alfa App.10, Ex.2 at pp. 22, 26 (Barnhardt's Corporate Representative stating "We were provided the premiums and we forwarded it up the chain"); Alfa App.13 at ¶6; Alfa App.6, admissions 37 & 39.

Alfa had knowledge that there were other links in the chain, but dealt with none of the links directly. Alfa had no knowledge that the chain passed through Florida on its way to Honduras. Alfa App.13 at ¶7. All Alfa knew was that it was insuring "a Honduran vessel based in Honduras and that [the insured] was a resident of Honduras," (Alfa App.2 & 8 at attached exhibit at ¶13) and that the

vessels it was insuring were restricted to sailing in Honduran and Caribbean waters. Alfa App.3 at p.11.

As Petitioners concede, all communications regarding the insurance policy were made through this chain of brokers. Borden Br. at 6; Ocean Br. at 7-8. At no point in time did Alfa ever authorize Barnhardt to take any actions on Alfa's behalf. Alfa App.10, Ex.2 at p. 16-18. In fact, Alfa never had any contact whatsoever with Barnhardt. Alfa App.10, Ex.2 at pp. 12, 16, 18, 24, 27; Alfa App.6, admission 9, 10, 12, 14, 15. Brokers only dealt directly with the next broker in the chain.[3] Thus, Alfa, six companies removed from the insured, never dealt directly with any company other than Turkish 2K.[4] Likewise, neither Sylvia nor Borden had any direct contact with Alfa. Alfa App.10, Ex.1.

On or about December 17, 2001, prior to the insured's (or Barnhardt's) receipt of the policy, one of the vessels sank. In order to decide whether the sinking was a payable loss, Alfa worked through the chain of brokers to gain information about the sinking. Alfa App.3 at p.147 (fax from Barnhardt to Ocean reflecting that Barnhardt was collecting information to forward to London, but did

[3] This practice was deviated from once, when Barnhardt had direct communication with Southern Seas because Barnhardt's contact at MICI was on vacation. Alfa App.10, Ex. 2 at p.18; Alfa App.6 at admission 9.

[4] Communication up and down a chain of brokers with no direct communication with the underwriter is common practice in the marine insurance industry. Alfa App.10, Ex. 2, at 18.

not know what Alfa needed and could not advise as to what would be acceptable proof in order to collect on the claim). At all times, Alfa communicated through a chain, and Barnhardt was but one link in the six-piece chain. App. 10, Ex. 2 at 12, 16, 18, 24.

Procedural Background

After Alfa denied coverage, Borden filed suit in Florida state court seeking damages for breach of contract and wanton and willful misconduct from Alfa. Borden also named Ocean and Barnhardt as defendants and sought damages for breach of contract, negligence, breach of fiduciary duty, and negligent misrepresentation.[5] Alfa App.7. In addition, Barnhardt filed a cross-claim against Alfa for equitable subrogration, indemnity, and reformation.

In response to Borden and Barnhardt's claims, Alfa filed a motion to quash service of process, alleging that the court lacked personal jurisdiction over Alfa, a Russian company with no contacts with the State of Florida. Alfa App.2. Borden then filed an amended complaint. Alfa App.7. In response, Alfa filed a renewed motion to quash both the complaint and the cross-claim. Alfa App.8. Barnhardt and Ocean sought to have the complaint dismissed, or, in the alternative, stayed or abated pending the outcome of the action against Alfa.

[5] While Southern Seas was named as a defendant in the original complaint, Southern Seas was dropped as a defendant in the amended complaint and is no longer a party in this case.

Alfa's memorandum in support of the motion argued that the court lacked personal jurisdiction over Alfa because Alfa lacked any contacts with the State of Florida, the insurance policy holder and insured property were located in Honduras, and the loss which gave rise to the dispute occurred in international waters. Alfa App.9. To support the motion, Alfa attached the affidavit of Vladimir Zelenchuk, head of Alfa's claims group, who testified that Alfa does not do business in Florida, writes no insurance in Florida, and otherwise had no contacts with the State of Florida. Alfa App.2 & 8, attached exhibit; Alfa App.13. Additionally, Alfa argued that the long-arm statute that Borden sought to invoke, Florida's Unauthorized Insurer's Process Law, Fla. Stat. § 626.906, did not give the court jurisdiction as the statute may only be invoked by Florida residents and Borden is not a Florida resident.[6] Alfa App.9.

Borden and Ocean responded that Alfa had contacts in Florida because it conducted an insurance contract transaction via an "agent" in Florida, Barnhardt. Borden argued that a contract was effectuated through Barnhardt when Barnhardt issued the Cover Note and when Alfa accepted premiums that passed through Barnhardt's hands. Borden also argued that Barnhardt's issuance of a Notice of

[6] In all motions and briefs and in the hearing regarding the motion to quash, Borden, Barnhardt, and Ocean all asserted that jurisdiction was proper only under Fla. Stat. § 626.906.

Cancellation upon Borden's failure to make premium payments also evidenced an agency relationship. Alfa App.10 & 11.

On August 11, 2003, the circuit court held a hearing on the motion to quash. At the hearing, Alfa responded to Borden, Ocean, and Barnhardt's arguments by noting that Alfa's only contact in the chain was 2K, located in Turkey. Alfa had no direct contact with Barnhardt or any other link in the chain other than 2K. The argument was supported by the deposition testimony of Barnhardt's representative, who testified that Barnhardt had no contact with Alfa, therefore none of Barnhardt's activities could have been directed by Alfa. Alfa App.10, Ex.2 at 12, 16, 18, 24, 27; Alfa App.6 at admissions 9, 10, 12, 14, 15. Neither Borden, Ocean, nor Barnhardt presented any evidence that Alfa was even aware that the chain of brokers passed through the United States on its way to the Honduran insured.

On October 17, 2003, the circuit court issued a consolidated order denying Alfa's motion to quash and granting Ocean and Barnhart's motion for abatement against further action to pending additional discovery. Alfa App.12. Alfa timely appealed this order to the Second DCA.

On appeal, the Second DCA reversed the circuit court order. *East-European Ins. Co. v. Borden*, 884 So. 2d 233 (Fla. 2d DCA 2004). The Second DCA held that Florida's Unauthorized Insurer's Process Law, Fla. Stat. § 626.906, only applies to Florida residents seeking to sue a foreign insurer. The court reached this

conclusion based on the legislative history of the statute, the directive that statutes are to be construed to reach a constitutional result whenever possible, and the recognition that reading Section 626.906 as creating jurisdiction over Alfa would render the other portions of the statute meaningless. 884 So. 2d at 237-38. The Second DCA noted that its decision conflicts with the Third DCA opinion in *Winterthur International Ltd. v. Palacios*, 559 So. 2d 1214 (Fla. 3d DCA 1990) and therefore certified the conflict to this Court.

Borden timely filed a Notice to Invoke Discretionary Jurisdiction (Ocean later joined the notice). This Court then issued an order postponing its decision on jurisdiction and directing the Petitioners to serve their briefs on the merits.

SUMMARY OF THE ARGUMENT

To establish personal jurisdiction, Borden carries the burden of satisfying both the statutory requirements for long-arm jurisdiction and constitutional due process requirements. Borden has alleged that long-arm jurisdiction is proper under Florida Statute § 626.906 and that due process is satisfied because Barnhardt acted in Florida with apparent authority from Alfa. As the discussion below will demonstrate, both of these claims fail as a matter of law.

First, Section 626.906 cannot create jurisdiction over Alfa. Section 626.906 is also available only to Florida residents. Borden is a resident of Honduras, therefore he cannot establish long-arm jurisdiction under this statute.

Second, Borden cannot satisfy constitutional due process requirements. Under the Due Process Clause, before jurisdiction may be asserted over a foreign defendant, the defendant must have purposely availed himself of a business opportunity in the state such that the defendant's minimum contacts with the state put him on notice that he could be haled into court there. *See e.g.*, *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Alfa, a Russian insurance company, issued an insurance policy in the name of a Honduran resident covering three Honduran vessels to be kept in Honduran and Caribbean waters. All transactions regarding the insurance took place up and down a chain of insurance brokers with Alfa only having contact with 2K in Turkey. At no point in time did Alfa have contact with any person or company in Florida, nor did Alfa know that its business was traveling through Florida. As such, Alfa did not purposely avail itself of a business opportunity in Florida nor make any contact with Florida that could establish jurisdiction. To permit jurisdiction in this case would offend traditional notions of "fair play and substantial justice." *See e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985), citing *World-Wide*, 444 U.S. at 292.

ARGUMENT

Standard of Review

This Court reviews issues of statutory construction de novo. *State v. Burris*, 875 So. 2d 408 (Fla. 2004). Likewise, this Court reviews issues of personal jurisdiction over foreign corporations *de novo*. *Exec-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So.2d 582, 584 (Fla. 2000).

I. THIS COURT LACKS JURISDICTION.

This Court lacks jurisdiction over this appeal pursuant to article V, section 3(b)(4) of the Florida Constitution because there is no actual conflict between the Second DCA and Third DCA opinions. *See Sun State Ford, Inc. v. Burch*, 2004 WL 2755868 (Fla. December 2, 2004).[7] In *East-European Insurance Company v. Borden*, 884 So. 2d 233 (Fla. 2d DCA 2004), the Second DCA held that Fla. Stat. § 626.906 only applies to Florida residents seeking to sue a foreign insurer. In *Winterthur International Ltd. v. Palacios*, 559 So. 2d 1214 (Fla. 3d DCA 1990), the Third DCA held that Fla. Stat. § 626.906(4) does apply to non-residents seeking to sue a foreign insurer. However, subsequent to *Winterthur*, in *Hassneh*

[7] In that case, this Court said, "We initially accepted jurisdiction to review [this case], a decision which the district court of appeal certified to be in direct conflict with the decision of another district court pursuant to article V, section 3(b)(4) of the Florida Constitution. Upon further consideration, we have determined that there is no actual conflict and that we should exercise our discretion and discharge jurisdiction in this cause. Accordingly, this review proceeding is hereby dismissed."

Insurance Co. of Israel, Ltd. v. Plastigone Technologies, Inc., 623 So. 2d 1223 (Fla. 3d DCA 1993), the Third DCA stated that Section 626.906 applies only to insurers that issue policies "held by Florida residents which are issued and delivered to them in Florida." 623 So. 2d at 1225. The *Hassneh* court did not limit its holding to any specific part of Section 626.906. The *Hassneh* court's statement harmonizes with the Second DCA's holding in East-European, thus there is no need to address a conflict.[8]

II. FRAMEWORK OF ANALYSIS

To establish *in personam* jurisdiction over a defendant, the plaintiff must show (1) the applicability of a Florida long-arm statute; (2) that the defendant has the constitutionally required "minimum contacts" with this state such that it should reasonably anticipate being haled into court in that state; and (3) that the suit does not offend traditional notices of fair play and substantial justice. *Venetian Salami*

[8] Even if this court were to find a conflict, this case is a poor vehicle for analysis of Section 626.906. As the *East-European* court notes, the facts in *Winterthur* demonstrate that jurisdiction was clearly present under Florida's general long-arm provision, Fla. Stat. § 48.193. 884 So. 2d at 236. Thus, the *Winterthur* court's holding as to Section 626.906 was unnecessary. Furthermore, the facts of the case at hand demonstrate that it would clearly be an unconstitutional violation of Due Process to allow jurisdiction over Alfa. Simply put, the unusual facts of this case and the facts of *Winterthur* will likely create confusion and unclear guidance for the lower courts. Under circumstances such as these, this Court should exercise its discretion to decline review of the case. *See Bay Anesthesia, Inc. v. Aldrich*, 863 So. 2d 310 (Fla. 2003) ("We originally accepted jurisdiction to review [this case] pursuant to article V, section 3(b)(4), of the Florida Constitution. However, after further consideration, we decline to exercise our discretion to review this matter.").

Co. v. Parthenais, 554 So. 2d 499, 500 (Fla. 1989), citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *World-Wide*, 444 U.S. at 286.

The first issue before this Court is whether Florida's Unauthorized Insurer's Process Law, Florida Statute § 626.906 ("UIPL") applies to non-Florida residents. Borden, Ocean, and Barnhardt[9] (collectively referred to as "Petitioners") argue that service of process was appropriate under the UIPL.[10] Alfa App.10 & 11; Borden Br. at 8 - 20; Ocean Br. at 12 - 22. However, Alfa demonstrates below that Borden has failed to establish jurisdiction under the UIPL.

Although this failure alone is a sufficient basis by itself for quashing service of process, Alfa also shows that Borden failed to establish that service of process would comport with the requirements of the Due Process Clause. *See e.g.*, *Springer v. Blue Cross & Blue Shield of Fla.*, 695 So. 2d 944, 946 (Fla. 4th DCA 1997) (holding that the UIPL does not afford an independent basis for *in personam* jurisdiction independent of the due process requirement of minimum contacts with

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[9] Prior to filing this brief, Alfa moved to strike Barnhart's brief. At the date of the filing of this brief, this Court has not yet ruled on Alfa's motion. For that reason, Alfa will address the issues raised in Barnhardt's brief so as not to waive the opportunity to illustrate the fallacy of Barnhardt's arguments. By addressing issues raised in Barnhardt's brief, Alfa in no way intends to abandon its motion to strike.

[10] Properly, neither Borden nor Ocean makes any argument regarding Florida Statute § 48.193, the general long-arm statute. (*See* Alfa App.53, Ocean's post hearing memorandum of law opposing Alfa's motion to quash; Alfa App.10, Borden's response to Alfa's motion to quash).

the forum state); *see also, Walter v. Blue Cross & Blue Shield of Wisconsin*, 181 F.3d 1198, 1205 (11th Cir. 1999) ("Because we conclude that the district court did not have jurisdiction over Blue Cross of Wisconsin under § 626.906, we need not determine whether it had sufficient minimum contacts with Florida to satisfy the Due Process Clause.").

Because Petitioners cannot satisfy any prong of the jurisdictional test, the Second DCA's opinion should be affirmed.

III. FLORIDA STATUTE § 626.906 APPLIES ONLY TO FLORIDA RESIDENTS.

Florida Statute § 626.906, Florida's Unauthorized Insurer's Process Law, allows for service of process on an unauthorized foreign insurance company if the insurer engages in any of the following acts enumerated in the statute:

> (1) The issuance or delivery of contracts of insurance *to residents of this state* or to corporations authorized to do business therein;
>
> (2) The solicitation of applications for *such contracts*;
>
> (3) The collection of premiums, membership fees, assessments, or other considerations for *such contracts*; or
>
> (4) Any other transaction of insurance.

Fla. Stat. § 626.906 (2000) (emphasis added).

Subsections (1) – (3)

Borden cannot establish long-arm jurisdiction under § 626.906(1), (2), or (3) since, on their face, subsections (1) – (3) are available only to Florida residents.

Florida court's are uniform in their requirement that these sections are available only to Florida residents. *See e.g., Parliament Life Ins. Co. v. Eglin Nat'l Bank*, 333 So. 2d 517, 518 (Fla. 1st DCA 1976) (stating that § 626.906 requires "issuance or delivery of contracts of insurance *to residents of this State*). Even the case with which the Second DCA certified conflict, *Winterthur*, recognized that subsections (1) – (3) are only available to Florida residents. *Winterthur v. Palacios*, 559 So. 2d 1214, 1215 (Fla. 3d DCA 1990) ("subsections 626.906 (1) – (3) apply only to residents of Florida"). [11]

Thus, Borden, who is undisputedly a resident of Honduras, cannot avail himself of subsections (1) – (3). *See* Alfa App.1 & 7 (naming only Victor Borden as plaintiff); Alfa App.10, Ex.5 (Cover Note listing Borden's address as Honduras); Alfa App.3 at 51 (certificate of registry listing Borden's address as Guanaja, Honduras); Alfa App.3 at 56 (letter from insurance investigator to Borden and copied to Alfa showing Borden's address as Honduras); Alfa App.3 at 144

[11] Barnhardt contends that as long as the insurance policy is delivered to a Florida resident, it does not matter that the insured named on the policy is not a Florida resident. *See* Barnhardt Br. at 20 ("Here Victor Borden's residency is dispositive of nothing. The dispositive fact is that Sylvia [sic] Borden was a resident and 'a' or 'the' contract in form of a cover note or binder was delivered to her."). First, this argument is not properly before this Court because Barnhardt is raising the argument for the first time. *See McGurn v. Scott*, 596 So. 2d 1042, 1043 (Fla. 1992); *Mendelson v. Great Western Bank, F.S.B.*, 712 So. 2d 1194, 1197 (Fla. 2d DCA 1998). Second, Barnhardt's reasoning eviscerates the entire purpose of the residency requirement by making the residency requirement a mere technicality easily evaded by foreign citizens wishing to invoke the power of United States courts. See Alfa Br. (below) at pp. 16 - 19.

(Insurance Policy listing Borden's address as Honduras); Alfa App.9 at Ex.2 & Ex.B (listing Borden's address as Honduras). While Borden's brief attempts to sidetrack this Court with references to the fact that Borden is part owner of his daughter's home in Florida or that Borden is an authorized user on a Florida bank account, those facts do not make him a Florida resident. Notably, while persistently mentioning these irrelevant facts, Petitioners never goes so far as to assert that Borden is a Florida resident.

Subsection (4)

Petitioners asserts that subsection (4) is not limited by a residency requirement and therefore is available as a basis for long-arm jurisdiction. To begin with, Borden failed to plead facts sufficient to create jurisdiction under subsection (4).[12] Alfa App.7 at ¶7. However, even if Borden were to allege facts sufficient to create possible jurisdiction under subsection (4), as the discussion below demonstrates, that section is not available to Borden. The Legislature has stated and all courts to address the issue (save *Winterthur*) have uniformly held that

[12] The amended complaint alleges that "the following actions subject [Alfa] to personal jurisdiction of the Court:"

(a) Issuing or causing to be issued a Cover Note or policy of insurance for delivery in Florida; or

(b) Delivering or causing to be delivered a cover note or policy of insurance in Florida.

(Alfa App.7 at ¶7.) These allegations are sufficient only to allege jurisdiction under subsection (1) of the UIPL, not subsection (4).

§ 626.906 is meant to protect only Florida residents. Thus, subsection (4), just like subsections (1) – (3), is available only to Florida residents.

First and foremost, the Florida Legislature has expressly stated that § 626.906 (as a whole) was meant to protect Florida residents. As both Borden and Ocean's briefs recognize, when construing a statute, the interpreting court must "give effect to the Legislature's intent" and the "polestar that guides a court's statutory construction analysis" is legislative intent. Borden Br. at 11, citing *State v. Burris*, 875 So. 2d 408 (Fla. 2004); Ocean Br. at 14, citing *State v. J.M.*, 824 So. 2d 105 (Fla. 2002)). Thus, any ambiguity on the face of the statute is clarified by the Legislature's statement of its intent. *See also Reynolds v. State*, 842 So. 2d 46, 49 (Fla. 2002) ("It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis.") .

Here the Legislature has expressly stated its purpose – to protect Florida residents. According to Section 626.905:

> The purpose of the UIPL is to subject certain insurers and persons representing or aiding such insurers to the jurisdiction of courts of this state in suits by or on behalf of insureds or beneficiaries under such insurance contracts. The Legislature declares that it is a subject of concern that many *residents of this state* hold policies of insurance issued or delivered them in the state by insurers while not authorized to do business in this state, thus presenting to *such residents* the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such state interest, the Legislature herein provides a method of substituted services of process upon unauthorized insurers and persons representing or aiding such insurers, and declares that in so doing it exercises its power to protect *its residents* and to define, for the purpose of

> this chapter, what constitutes doing business in this state, and also exercises powers and privileges available to the state by virtue of Pub. L. No. 15, 79th Congress of the United States, chapter 20, 1st session, s. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the states.

Fla. Stat. § 626.905 (2000) (emphasis added). The former Fifth Circuit cited to this same statement of purpose when it held that Section 626.906 applied only to insurance policies issued and delivered in Florida to Florida residents. *Parmalee v. Iowa State Traveling Men's Association*, 206 F.2d 518, 522 (5th Cir. 1953). By requiring that the policy be issued and delivered in Florida to a Florida resident, the UIPL ensures that the foreign insurer must know that it is making contacts with Florida which could subject it to the jurisdiction of Florida's courts.

As discussed in more detail below, limiting the statute to Florida residents is also consistent with constitutional due process requirements. First and foremost, the activities which may subject a defendant to jurisdiction of a foreign court must be purposefully directed toward forum *residents*. *Burger King*, 471 U.S. at 473. The requirement that the activities be directed at forum residents flows from the fact that a "State generally has a 'manifest interest' in providing *its residents* with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.*

Simply put, Florida laws are created to protect Florida residents. Florida courts exist to adjudicate matters affecting Florida and her residents. It would fly in the face of state sovereignty and judicial economy to rule otherwise. This case

is a perfect example: why should Florida courts adjudicate a case where a Russian corporation with no contacts with Florida delivers an insurance contract in Turkey to be sent through a chain of brokers, two of which happen to be located in Florida, to an insured in Honduras, which insures vessels that were supposed to be located in and restricted to Honduran waters but sank in international waters?

Borden and Ocean's weak response is to focus on the Legislature's use of the word "a" instead of "the" in its statement of purpose. Both parties conclude that, because the Legislature said that "it is *a* subject of concern that [Florida residents might not be able to sue foreign insurers]" rather than "*the* subject of [Florida residents might not be able to sue foreign insurers]," then the Legislature clearly intended for subsection (4) to be available to non-residents. (Borden Br. at 14, Ocean Br. at 14-15.)

This argument stretches the bounds of credulity. First, as noted by the Second DCA, "courts have a duty to 'interpret a legislative Act so as to effect a constitutional result if it is possible to do so.'" *East-European*, 884 So. 2d at 238, quoting, *Cassady v. Consol. Naval Stores Co.*, 119 So. 2d 35, 27 (Fla. 1960). The Second DCA said that "we believe that to construe section 626.906(4) as being available to nonresidents would broaden the statute's jurisdictional reach such that it would violate constitutional due process requirements, given the paucity of Alfa's contacts with Florida." *Id.* Put differently, were subsection (4) to be read

the way Petitioners suggest, the Florida Legislature would overstep the bounds of its authority.

Second, the Florida Legislature addresses thousands of issues each year. It makes perfect sense to say that foreign insurers is "a" concern among many.

Finally, subsection (4) cannot be read to mean that it is available to non-residents because such a reading would subsume subsections (1) – (3). As the Second DCA recognized, a "'statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.'" *East-European,* 884 So. 2d at 238, quoting *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-14 (Fla. 2001). Thus, because subsections (1) – (3) place a residency limitation on the activities, "[t]o construe subsection (4) to include, without limitation, the same activities subject to the residency limitation of subsections (1) – (3) is to render subsections (1) – (3) meaningless." *Id.*

An example demonstrates the absurdity of Petitioners' argument. Suppose that a Peruvian resident on vacation in Florida buys a policy of insurance from a Bahamian insurance company who set up shop in the lobby of the Peruvian tourist's hotel. Ignore the fact that there would be jurisdiction under Section 48.193 and focus on Section 626.906. Caselaw is absolutely clear that delivering the policy to the Peruvian resident, soliciting the policy from him, or receiving payment in Miami would not invoke jurisdiction under Section 626.906(1), (2), or

(3) because those sections are available only to Florida residents. Thus, Petitioners are reduced to arguing that if the Bahamian insurance company does anything less specific than deliver, solicit, or collect money from the Peruvian while he is in Florida, *then* § 626.906(4) applies to confer jurisdiction. This interpretation is not only inconsistent with the legislative history, it defies logic.

Caselaw interpreting subsection (4) also refutes Petitioner's arguments. In the earliest decision to address the issue, *Parmalee v. Iowa State Traveling Men's Association*, 206 F.2d 518 (5th Cir. 1953), the Fifth Circuit held that the entire UIPL was available only to Florida residents. Notably, neither Borden nor Ocean mention the *Parmalee* decision in their briefs. The *Parmalee* court construed the UIPL "to apply only to policies of insurance delivered in Florida to Florida residents," finding that the statute's provisions are "restricted to suits 'arising out of any such contract of insurance.'" *Parmelee*, 206 F.2d at 522. The court concluded that "[w]hile the statute refers to 'any of the following acts', we understand it to mean rather the doing of any of the prescribed acts from which results the issuance or delivery of a contract of insurance in the state." *Id.* The court recognized that "Florida has the power, within constitutional bounds, to prescribe the terms upon which insurance may be placed and kept in force *upon its residents*." *Id.* Thus, by applying the entire statute only to Florida residents, the

statute "protects those for whom government has a legitimate concern[, its residents]." *Id.*

Additionally, with the exception of *Winterthur*, the courts to consider the statute have unanimously determined that it is available only to Florida residents. *See e.g., Drake*, 353 So. 2d at 966 (holding that in order to avail itself of § 626.906 plaintiff must demonstrate both that he is a resident of Florida and that the policy was issued and delivered in Florida; simply showing one is not enough); *Parliament*, 333 So. 2d at 518 (stating that § 626.906 requires "issuance or delivery of contracts of insurance *to residents of this State*); *Bookman v. KAH Inc.*, 614 So. 2d 1180, 1182 (Fla. 1st DCA 1993) (stating that § 626.906 "only applies to policies held by Florida residents which are issued and delivered to them in Florida"); *Hassneh Ins. Co. of Israel, Ltd. v. Plastigone Technologies, Inc.*, 623 So. 2d 1223, 1225 (Fla. 3d DCA 1993) ("section 626.906 [ ] applies only to insurers that issue policies "*held by Florida residents* which are issued and delivered to them in Florida."); *American Fire & Marine Inc. Co, Ltd. v. Eising*, 673 So. 2d 493, 493 (Fla. 4th DCA 1996) ("Substitute service on Florida's Insurance Commissioner is permitted under [the UIPL] where a foreign insurer has 'by mail or otherwise' issued and delivered a contract of insurance *to a resident of Florida*."); *see also Parmalee v. Commercial Travelers Mut. Acc. Ass'n of America*, 206 F.2d 523, 524 (5th Cir. 1953) (because the certificate of insurance

was "not delivered in Florida *to a Florida resident*," the UIPL did not apply); *Walter*, 181 F.3d at 1204-05 (citing to multiple Florida cases holding that the insurance policy must be issued and delivered in Florida to a Florida resident).

Against this backdrop of consistent findings, *Winterthur*, is the only case to reach the conclusion that subsection (4) is available to non-residents.[13] Not only is *Winterthur* an outlier in UIPL jurisprudence, but is also easily distinguished from the facts at hand.

In *Winterthur*, the insured was a resident of Peru who purchased a medical insurance policy from a Bermudan insurance company. 559 So. 2d at 1214-1215. While visiting Miami, Florida, Palacios purchased the policy from a Winterthur Insurance authorized broker who was located in and doing business for Winterhur in Miami. *Id.* The policy was later delivered to Palacios in Peru. *Id.* When Palacios sued Winterthur for coverage, Winterthur alleged that because Palacios was not a resident of Florida, he could not avail himself of § 626.906. *Id.*

The Third DCA rejected that argument. While the court readily agreed that subsections (1) through (3) only applied to Florida residents, the court concluded that such a limitation did not apply to subsection (4). *Id.* The court based its decision on the fact that subsection (4) uses the term "transaction of insurance," which in turn lead the court to § 624.10, the section that defines "transaction of

[13] *Winterthur International Ltd. v. Palacios*, 559 So. 2d 1214 (Fla. 3d DCA 1990).

insurance." Because section 624.10 on its fact does not limit its application only to Florida residents, the Third DCA concluded that "subsection 626.906(4) is available to a nonresident insured." *Id.* at 1215.

Winterthur is a prime example of the adage that hard cases make bad law. The court reached the right result but took the wrong road to get there. In *Winterthur*, there could be no doubt that Winterthur was subject to suit in Florida. Winterthur had an authorized agent in Miami that solicited Florida insurance business. Thus, the court could have easily found jurisdiction under § 48.193, the general long-arm statute, without reaching the issue of whether § 626.906(4) applied to non-residents. The Third DCA's decision is an ill-founded attempt to reach the right conclusion via the wrong route. *See East-European,* 884 So. 2d at 236 (stating that "we agree with the result in *Winterthur* . . . [h]owever, we disagree with the *Winterthur* analysis of section 626.906.")

Case law subsequent to the Third DCA's decision also weakens Borden's reliance on *Winterthur.* In *Walter v. Blue Cross & Blue Shield of Wisconsin*, the Eleventh Circuit directly called into question the soundness of *Winterthur.* The *Walter* court noted that the *Winterthur* court failed to "question the requirement that the policy be issued and delivered in Florida [to a Florida resident.]" 181 F.3d at 1205 n.5. In the text surrounding the footnote, the *Walter* court cites to cases like those mentioned above where courts stated that Section 626.906 (in its

entirety) is only available to Florida residents who were issued and delivered policies in Florida. *Id.*

The Third DCA's own jurisprudence subsequent to *Winterthur* also calls into question *Winterthur*'s validity. In *Hassneh*, the Third DCA stated that § 626.906 applies only to insurers that issue policies "held by Florida residents which are issued and delivered to them in Florida." 623 So. 2d at 1225, citing *Bookman v. KAH Incorporated*, 614 So. 2d 1180, 1182 (Fla. 1st DCA 1993); *Parliament Life Ins. Co. v. Eglin Nat'l Bank*, 333 So. 2d 517, 518 (Fla. 1st DCA 1976). The court did not specify that only subsections (1) through (3) apply to Florida residents. The court drew no distinctions between subsections, instead making a blanket statement that the statute as a whole is available only to Florida residents whose insurance policies were issued and delivered in Florida. *Hassneh*, 623 So. 2d at 1255.

Finding no support in the caselaw addressing Section 626.906, Ocean cites to *Ryder Truck Rental, Inc. v. Rosenberger*, 699 So. 2d 713 (Fla. 3d DCA 1997) and makes the generalized argument that Florida laws are not limited to protecting Florida residents.[14] In *Ryder*, the accident giving rise to the lawsuit occurred in Montana; the defendant was a Florida corporation; the plaintiff and her family

[14] Ocean also contends that Florida's long-arm statute is available to non-Florida residents and cites to *Acquardo, M.D. v. Bergeron*, 851 So. 2d 665 (Fla. 2003) in support. *Acquardo* is totally off point as that case concerned a *Florida resident* invoking Florida's long-arm statute to sue a non-Florida resident.

resided in Nebraska; the truck was titled in Georgia and licensed in New Mexico; Washington was the state of departure and Nebraska the intended destination. *Id.* at 715. Contrary to Ocean's interpretation, what the court actually said was, "[w]hile Florida has an interest in protecting its citizens and visitors from persons who put dangerous instrumentalities in another's hands, *we are not here dealing with Florida plaintiffs, either residents or visitors*." *Id.* at 716 (emphasis added). In words that apply equally to this case, the court held that the case did not belong in a Florida court:

> Florida has no interest in committing its judicial time and resources to the litigation of this action which calls for the application of foreign law in relation to a vehicle accident where a non-Florida resident was injured by the negligence of a non-Florida resident, in a vehicle registered and licensed, and leased, out of state. It would be unduly burdensome to ask our courts, already suffering from a tremendous caseload, to accept litigation arising from all Ryder trucks and the like, regardless of where the lease agreement was entered into or where the accident occurred.

Id. at 717.

Likewise, the courts of this state have no interest in Alfa and Borden's dispute. The plaintiff is a Honduran resident who sought insurance for Honduran vessels limited to sailing in Honduran waters (one of which later sank in international waters). The defendant is a Russian insurance company with no contacts with the United States, much less Florida. Resolution of this case will

have no impact on Florida other than to burden our courts and waste judicial resources.[15]

IV. ALFA'S ACTIONS DO NOT FALL WITHIN THE AMBIT OF § 624.10.

Even if this Court were to assume that § 626.906(4) was available to non-residents like Borden, Appellees have no evidence that Alfa engaged in a "transaction of insurance" in Florida. Transaction of insurance is defined by Section 624.10 as: "(1) solicitation or inducement; (2) preliminary negotiations; (3) effectuation of a contract of insurance; or (4) transaction of matters subsequent to effectuation of a contract of insurance and arising out of it." Fla. Stat. § 624.10. None of Alfa's actions fall within this definition.

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[15] Barnhardt asserts that courts from other jurisdictions have found the personal jurisdiction was proper under the long-arm statutes of those states based on facts similar to the facts at hand. Each of the cases cited by Barnhardt is off point because, in each case, the plaintiff was a resident of the state whose jurisdiction the plaintiff sought to invoke. Additionally, in every case involving the insurance of property, the property to be insured was also located in the forum state. In some of the cases, the defendant even maintained an office or broker in the forum state. *See Caronia v. American Reliable Ins. Co.*, 999 F. Supp. 299, 304 (E.D. N.Y. 1998); *Armada Supply Inc. v. Wright*, 858 F.2d 842, 848 (2d Cir. 1988); *Aero Assocs, Inc. v. La Metropolitana*, 183 F. Supp. 357, 358 (S.D. N.Y. 1960); *Ace Grain Co. v. Amer. Eagle Fire Ins. Co.*, 95 F. Supp. 784, 786 (S.D. N.Y. 1951); *Security Nat'l Life Ins. Co. v. Washington*, 113 A.2d 749, 750 (D.C. 1955); *Zacharakis v. Bunker Hill Mut. Ins. Co.*, 281 A.2d 487, 490 (N.Y. App. Div. 1953). In contrast, Borden is a resident of Honduras, the policy was mailed to him by Ocean at his Honduras address, and the insured property is located in Honduras and Alfa has no contacts whatsoever with the state of Florida.

First, Alfa did not solicit Borden's business. As discussed above, Borden approached Ocean asking Ocean to procure insurance on Borden's behalf. Alfa's acceptance of an offer from Turkish 2K to extend a quote to a Honduran resident hardly constitutes solicitation of insurance in Florida.

Similarly, there were no negotiations. Indeed, the entire premise of Borden's suit is that, had there been negotiations, he would not have agreed to an arbitration clause. Alpha App.10, Ex.1, ¶¶10-11; Alpha App.7, Count II. If the communications up and down the chain be considered "negotiations," then again, Petitioners concede that the "negotiations [ ] took place through the noted chain of brokers." Ocean Br. at p.7.

Borden's argument that Barnhardt's delivery of a cover note effectuated the insurance contract is misplaced. Alfa never instructed Barnhardt to send the cover note – Alfa never had contact of any kind with Barnhardt. Barnhardt testified that "East European had no direct contact with Barnhardt whatsoever" and that "[Alfa] wouldn't have any authority to tell us what to do with our cover note." Alfa App.10, Ex.2 at p.16. Barnhardt sent the cover note to Ocean to be forwarded to "Victor K. Borden, Jr." at "Guanaja, Bay Islands of Honduras." Borden App. 10, Ex. 5 (cover note); Borden App.6 admission 17 (Barnhardt's admission that "BMI had no direct contact with Sylvia Borden as far as the issuance of the cover note. BMI forwarded a copy of the [cover note] to Ocean."); Alfa App.10, Ex.2 at p.40

(Barnhardt stating that it forwarded the notice of rescission to Ocean for Ocean to forward to Borden in Honduras because Barnhardt could not send registered mail to Honduras.)[16] Barnhardt similarly testified that MICI provided Barnhardt with a cover note that outlined the coverage and then Barnhardt used that information to create a cover to send to Ocean, which was then sent to Borden. Alfa App.10, Ex.2 at 12, 19.

The reality is that effectuation of the contract took place in Russia when Alfa received word that Borden accepted the terms of the insurance. Moreover, Alfa did not deliver a contract of insurance to Barnhardt. All documents reflect a Honduras address for Victor Borden. *See, e.g.*, App. 3, pp. 10, 11, 49, 51, 53, 56, 63, 84. Alfa issued a contract of insurance to 2K with the expectation was that it would be forwarded down the chain to Borden in Honduras. The fact that the policy fortuitously made a stop in Florida does not mean the policy was effectuated in Florida. If that analysis were true, then the policy was effectuated six times:

[16] To the extent that Borden's argument suggests that Barnhardt sending Ocean the insurance contract demonstrates an agency relationship, the record disproves Borden's theory. In a letter to Borden, Ocean expressly disavowed any agency relationship with Borden. Ocean App. 2, at p.2 (letter from Ocean to Sylvia stating that Ocean would try to help her find insurance but "[t]he aforementioned will be provided to you in a purely support/advisory capacity and not acting as your agent or broker in that regard"); Alfa App.3 at p.21, fax from Ocean to Borden reminding Borden that Ocean is not his agent. Thus, Barnhardt did not send Borden's agent any insurance document. If Petitioners mean to assert that Sylvia is Borden's agent, that argument is also misplaced. Barnhardt never delivered any official document to Sylvia. The documents were sent to Ocean so that Ocean could forward them to Borden. Alfa App.6 at admissions 17, 43.

first in Turkey and twice in Britain before being effectuated twice in Florida and then in Honduras.

Finally, Alfa did not transact matters subsequent to the effectuation of insurance in Florida. When Alfa rescinded the policy due to nonpayment, Barnhardt took it upon itself to issue a notice of recscission and send the notice to Ocean to be forwarded to Borden. Alfa App.6 at admission 33 and 34 (Barnhardt stating that notice of rescission was not authorized by Alfa but was "done as a courtesy by [Barnhardt] to Ocean"). When Sylvia Borden wrote the checks to have the policy reinstated, she wrote those checks to Barnhardt and Barnhardt forwarded them up the chain. Alfa App.10, Ex.2 at 22; Alfa. App.6 at admission 37 and 39 (Barnhardt explicitly denies collecting premiums "on behalf of East European."). The communications simply passed through Barnhardt (in addition to five other brokers) hands.

Indeed, to construe Section 624.10 the way that Appellees assert would render it unconstitutional. Such a reading would cast a jurisdictional net over companies that have no connection with Florida. This Court should interpret the statute to avoid that unconstitutional result.

V. THERE IS NO PERSONAL JURISDICTION UNDER § 48.193.

Barnhardt improperly contends that personal jurisdiction is appropriate under Fla. Stat. § 48.193. Barnhardt contends that its claims for indemnity,

equitable subrogation, and reformation could be construed as either tort claims or as breach of contract claims and therefore jurisdiction is proper under either § 48.193(1)(b) or (1)(g). First, claims for indemnity, equitable subrogation, and/or reformation are not tort claims. Second, it would be impossible for Barnhardt to allege a breach of contract claim since Alfa had no contracts with Barnhardt. Finally, if Barnhardt's claims could be construed as tort or breach of contract claims, Barnhardt can set forth no facts establishing the necessary element that the tort or the breach of contract took place in Florida.[17] *See Miami Breakers Soccer Club, Inc. v. Women's United Soccer Association*, 140 F. Supp. 2d 1325, 1329 (S.D. Fla. 2001), *citing Cable/Home Communication Corp*., 902 F.2d 829, 857 (11th Cir. 1990) (Plaintiff asserting jurisdiction under § 48.193 "bears the burden of showing that substantial aspects of the alleged tortious conduct happened in Florida.") (emphasis added).

VI. ALFA DID NOT WAIVE ITS ABILITY TO RAISE THE ISSUE OF PERSONAL JURISDICTION.

For the first time on appeal, Barnhardt improperly contends that Alfa waived its ability to assert a lack of personal jurisdiction defense. As a threshold matter,

[17] Section 48.193(1)(b) and (g) state that long-arm jurisdiction is proper when a person:

> (b) Commit[s] a tortious act within this state.
> (g) Breach[es] a contract in this state by failing to perform acts required by the contract to be performed in this state.

this argument has itself been waived because it was not raised below. *McGurn v. Scott*, 596 So. 2d 1042, 1043 (Fla. 1992); *Mendelson v. Great Western Bank, F.S.B.*, 712 So. 2d 1194, 1197 (Fla. 2d DCA 1998).

Even if the argument were properly before the court, it is without merit. The record reflects that the first substantive document filed by Alfa in this state court action was its motion to quash. Prior to filing the motion to quash, Alfa filed a notice of appearance (a necessary pre-requisite to making any substantive filing) and a consent to removal. The consent to removal was necessary before any jurisdictional argument could be made (since Alfa needed to know which court – state or federal – to file the motion). In any event, when the skirmish over the proper court was settled, a skirmish initiated and fought by Barnhardt, Alfa's first filing was a motion to quash. In no way could Alfa have been said to have waived a jurisdictional argument.[18]

VII. THERE IS NO SPECIFIC JURISDICTION BECAUSE ALFA DID NOT PURPOSELY AVAIL ITSELF OF AN OPPORTUNITY IN FLORIDA.

Even if Borden could establish statutory long-arm jurisdiction, imposing jurisdiction is still improper because Borden cannot satisfy the due process

[18] Barnhardt's cases offer no support for its waiver argument. See Barnhardt Br. at p.14. In those cases, either the defendant waited months to file a motion to quash or the defendant failed to raise a personal jurisdiction argument in the initial pleading or motion to dismiss. As stated, in this case, Alfa's first motion was the motion to quash.

requirements of the constitution. *See, Response Reward Systems, L.C. v. Meijer*, 189 F. Supp. 1332 (M.D. Fla. 2002) (holding that even though Florida long-arm statute would have extended personal jurisdiction over defendant, defendant lacked sufficient contacts with Florida such that the exercise of personal jurisdiction would violate due process).

A court faced with a constitutional personal jurisdiction determination concerning a non-resident defendant may find jurisdiction under either of two concepts, general or specific jurisdiction. General jurisdiction is based upon a defendant's continuous and systematic contacts with the forum and jurisdiction may be present even if the plaintiff's cause of action arises out of the defendant's non-forum related activities. *See e.g., Christus St. Joseph's Health Systems v. Witt Biochemical Corp.*, 805 So. 2d 1050, 1052 (Fla. 1st DCA 2002). Alternatively, specific jurisdiction arises out of a defendant's activities in the forum that are related to the cause of action alleged in the complaint. *Id.*

Alfa has no contacts with Florida. Alfa has no offices, agents, or employees in Florida. Alfa does not advertise or solicit business in Florida. Neither does Alfa insure any Florida resident or property in Florida, nor has it ever issued any insurance policy to Florida resident. Alfa App.2 & 8, attached exhibit; Alfa App.13. Alfa, a Russian company, wrote an insurance policy for a Honduran resident insuring Honduran vessels and limiting their travels to Honduran and

Caribbean waters. Because Alfa has no contacts with Florida, let alone continuous, systematic contacts, general jurisdiction cannot apply.

Specific jurisdiction also does not apply. Before a forum may assert specific jurisdiction over a foreign defendant who has not consented to suit there, the defendant must have "fair warning" that its activities might subject it to the jurisdiction of a foreign sovereign. *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977). The United States Supreme Court has held that the "constitutional touchstone" of the determination whether specific jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp.*, 471 U.S. at 474, quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The basis of the minimum contacts must be in "some act by which the defendant *purposely* avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of the laws." *Id.* This Due Process requirement is satisfied where "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World Wide*, 444 U.S. at 297 (1980).

Petitioner's once again come up short. Alfa could not reasonably anticipate that a policy of insurance arranged by a Turkish broker to insure vessels owned by

a Honduran resident that were located in and restricted to Honduran waters would wind up being the subject of litigation in the United States.

Borden's response is to focus on his connections to the United States. This argument is misplaced because the focus of the constitutional inquiry must be *Alfa's* actions. *See World Wide,* 444 U.S. 286. The question is whether *Alfa* purposefully established minimum contacts with Florida. *World Wide*, 444 U.S. at 297; *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985). Thus, the fact that Borden jointly owns a home here, has a joint bank account here, or may have believed Barnhardt was Borden's agent is irrelevant to whether Alfa purposely availed itself of a business opportunity here.

Borden cannot meet the constitutional requirement imposed by the Due Process clause because Borden has failed to establish that Alfa "purposely" availed itself of an opportunity in Florida. As previously discussed, Alfa had absolutely no contact with the State of Florida. Alfa App.2 & 8, attached exhibit; Alfa App.13. Alfa purposely availed itself of a business opportunity in Honduras: Alfa believed it was insuring vessels located in Honduras, restricted to Honduran waters and owned by a Honduran resident. *Id.* at ¶13.

Petitioners cannot even show that Alfa knew that a member of the chain was located in Florida. The few documents they cite for that proposition prove nothing. For instance, the application for insurance says is: "Current Insurance Agent:

Ocean Insurance." Alfa App.9, Ex.2. The words Florida or Tampa appear nowhere on the document. Likewise, a fax from 2K to Alfa on 2K letterhead that says, "The clari[t]y of the [Seaworthiness] Certificates are not good and this has been acknowledged by Barnhardt Marine, who in turn are arranging for better copies being sent over" gives no information about the location of Barnhardt. App. 9 at Ex. 3. The seaworthiness certificates themselves reflect that the fax came from "Barnhardt Marine" (top of fax) and also was sent from "Southern Seas" (bottom of fax) but not more. Alfa App.3 at p.84. The fax does not reveal the location of either broker. No other document even comes close to revealing Barnhardt's location in the chain.

Based on these facts, the record is devoid of any evidence suggesting that Alfa knew that a link in the chain was located in Florida. Thus, Alfa could not have "purposely availed" itself of an opportunity to conduct business in Florida if Alfa had no knowledge that its business was passing through the state of Florida.[19]

[19] Borden's statement of facts implies that having a website accessible in Florida satisfies minimum contacts. To the contrary, because Alfa's website is passive (meaning that a person in Florida cannot contract with Alfa – either directly or through 2K or Southern Seas – without directly contacting one of the companies) the existence of the website cannot create personal jurisdiction. *See Miller v. Berman*, 289 F. Supp. 2d 1327 (M.D. Fla. 2003) (finding that website's accessibility in Florida did not create jurisdiction because "Defendants never solicited business or contracted with Florida residents over the internet"), citing, *Cf. Obermaier v. Kenneth Copeland Evangelistic Assoc., Inc.*, 208 F. Supp. 2d 1288, 1291 (M.D. Fla. 2002); *see also*, *Miami Breakers*, 140 F. Supp. 2d at 1329

Barnhardt was not Alfa's agent

Because it is clear that Alfa had no direct contact with Florida, Petitioners are left to contend that there is jurisdiction because of Barnhardt's involvement in the chain of brokers. Essentially, Petitioners contend that Barnhardt was Alfa's agent, therefore Alfa conducted business in Florida through its agent when Barnhardt relayed notices and payments up and down the chain.

"The elements of an agency relationship under Florida law are (1) acknowledgement by the principal that the agent will act for it, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent." *State v. American Tobacco Co.*, 707 So.2d 851, 854 (Fla. 4th DCA 1998), *citing Goldschmidt v. Holman*, 571 So.2d 422, 424 n. 5 (Fla.1990)).

The control element is noticeably absent in this case. Barnhardt explicitly testified that Alfa would have no authority to govern Barnhardt's actions. Alfa App.10, Ex.2 at p.16. Indeed, there could be no direct agency relationship between Alfa and Barnhardt because the record is replete with evidence that Barnhardt had

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(finding that the court could not confer jurisdiction because the website in question was passive).

Borden's statement of facts also seems to suggest that because 2K has an office in Miami, there is jurisdiction over Alfa. There is no authority to suggest that because 2K's passive website lists Alfa and as "institutional partner," then by way of doing business with a company that has an office in Florida, Alfa itself has established minimum contacts sufficient to put it on notice that it can be haled into court here.

absolutely no contact with Alfa. Alfa App.10, Ex.2 at pp. 12, 16, 18, 24, 27; Alfa App.6 at admissions 9, 10, 12, 14, 15. It would be impossible for Alfa to control Barnhardt in the absence of contact.

Likewise, Barnhardt was not an implied or apparent agent of Alfa. An apparent agency relationship exists only if all three of the following elements are present: "(a) a representation by the purported principal; (b) a reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation." *Roessler v. Novak*, 858 So. 2d 1158, 1161-62 (Fla. 2d 2003), citing *Mobil Oil Corp. v. Bransford*, 648 So.2d 119, 121 (Fla.1995). The theory behind apparent agency is that a principal should be estopped from denying authority of an agent where the principal permitted the appearance of authority in the agent thereby justifying a reliance on that authority. *Liberty Mutual Ins. Co. v. Sommers*, 472 So. 2d 522, 524 (Fla. 1st DCA 1985).

Barnhardt's unilateral actions cannot create apparent authority. "Apparent authority does not arise from the subjective understanding of the person dealing with the purported agent or from appearances created by the purported agent himself." *Id., citing Izquierdo v. Hialeah Hosp., Inc.*, 709 So.2d 187, 188 (Fla. 3d DCA 1998). Rather, "apparent authority exists only where the principal creates the appearance of an agency relationship." *Id.; see also, MeterLogic, Inc. v. Copier Solutions, Inc.*, 126 F. Supp. 2d 1346, 1354-55 (S.D. Fla. 2000), citing *Ja Dan, Inc.*

v. L-J, Inc., 898 F. Supp. 894, 900 (S.D.Fla.1995) (holding that agency relationship existed where principal paid plaintiff directly and written agreement stated agent was signing on behalf of principal); *Izquierdo v. Hialeah Hosp., Inc.*, 709 So.2d 187, 188 (Fla. 3d DCA 1998) (finding no apparent authority where defendant took no actions to create appearance of agency relationship).

This Court has set a high threshold for acts an insurance company must undertake in order to create an apparent agency relationship. For instance, in *Almerico v. RLI Insurance Co.*, 716 So. 2d 774 (Fla. 1998), this Court was not convinced that an agency relationship had been established even though the insurance company (1) supplied the broker with an agent number (which was affixed to the insured's renewal application next to the caption "RLI Agent Number"); (2) required the broker to procure a certain minimum number of policies every year; (3) listed the broker as an agent; (4) prominently allowed its name to be placed on the application; and (5) required the insured to make premium payments directly to the insurer. *Id.* at 775, 782-83. Despite all these facts, this Court remanded the case for further fact-finding because it was still uncertain whether the insurer had "cloaked" the independent agent "with sufficient indicia of agency to induce a reasonable person to conclude that there is an actual agency relationship." *Id.* at 783; *see also, Centennial Insurance Co. v. Parnell*, 83 So. 2d 688, 690 (Fla. 1955) (finding no indicia of apparent authority present

because the insurance company never supplied "application forms, literature, letterheads, calling cards, or anything else" to the alleged agent" and the fact that the purported agent never held himself out as an agent of the insurance company).

The record in this case is devoid of evidence to support an apparent agency theory because Alfa never did anything to represent to Borden that Barnhardt was Alfa's agent. Not one of the Petitioners has explained to this Court how Alfa could have created implied authority when it had no contact with Borden, Barnhardt, Ocean, or any other Florida entity or person. Alfa App.10 at Ex.1 (affidavit of Sylvia Borden reflecting that she had no contact with Alfa); App. 10, Ex.2 at pp. 11, 12, 16, 24, 27 (deposition of Barnhardt reflecting that Barnhardt had no direct contact with Borden or Alfa). Similarly, Barnhardt testified that it had no direct contact with Borden. Alfa App.10, Ex.2 at pp.33, 39; Alfa App.6 at admissions 21, 89, 90. How could the appearance of an agency relationship arise when neither the "agent" nor the "principal" has contact with the insured?

Neither did Alfa ever take any action that would lead a reasonable person to believe that Alfa had cloaked Barnhardt with apparent authority. First, it is undisputed that Alfa supplied Barnhardt with nothing: no application forms, no literature, no letterheads, no calling cards. Similarly, there is no evidence in the

record that Barnhardt ever held itself out to be Alfa's agent.[20] The cover note and notice of rescission (upon which Petitioners so heavily rely when arguing that there was an apparent agency relationship) do not say "Barnhardt" anywhere. In fact, Sylvia's affidavit only says that, based on the information on the cover note, it was her understanding that the insurance "had been effected by East European through its Florida agents or someone having the apparent authority to act for it in Jacksonville, Florida." Alfa App.10, Ex.1 at ¶5. Sylvia cannot identify an entity that could be an agent, yet Borden asks this Court to hold that it was reasonable for him to rely on this amorphous cover note and notice of rescission as establishing the existence of an Alfa agent in Florida.

Petitioner's focus on Barnhardt's actions as a source for the creation of apparent agency are misplaced. First, as noted above, an agent cannot cloak itself with apparent authority. *See, e.g., Liberty Mutual*, 472 So. 2d at 524. Second, the fact that Barnhardt followed Florida laws governing Barnhardt's actions does not create an apparent agency relationship.[21] Likewise, the fact that Barnhardt took it

[20] In point of fact, in Barnhardt's responses to Borden's requests for admissions (Borden App.6), Barnhardt takes pains in almost all of its responses to to make it absolutely clear that Barnhardt took all actions as a separate entity and never "on behalf" of Alfa. Thus, in the pleading stage, Barnhardt dissociated itself from any agency relationship but now Barnhardt is prepared to don the "cloak" of apparent authority. Such inconsistencies poison any agency argument.

[21] In order to bolster their argument regarding the cover note, Petitioners also make a tortured reading of the Florida statutes. (As an initial note, not one of the Petitioners raised this line of argument below, thus the arguments are considered

upon itself to create its own cover note or to create a notice of rescission as a courtesy (and without authorization or knowledge from Alfa) does not create apparent agency.[22] Alfa App.10, Ex.2 at pp.16, 18 (Barnhardt's agent stating that

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waived. *McGurn*, 596 So. 2d at 1043; *Mendelson*, 712 So. 2d at 1197.) Petitioners contend that Fla. Stat. § 626.922(1) & (2) create an agency relationship. These statutes, which respectively require a surplus lines agent to deliver evidence of insurance and require an agent to receive confirmation of coverage before sending a cover note, avail Petitioners nothing. The statutes presume that there is an identified agency relationship and then place restrictions on the agent's actions. In pointing to these statutes, Petitioners improperly presuppose the existence of an agency relationship. Petitioners also cite to Fla. Stat. § 626.926 arguing that the statute creates an agency relationship. What the statute actually says is that payment to a broker constitutes payment to the insurer if there is a later dispute over coverage (Alfa does not dispute that it received the payments). The statute does *not* say that collecting a payment creates an agency relationship. This is especially true where, as here, Barnhardt was simply taking the money and forwarding it up a line. Alfa App.6 at admission 37 and 39 (Barnhardt denies collecting premiums "on behalf of East European.")

[22] Petitioners rely heavily on the argument that Barnhardt prepared a cover note and a notice of rescission and "delivered" them in Florida. First and foremost, Alfa never authorized the creation of either the cover note or the notice of rescission. The lack of authorization is demonstrated by the fact that neither the cover note nor the notice of rescission are on Alfa letterhead. Petitioners also neglect to mention that other brokers in the line also prepared cover notes. For instance, Barnhardt testified that it only issued a cover note after it received the cover note from MICI. (Alfa App.10, Ex. 2 at admission 12.) Certainly Barnhardt cannot be said to be an agent of MICI just because it forwarded the information received from MICI. For the same reason, Barhardt cannot be said to be an agent of Alfa (who is three times more removed than MICI).

Additionally, as explained above, neither the Cover Note nor the Notice of Rescission mention the name "Barnhardt" anywhere. Alfa App.10, Ex. 5 (cover note); Alfa App.10, Ex. 7 (notice of rescission). It is virtually impossible to create the appearance of an agency relationship with an unnamed agent.

it was "our" cover note, that Barnhardt never had contact with Alfa, and that Alfa would have no authority to tell Barnhardt what to do); Alfa App.6 at admission 33 and 34 (Barnhardt stating that notice of rescission was not authorized by Alfa but was "done as a courtesy by [Barnhardt] to Ocean"). The focus is on whether Alfa did something to reasonably convey to Borden that Barnhardt was Alfa's agent. The reality is that Alfa responded to a solicitation from a Turkish broker. Alfa knew the Turkish broker would pass information down a line to Victor Borden in Honduras. The fact the fifth stop along the way passed through Florida and that link obeyed Florida laws before passing the information to the sixth link does not create an agency relationship.

At the end of the day, Petitioners are forced to exceed the limits of credulity in order to argue that there was an agency relationship. In essence, Petitioners' must argue that Barnhardt, who never communicated with Alfa and who was four times removed from Alfa was nonetheless Alfa's agent. Petitioners are forced to make this argument despite the fact that Barnhardt concedes that Alfa never

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Finally, neither the cover note nor the notice of rescission were delivered in Florida. (Barnhardt Br. at 16.) Barnhardt sent the cover note to Ocean to be forwarded to "Victor K. Borden, Jr." at "Guanaja, Bay Islands of Honduras." Borden App. 10, Ex. 5 (cover note); Borden App.6 admission 17 (Barnhardt's admission that "BMI had no direct contact with Sylvia Borden as far as the issuance of the cover note. BMI forwarded a copy of the [cover note] to Ocean."); Alfa App.10, Ex. 2 at p.40 (Barnhardt stating that it forwarded the notice of rescission to Ocean for Ocean to forward to Borden in Honduras because Barnhardt could not send registered mail to Honduras.)

directed any action by Barnhardt and indeed lacked any authority to give Barnhardt directions. Alfa App.10, Ex.2 at pp. 12, 16, 18, 24, 27; Alfa App.6, admission 9, 10, 12, 14, 15.

In short, Borden cannot establish that Alfa purposely availed itself of a business opportunity in Florida through such minimum contacts that Alfa could expect to be haled into court here. The facts of this case demonstrate a clear absence of implied agency. The application for insurance was not supplied by Alfa. In fact, no application forms, literature, letterheads, calling cards, or anything else was supplied by Alfa to Barnhardt or any other link in the chain. *See Centennial Insurance*, 83 So. 2d at 690; *see also, Smith v. American Auto Ins. Co.*, 498 So. 2d 448, 450 (Fla. 3d DCA 1986) (finding no apparent agency because there were "no representations on the part of the insurance company and no written agreements concerning liability between the appellant and the alleged agent."). Petitioners do not contend that Barnhardt ever held itself out as Alfa's agent. *Smith*, 498 So. 2d at 450 (noting as part of finding of no apparent agency that the independent agent never held himself out as an agent of the insurer). It defies reason to assert that despite having no contact with Barnhardt or Borden and having no knowledge of Barnhardt's location in the chain (five brokers removed from Alfa) that Alfa was using Barnhardt as its agent or "cloaking" Barnhardt with such authority that Borden could reasonably believe that Barnhardt was Alfa's

agent. The law of agency and Due Process in general are stretched beyond the breaking point when Petitioners argue that Alfa should expect to be hailed into Florida court.[23]

[23] A Texas federal court addressed and rejected an argument similar to Petitioner's argument in *Toshiba Funding Authority, Ltd. v. Somerset Marine, Inc.*, 923 F. Supp. 982 (S.D. Texas 1996). The plaintiff (Toshiba) was a Turks and Caicos corporation and the owner of a yacht that was destroyed by a storm while moored in Greece. 923 F. Supp. at 984. The yacht was insured by Somerset, a New York corporation. *Id.* Toshiba sued Somerset in Texas state court when Somerset refused to reimburse Toshiba for repair costs (the case was later removed to federal court), alleging jurisdiction in Texas because Toshiba's lawyer, with whom Somerset's agent (Alliance) regularly corresponded, was located in Texas. *Id.* Somerset filed a motion to dismiss for lack of personal jurisdiction, arguing, among other things, that it had no contacts with Texas since its principal place of business was in New York, and it never maintained an office, employed any agents or employees, advertised or solicited business, received or tried to obtain licensing, or maintained an agent for service of process in Texas. *Id.* at 985.

Based on this information, the court determined that Somerset had not purposely availed itself of the privilege of doing business in Texas. While there was correspondence directed to Toshiba at a Texas address, the court noted that the letters indicate that Alliance was acting as Toshiba's agent to procure insurance for the yacht. *Id.* The fact that Toshiba's attorney may have been located in Texas did not establish that Toshiba itself has any presence in Texas. According to the court, "[t]he fortuitous location in Texas of Toshiba's attorney is not sufficient to put Somerset on notice that it might be haled into Texas to litigate a dispute over an insurance policy issued and delivered in New York to a foreign corporation covering property that was never located in Texas." 923 F. Supp. at 985-86. Additionally, the court noted that the policy reflects that Toshiba's address was Turks and Caicos and that there was no evidence to suggest that Somerset knew at the time it issued the policy that Toshiba had any connection with Texas. *Id.* at 986. Therefore, the court concluded that "Somerset did not purposefully direct its business activities to Texas residents and that Somerset lacks sufficient contacts with Texas to support the exercise of personal jurisdiction." *Id.*

Like the *Toshiba* case, a Russian insurance company issuing a policy of insurance to a Honduran resident covering a Honduran vessel restricted to

VIII. TO ALLOW JURISDICTION WOULD VIOLATE THE CONSTITUTIONAL PRINCIPLE OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

Even if Borden were able to establish that Alfa purposefully established minimum contacts, jurisdiction may still be improper if allowing jurisdiction would offend the notions of "fair play and substantial justice." *Burger King*, 471 U.S. at 477-78, citing *World-Wide*, 444 U.S. at 292. Factors to consider when determining whether the exercise of jurisdiction would offend "traditional notions of fair play and substantial justice" include: (1) "the burden on the defendant;" (2) "the forum state's interest in adjudicating the dispute;" (3) "the plaintiff's interest in obtaining convenient and effective relief;" (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies;" and (5) the "shared interest of the several States in furthering fundamental substantive social policies." *Burger King*, 471 U.S. at 477.

Examining the facts of this case, it is clear that forcing Alfa to submit to the jurisdiction of Florida courts would violate traditional notions of fair play and substantial justice.

Caribbean waters should not result in jurisdiction in Florida simply because the Honduran claim to have an agent (be it Sylvia or Ocean) in Florida helping to procure the insurance. As the *Toshiba* court found, this should be especially true since the policy reflected a Honduras address and there is no evidence that Alfa knew that the policy had any connection with Florida.

First, the burden on Alfa to defend this case in Florida would be tremendous. Alfa is a Russian company located in Russia. The documents and witnesses necessary to defend this case are mostly located in Russia, Turkey, and Britain. The cost of transporting documents and witnesses would be substantial. The Middle District of Florida has held that where the defendant had "no offices, employees, or documents located in this state," the due process requirement of fair play and substantial justice was not met. *Response Reward Systems, L.C. v. Meijer, Inc.*, 189 F. Supp. 2d 1332, 1339 (M.D. Fla. 2002).

Second, Florida has no interest in adjudicating this matter. The defendant is a Russian insurance company. The plaintiff is a Honduran resident. The vessels at issue sank in international waters. Simply because the plaintiff jointly owns a home with his daughter here and has a joint bank account with her here, does not make a dispute which does not affect any of the plaintiff's contacts with Florida an issue Florida courts have an interest in resolving. Neither should the fact that Borden's daughter/purported agent is located in Florida affect the determination. Just as the "in-state presence of an attorney representing a foreign client in matters not connected to the state is insufficient to give Texas an interest in resolving a dispute between Toshiba and Somerset," the in-state presence of an agent representing a foreign principal in the procurement of insurance unrelated to the

state of Florida should be insufficient to give Florida an interest in resolving the dispute. 923 F. Supp. at 985-86 (discussed in footnote 23).

Florida simply has no stake in the outcome of this case. There is nothing convenient or efficient about litigating this case here. Alfa has no contacts here and directed no actions toward this State. The proper forum for litigating this matter is in Honduras or Russia, not Florida.

CONCLUSION

For all the foregoing reasons, Alfa respectfully requests that this affirm the decision of the Second DCA quashing the service of process on Alfa (in both Borden's claim and Barnhardt's cross-claim) and directing the trial court to dismiss Borden's complaint for lack of jurisdiction.

Respectfully submitted,

Steven L. Brannock
Florida Bar No. 0319651
Paul Parrish
Florida Bar No. 0373117
Maegen E. Peek
Florida Bar No. 0549851
P.O. Box 1288
Tampa, Florida 33601-1288
(813) 227-8500
(813) 229-0134 (Fax)

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was furnished by U.S. Mail to: **Nathaniel G.W. Pieper, Esq.,** LAU, LANE, PIEPER, CONLEY & McCREADIE, P.A., 100 South Ashley Drive, Suite 1700, Tampa, FL 33602, **David W. Henry, Esq.**, ALLEN, DYER, DOPPELT, MILBRATH & GILCHRIST, P.A., 225 South Orange Avenue, Suite 1401, Orlando, FL 32802, and **John Bond Atkinson, Esquire**, Atkinson & Brownell, One Biscayne Tower, 2 South Biscayne Blvd., Suite 3750, Miami, FL 33131 on this ____ day of December, 2004. A copy has also been submitted to this Court electronically via e-mail in Microsoft Word format pursuant to Administrative Order AOSC04-84.

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Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Respondent certifies that this Answer Brief is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

_____
Attorney

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