IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. SC09-1914
Lower Tribunal No. 4D08-2482

DONALD WENDT, KENNY WENDT, and CLARKE WARNE,

Petitioners,
v.

LA COSTA BEACH RESORT CONDOMINIUM ASSOCIATION, INC.

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioners, DONALD WENDT, KENNY WENDT, and CLARKE WARNE are the Appellants/Plaintiffs below and are collectively referred to herein as the "Former Directors".

Respondent, LA COSTA BEACH RESORT CONDOMINIUM ASSOCIATION, INC., is the Appellee/Defendant below and is referred to herein as the "Association".

References to the Former Directors' Initial Brief On The Merits shall be designated as: "[IB.]" followed by the applicable page number(s).

References to the Former Directors' Appendix to the Initial Brief On The Merits will be designated as: "[A.]" followed by the applicable page number(s).

References to the Association's Appendix to the Answer Brief On The Merits will be designated as: "[AA.]" followed by the applicable page number(s).

References to the Record will be designated as: "[R.]" followed by the applicable page number(s) and paragraph number(s).

STATEMENT OF THE CASE AND OF THE FACTS

The Parties.

The Association was formed for the purpose of operating and maintaining a residential time share complex in Pompano Beach, Broward County, Florida known as La Costa Beach Club Resort ("La Costa"). [R.87-88, ¶3 and ¶14]. Petitioners are Former Directors of the Association. [R.2-3, ¶10- ¶12].

The Association's Lawsuit Against The Former Directors For Breach Of Fiduciary Duty Based On Their Intentional Misconduct.

On July 14, 2003, the Association sued the Former Directors in - *La Costa Beach Club Resort Condominium Association, Inc., Plaintiff vs. Alphonso Carioti, et. al., Defendants,* Broward County, Circuit Court Case No.: 03-12095 (03), for breach of fiduciary duty based on self-dealing transactions and misappropriation of Association property and business opportunities. [R.86-91]. As more particularly alleged in the Second Amended Complaint filed therein, the Former Directors engaged in a common and concealed scheme in which they appropriated for their own use and benefit, a substantial number of time share weeks at La Costa during the years of 1998 - 2001 by allowing such weeks to be occupied either by themselves, their friends, relatives, and/or business associates without any benefit to the Association. [R.90, ¶19]. The Second Amended Complaint further alleged that the Former Directors allowed time share units belonging to La Costa (or the right to

select units from RCI), to be sold, rented, or exchanged without any benefit and/or accounting to the Association (the "Association's Lawsuit"). [R.90, ¶19].

A trial of the Association's Lawsuit was held in February, 2007 and the jury found that the Former Directors breached their fiduciary duties to the Association and awarded damages in the principal amount of $275,000.00 as reflected in the verdict. [R.209-214]. The Former Directors subsequent motion for a new trial was granted by the trial court. [A.1].

The Association's Appeal From The Order Granting A New Trial And The Fourth District Court Of Appeals Reversal Of The Order.

The Association appealed from the order granting the Former Directors' motion for a new trial. On April 14, 2010, the Fourth District Court of Appeal reversed the order granting a new trial.[1] As a result, the jury's verdict that the Former Directors breached their fiduciary duties by engaging in the intentional misconduct described in the Association's Second Amended Complaint has been restored. The Fourth District Court of Appeal has remanded the case to the trial court with instructions for entry of a final judgment in favor of the Association and against the Former Directors in the amount of $275,000 for which they are jointly and

[1] *See*, *La Costa Beach Club Resort Condominium Association, Inc. vs. Carioti, et al*, 2010 WL 1460198 (Fla. 4th DCA April 14, 2010). [AA.1-8].

severally liable (less a set-off for $25,000 to Donald Wendt and a set-off for $16,000 to both Kenny Wendt and Clarke Warne).[2] [AA.8].

The Former Directors Lawsuit Against The Association For Indemnification.

On December 20, 2007 (after the jury's verdict against them and while the Association's appeal from the order granting a new trial was pending), the Former Directors commenced the lawsuit underlying this appeal seeking indemnification for the expenses and attorneys fees incurred in defending themselves in the Association's Lawsuit. [R.1-8]. In their complaint, the Former Directors asserted the following three (3) claims for indemnification: (i) contractual indemnity pursuant to Article XII of the Association's Bylaws [R.4, ¶19]; (ii) statutory indemnity pursuant to Fla. Stat. §607.0850(3) [R.6, ¶27]; and (iii) statutory indemnity pursuant to Fla. Stat. §607.0850(9)(c) [R.7, ¶33] (the "Indemnification Complaint").

The Trial Court's Dismissal Of The Indemnification Complaint.

On February 27, 2008, the Association served a motion to dismiss the Indemnification Complaint with prejudice. [R.139–153]. On May 13, 2008, the

[2] On April 29, 2010, the Former Directors filed a Motion For Rehearing, a Motion For Rehearing *En Banc* and a Motion For Certification. On June 3, 2010, the Association filed its responses to all such motions which, as of the today's date, have not yet been ruled upon by the Fourth District Court of Appeal.

Former Directors filed their memorandum in opposition. [R.154-170].[3] On May 21, 2008, the trial court entered an order dismissing the Indemnification Complaint with prejudice (the "Dismissal Order"). [R.265-266]. The trial court determined that the Former Directors failed to state the above referenced causes of action for indemnification. The trial court further determined that the indemnity claims were compulsory in nature and that the Former Directors waived them by failing to assert them in the Counterclaim they had filed in the Association's Lawsuit.

The Fourth District Court Of Appeals Affirms The Dismissal Order And Certifies "Conflict" Between Its Decision And *Turkey Creek*.

On June 17, 2008, the Former Directors filed a notice of appeal from the Dismissal Order. [R.275-277]. On June 17, 2009, the Fourth District Court of Appeal affirmed the Dismissal Order determining that the Former Directors failed to state (and could not state), the causes of action set forth in the Indemnification Complaint. [A.1-5].[4] The Fourth District Court of Appeal chose not to address the trial court's separate determination that the indemnity claims were compulsory and

[3] There was no request in the memorandum for leave to amend the Indemnification Complaint should the trial court deem dismissal appropriate. Nor did the Former Directors ever serve a motion to amend and/or an amended complaint at any time.

[4] References to the Fourth District Court of Appeal's decision in *Wendt v. La Costa Beach Resort Condominium Association, Inc.*, 14 So.3d 1179 (Fla. 4th DCA 2009) shall be referred to herein as the "*Wendt*" decision followed by the page number(s) from the decision.

were waived as a result of the Former Directors failure to raise them in the Counterclaim they filed in the Association's Lawsuit. [A.5].

The Fourth District Court of Appeal also certified what it perceived to be a conflict between its decision and the First District Court of Appeal's earlier decision in *Turkey Creek Master Owners Association, Inc. v. Hope*, 766 So.2d 1245 (Fla. 1st DCA 2000) ("*Turkey Creek*"). [A.4].

The Former Directors' Petition For Discretionary Review By This Court.

On September 28, 2009, the Former Directors served a notice of invoking the discretionary jurisdiction of this Court based on the Fourth District Court of Appeal's above mentioned conflict certification. On February 5, 2010, this Court entered an order accepting jurisdiction. On April 1, 2010, the Former Directors filed their Initial Brief On The Merits. On June 4, 2010, the Former Directors filed this Answer Brief On The Merits.

SUMMARY OF THE ARGUMENT

The *Wendt* and *Turkey Creek* decisions are not in conflict since the appellate courts addressed separate and distinct issues and the holdings of the two decisions are based on such different issues. Although jurisdiction was initially accepted, this Court should now dismiss the petition for discretionary review since there is no conflict. If the petition is not dismissed, then regardless of how this Court addresses the alleged conflict, the *Wendt* decision and Dismissal Order must still

be affirmed since the Former Directors cannot state the causes of action set forth in the Indemnification Complaint based on the particular facts of this case. The jury's verdict that the Former Directors breached their fiduciary duties to the Association by engaging in the intentional misconduct described in the Second Amended Complaint has now been restored.

The Former Directors fail to cite a single decision from any Florida court allowing officers/directors to pursue (much less obtain), indemnification from a corporation/association that has prevailed against such officers/directors in an action against them for breach of their fiduciary duties. The Association is not aware of a single decision allowing any type of indemnification under such circumstances. Setting such a precedent in this case would violate Florida law and well settled public policy precluding indemnification of tortfeasors for their own intentional misconduct.

The *Wendt* decision and Dismissal Order must also be affirmed since the Former Directors cannot state a cause of action in Count I for indemnification pursuant to Article XII of the Association's Bylaws. The plain language of Article XII precludes indemnification since the Former Directors committed an intentional tort against the Association (breach of fiduciary duty). Article XII indemnification is also unavailable since it does not apply in lawsuits by the Association against its own officers/directors but, rather, applies to lawsuits by *third parties* against such

officers/directors. Article XII indemnification is also unavailable since the language in this bylaw provision does not express in clear and unequivocal terms an intention to indemnify the Former Directors for their own wrongful conduct.

The *Wendt* decision and Dismissal Order must also be affirmed since the Former Directors cannot state a cause of action in Count II for indemnification pursuant to Fla. Stat. §607.0850(3). While indemnification under this provision is mandatory, it requires the Former Directors to have prevailed on the merits of the Association's Lawsuit against them for breach of fiduciary duty. Yet, the Former Directors have not prevailed since the jury's determination that they breached their fiduciary duties to the Association (by engaging in the intentional misconduct described in the Association's Second Amended Complaint) has now been restored. [AA.1-8].

The *Wendt* decision and Dismissal Order must also be affirmed since the Former Directors cannot state a cause of action in Count III for indemnification pursuant to Fla. Stat. §607.0850(9)(c). The Former Directors fail to cite a single decision from any Florida court where an officer/director has been permitted to pursue (much less obtain), indemnification under this provision where they are seeking it from a party that has sued them for breach of fiduciary duty and where a jury has determined that such intentional misconduct has been committed by such officer/director (as here). The Association is not aware of any such decisions and

setting a precedent allowing such indemnification pursuant to §607.0850(9)(c) under these circumstances would be contrary to Florida law, public policy and common sense.

The *Wendt* decision and Dismissal Order must also be affirmed since the Former Directors waived their right to pursue the claims in the Indemnification Complaint. The indemnity claims were compulsory in nature and were mature/ripe for adjudication in the Association's Lawsuit. Yet, the Former Directors failed to raise them in the Counterclaim they filed in the Association's Lawsuit despite having three and a half years to do so prior to the trial in February, 2007.

ARGUMENT

I. THE *WENDT* DECISION AND DISMISSAL ORDER MUST BE AFFIRMED REGARDLESS OF HOW THIS COURT RESOLVES THE ALLEGED "CONFLICT" BETWEEN *WENDT* AND *TURKEY CREEK* SINCE THE FORMER DIRECTORS CANNOT STATE THE CAUSES OF ACTION SET FORTH IN THE INDEMNIFICATION COMPLAINT UNDER THE FACTS OF THIS CASE.

In light of the Fourth District Court of Appeal's April 14, 2010 decision in *La Costa Beach Club Resort Condominium Association, Inc. supra*, [AA.1-8] which restores the jury's verdict against the Former Directors for breach of fiduciary duty, the Former Directors cannot state a cause of action for any of the claims set forth in the Indemnification Complaint. This holds true regardless of

how this Court addresses the alleged "conflict" between *Wendt* and *Turkey Creek*. Accordingly, the *Wendt* decision and Dismissal Order must be affirmed.

A. The Petition For Discretionary Review Must Be Dismissed Since There Is No Conflict Between *Wendt* And *Turkey Creek*.

Article V, §3(b)(3) of the Florida Constitution only permits discretionary review by this Court where a decision from one district court of appeal: "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." The constitutional standard is: "whether the decision of the District Court on its face collides with a prior decision of this Court or another District Court **on the same point of law** so as to create an inconsistency or conflict among the precedents". *See, Kincaid v. World Insurance Company*, 157 So.2d 517 (Fla. 1963). "[C]onflict must be such that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter... If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise…". *See*, *Kyle v. Kyle*, 139 So.2d 885, 887 (Fla. 1962). This Court lacks discretionary jurisdiction since the issues on appeal

and questions of law decided in *Wendt* and *Turkey Creek* are not the same. Moreover, the decisions are also factually distinguishable from one another. [5]

In *Wendt*, the issue on appeal focused on whether the trial court erred in granting the Association's motion to dismiss the Former Directors' complaint for failing to state the causes of action set forth in the Indemnification Complaint. [A.2]. The Fourth District held that the dismissal was proper because the Former Directors could not *"state an action for indemnification under the circumstances of this case."* [A.3].

In contrast, the issue on appeal in *Turkey Creek* had nothing to do with a motion to dismiss and/or whether the complaint by the former directors of the Turkey Creek Association stated a cause of action for contractual and/or statutory indemnification pursuant to Fla. Stat. §607.0850. Rather, the issue focused on whether the trial court erred in awarding indemnification to the former directors pursuant to Fla. Stat. §607.0850(9)(c) based solely on the language of that provision and the parties' pleadings. The First District Court of Appeal held as follows:

> *"…[W]e hold that* there was an insufficient basis for the trial court to conclude that the defendants were fairly and reasonably entitled to the payment of their expenses by Turkey Creek under the statute. The

[5] In *Turkey Creek*, the former directors were not found to have breached their fiduciary duties (as here) and notably, the award in their favor was reversed. There are no subsequent reported decisions reflecting whether the former directors in *Turkey Creek* ever obtained indemnification.

> parties agreed at oral argument that the trial court granted the defendants' motion *based solely on the pleadings and statute…"* [Emphasis Supplied]. 766 So.2d at 1246.[6]

The issue on appeal and point of law decided in *Wendt* clearly is not the same as the issue on appeal and point of law decided in *Turkey Creek*. The holding in *Wendt* does not "collide" with the holding in *Turkey Creek* since they address entirely different issues. *Kincaid, supra*.

Additionally, Article V, §3(b)(3) and §3(b)(4) of the Florida Constitution both require the existence of direct conflict between "decisions" from different appellate district courts:

> (b) Jurisdiction.—The supreme court:
>
> (3) May review ***any decision*** of a district court of appeal…that expressly and directly conflicts with ***a decision*** of another district court of appeal or of the supreme court on the same question of law.
>
> (4) May review ***any decision*** of a district court of appeal…that is certified by it to be in direct conflict with ***a decision*** of another district court of appeal. [Emphasis Supplied].

"It is conflict of Decisions, not conflict of Opinions or reasons that supplies jurisdiction for review…". *See, Gibson v. Maloney*, 231 So.2d 823, 824

[6] The Former Directors incorrectly state that the First District's holding was as follows: "Section 607.0850(9), Florida Statutes (1993) provides that the trial court may order a corporate plaintiff to indemnify the defendant for fees and expenses in an action by the corporation against one or more of its directors or employees." [IB, p.15]. **That is <u>not</u> the First District's holding in *Turkey Creek*. The holding is as set forth above and is directly quoted from the decision itself.**

(Fla.1970). "We have to look at the decision, **rather than a conflict in the opinion**, to find that we have jurisdiction". *See, Niemann v. Niemann*, 312 So.2d 733, 734-735 (Fla. 1975). This Court has discharged jurisdiction where district court decisions are merely in conflict with dictum from appellate court decisions from other districts. *See, Ciongoli v. State of Florida*, 337 So.2d 780 (Fla.1976) and *South Florida Hospital Corporation v. McCrea*, 118 So.2d 25 (Fla. 1960).[7]

The *Turkey Creek* decision clearly holds that a trial court cannot award indemnification pursuant to Fla. Stat. §607.0850(9)(c) based solely on the language of this statutory provision coupled with the allegations in the parties' pleadings. 766 So.2d at 1246. The language in the last paragraph of *Turkey Creek* which follows the holding (and upon which the *Wendt* court certified conflict), **is merely non binding obiter dictum commentary**:

> "*We note that* section 607.0850 is more likely to be applied when corporate employee or director is sued by a third party in relation to the actions of the employee or director as a corporate agent. In such a case, the corporate employer may be required to indemnify the agent for the expenses of his or her defense. However, the statute also provides for indemnification in a case such as this one where a corporation has sued its own agent. In this situation, the corporation faces the possibility of being

[7] *Compare, Baez v. State of Florida*, 814 So.2d 1149, 1152 (Fla. 4th DCA 2002) ("under Article V, Section 3(b)(4) our supreme court has discretionary jurisdiction to review any 'decision' of a district court of appeal that is certified to be in direct conflict with a decision of a different district court of appeal. *We do not consider a conflict by virtue of dicta to present conflicting 'decisions'*…"). [Emphasis Supplied].

> required to pay the legal fees and expenses of the very party it is suing, and it is therefore especially important to determine whether the circumstances justify a finding that the agent is reasonably entitled to indemnification for attorney's fees." [Emphasis Supplied]. *Id*. at 1247.

Such non-binding *obiter dictum* commentary from *Turkey Creek* does not serve as a basis for conflict jurisdiction since there is no conflict between the decisions (the holdings) of *Turkey Creek* and *Wendt*.[8] Based on all of the foregoing, this Court should dismiss the petition for discretionary review. However, if this Court declines to do so, regardless of how it resolves the alleged conflict, the *Wendt* decision and Dismissal Order must still be affirmed since the Former Directors cannot state the causes of action set forth in the Indemnification Complaint based on the particular facts of this case.

[8] As discussed by Anstead, Kogan, Hall & Waters in *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova Law Rev. 431, 530, fn. 594-595, the fact that a district court certifies conflict is not sufficient, in and of itself, to require this Court to exercise jurisdiction under Article V, §3(b). This Court has dismissed numerous petitions for discretionary review upon determining that conflict jurisdiction was improvidently granted when, upon a closer examination, no conflict in the decisions actually existed. *See, Vega v. Independent Fire Insurance Company*, 666 So.2d 897 (Fla. 1996); *Blevins v. State of Florida*, 829 So.2d 872 (Fla. 2002); *Famiglietti v. State of Florida*, 838 So.2d 528 (Fla. 2003).

B. Florida Law And Public Policy Preclude Indemnifying The Former Directors For Their Own Intentional Misconduct (Breach Of Fiduciary Duty) Against The Association.

Florida law and public policy preclude insuring/indemnifying tortfeasors for their own intentional misconduct. This Court has stated that: "[i]t is axiomatic in the insurance industry that one should not be able to insure against one's own intentional misconduct." *See, Ranger Insurance Company v. Bal Harbour Club, Inc*., 549 So.2d 1005, 1007 (Fla.1989) ("…we hold that the public policy of Florida prohibits an insured from being indemnified for a loss resulting from an intentional act of religious discrimination). In *Ranger*, this Court cogently explained why such a public policy exists:

> "The rationale underlying this rule is that the availability of insurance [indemnification] will directly stimulate the intentional wrongdoer to violate the law." *Id*.

Also See, U.S. Concrete Pipe Company v. Bould, 437 So.2d 1061, 1064 (Fla. 1983) ("Florida public policy prohibits liability insurance coverage for punitive damages assessed against a person because of his own wrongful conduct"); *Griffin Brothers Co., Inc. v. Mohammed*, 918 So.2d 425, 430 (Fla. 4th DCA 2006) ("…Florida courts have long held that the public policy of this state prohibits an insured from being indemnified from a loss resulting from its own true intentional acts); *Prison Health Services, Inc. v. Florida Association of Counties Trust*, 858 So.2d 1119 (Fla. 2d DCA 2003) (acknowledging that it is "…generally contrary to public

policy to attempt by contract to avoid responsibility for one's intentional acts, whether by insurance or by indemnification agreement…"); *Mason v. Florida Sheriffs' Self-Insurance Fund*, 699 So.2d 268, 270 (Fla. 5th DCA 1997) ("The general rule is that one may not insure against one's own intentional misconduct because the availability of insurance will directly stimulate the intentional wrongdoer to violate the law"); *Leatherby Insurance Company v. Willoghby*, 315 So.2d 553, 554 (Fla. 2d DCA 1975) (acknowledging that "one ought not be permitted to indemnify himself against his intentional wrongs"); *Penzer v. Transportation Insurance Company*, 545 F.3d 1303, 1310 (11th Cir. 2008) (acknowledging Florida's public policy precluding insuring against one's own intentional misconduct); *Tew v. Chase Manhattan Bank, N.A.*, 728 F.Supp. 1551, 1563 (S.D. Fla. 1990) ("Here, to the extent that the contract clause indemnifying Chase was so broad as to include intentional torts and criminal acts, it is invalid. Public policy precludes enforcement of any agreement whereby one party agrees to indemnity for costs and attorneys' fees arising out of the commission of an intentional tort such as fraud against a third party").

Breaches of fiduciary duty are intentional torts. *See, La Costa Beach Club Resort Condominium Association, Inc. supra*, 2010 WL 1460198 at *7; *Halkey-Roberts Corp. v. Mackal*, 641 So.2d 445, 447 (Fla. 2d DCA 1994); *Allerton v. State Department of Insurance*, 635 So.2d 36, 39 (Fla. 1st DCA 1994) ("Here,

Allerton is not alleged to have committed acts of 'untargeted negligence,' but rather to have committed **the intentional torts of** fraud, conspiracy to defraud, **breach of fiduciary duty**…"); *Davis v. Monahan*, 832 So.2d 708, 711 (Fla. 2002) (citing to *Halkey-Roberts Corp., supra*, and holding that the delayed discovery rule did not operate to delay the accrual of a cause of action **for the intentional tort of breach of fiduciary duty** because such a cause of action is not specified in Fla. Stat. §95.11).

In *La Costa Beach Club Resort Condominium Association, Inc. supra,* the Fourth District Court of Appeal noted that the Former Directors breaches of their fiduciary duties to the Association **involved intentional misconduct**:

> "Breaches of fiduciary duty are intentional torts *and that is precisely the nature of the allegations against the three defendants in this case* [the Former Directors]."[9] [AA.7]. [Emphasis Supplied].

[9] The Association's Second Amended Complaint describes the Former Directors' intentional misconduct as follows:

> The foregoing notwithstanding, during the period of 1998 through 2001, the defendants, identified in paragraph eighteen (18), and each of them, *engaged and participated in a common scheme or design through which they appropriated for their own use and benefit weeks, and the opportunity to profit from those weeks, all of which belonged to the plaintiff. Among other things, those defendants allowed weeks to be occupied for themselves, their friends, business associates and relatives without benefit to the plaintiff. The defendants further allowed units belonging to La Costa, or the right to select a unit from RCI to be sold, rented, or exchanged without benefit to the plaintiff and with no accounting to La Costa. The defendants, throughout, sought to, and did, conceal their actions from the plaintiff, its accountants, or its attorneys.* [R.90, ¶19]. [Emphasis Supplied]

Based on the foregoing, the *Wendt* decision and Dismissal Order must be affirmed. The Former Directors cannot state any of the claims set forth in the Indemnification Complaint in light of the Fourth District Court of Appeals recent decision in *La Costa Beach Club Resort Condominium Association, Inc*., which restored the jury's determination that they breached their fiduciary duties to the Association by engaging in the intentional misconduct described in paragraph nineteen (19) of the Second Amended Complaint.

Allowing the Former Directors to pursue any type of indemnity claim under these circumstances would undermine well settled Florida law and public policy precluding indemnification of tortfeasors for their own intentional wrongdoing. Setting such a precedent would also undermine this Court's rationale in *Ranger* in that it would not deter and, if anything, it would encourage officers/directors to engage in intentional misconduct towards their corporation/association knowing that they will be indemnified for their own wrongdoing.

C. The Former Directors Cannot State A Cause Of Action For Indemnification Pursuant To Article XII Of The Association's Bylaws.

The *Wendt* decision and Dismissal Order must be affirmed since the Former Directors cannot state a cause of action for indemnification pursuant to Article XII of the Association's Bylaws.

1. The Plain Language Of Article XII Precludes Indemnification Since The Former Directors Committed An Intentional Tort (Breach Of Fiduciary Duty) Against The Association.

Article XII of the Association's Bylaws states the following:

> The Association shall indemnify every Director and every Officer, his heirs, and personal representatives against all loss, cost and expense reasonably incurred by him in connection with any action, suit or proceeding to which he may be made a party by reason of his being or having been a Director or Officer of the Association, *except to matters wherein he shall be finally adjudged in such action, suit or proceeding, to be liable for or guilty of gross negligence or willful misconduct.* The foregoing rights shall be in addition to and not exclusive of all other rights to which such Director or Officer may be entitled. [Emphasis Supplied]. [R.4, ¶19], [R.76].

Whatever argument the Former Directors believe they may have had to pursue contractual indemnification pursuant to Article XII is now entirely moot in light of the Fourth District Court of Appeal's April 14, 2010 decision in *La Costa Beach Club Resort Condominium Association, Inc. supra,* reversing the order granting a new trial to the Former Directors on the breach of fiduciary duty claim. [AA.1-8]. As the Fourth District Court of Appeals states in its decision:

> *"Breaches of fiduciary duty are intentional torts and that is precisely the nature of the allegations against the three defendants* [the Former Directors]." [Emphasis Supplied]. [AA. p.7].

In light of the foregoing, the plain language from Article XII precludes the Former Directors from pursuing (much less obtaining), such contractual indemnification since there is a determination that they engaged in intentional misconduct.

2. Article XII Does Not Apply To Lawsuits By The Association Against Its Own Officers And Directors But, Rather, Applies Only To Lawsuits *By Third Parties* Against Such Officers And Directors.

Both this Court and other appellate courts have held that indemnification provisions such as Article XII of the Association's Bylaws only apply to claims brought against the indemnitee [i.e. - the Former Directors] *by a third party* and do not apply to suits by the indemnitor [i.e. – the Association] against the indemnitee. *See, Penthouse North Association, Inc. v. Lombardi*, 461 So.2d 1350 (Fla.1984); *Century Village, Inc. v. Chatham Condominium Associations*, 387 So.2d 523 (Fla. 4th DCA 1980); *Old Port Cove Property Owners Association, Inc. v. Ecclestone*, 500 So.2d 331 (Fla. 4th DCA 1986).

In *Century Village*, the lessees (condominium associations) under a condominium recreational lease sued the lessor in federal court alleging violations of federal antitrust laws in connection with the lease. 387 So.2d at 523. After the suit was dismissed, the lessor sued the lessees in state court seeking indemnification for the costs and fees incurred in defending itself against the

lessees' federal antitrust claims. The lessor's claim was based on an indemnification provision in the lease holding the lessor harmless from liability against "*any and all claims*" made against the lessor arising out of the lease contract and awarding any sums owed and attorney's fees to the lessor should it have to defend any such action.[10] The trial court dismissed the lessor's indemnity claim with prejudice. *Id*.

The Fourth District Court of Appeal affirmed and in doing so, held that it was "*quite obvious*" that the indemnification provision in the lease was not intended to apply to actions *between the parties* to the indemnity provision but, rather, applied to actions brought against the lessor *by third parties:*

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[10] The indemnity provision in *Century Village* states:

> Lessee covenants and agrees with Lessor that during the entire term of this Lease, the Lessee will indemnify and save harmless the Lessor *against any and all claims, debts, demands, or obligations which may be made against Lessor*, or against Lessor's title of the premises, arising by reason of or in connection with the making of this Lease and the ownership by Lessee of the interest created in the Lessee hereby, and if it becomes necessary for the Lessor to defend *any action* seeking to impose such liability, the Lessee will pay the Lessor all costs of Court and attorney's fees incurred by the Lessor in effecting such defense, in addition to any other sums which the Lessor may be called upon to pay by reason of the entry of a judgment against the Lessor in the litigation in which such claim is asserted. [Emphasis Supplied]

> "It is quite obvious that the indemnification clause was not intended to apply to actions *between the lessor and lessees, but rather to claims of third parties against the lessor*. *Accepting the lessor's contention would amount to accepting the incongruous theory that although the appellees* [lessees] *may be successful in their litigation, they would nevertheless have to satisfy their own judgment in addition to paying the lessor's costs*. The law will not sanction such an anomaly." [Emphasis Supplied] *Id*. at 524.

This Court discussed *Century Village* with approval in *Penthouse North Association, supra.* In that case, a not for profit condominium association sued its own officers and directors for breach of their fiduciary duties (as here), relating to a recreational lease in which the officers/directors were the lessors and the association was the lessee. 461 So.2d at 1351. The trial court dismissed the claim as time barred. The officers and directors thereafter filed a motion seeking to recover their costs and attorneys fees in successfully defending against the breach of fiduciary duty claim pursuant to the following indemnification provision in the association's Articles of Incorporation:

> Every director and every officer of the Association shall be indemnified by the Association against all expenses and liabilities, including counsel fees, reasonably incurred by or imposed upon him *in connection with any proceeding to which he may be a party, or in which he may become involved, by reason of his being or having been a director or officer of the Association,* or any settlement thereof, whether or not he is a director or officer at the time such expenses are incurred, except in such cases wherein the director or officer is adjudged guilty of willful misfeasance or malfeasance in the performance of his duties; provided that in the event of a settlement the indemnification herein shall apply only when the board of directors approves such settlement and reimbursement as being for the best interests of the Association. The foregoing right of

> indemnification shall be in addition to and not exclusive of all other rights to which such director or officer may be entitled. [Emphasis Supplied] 436 So.2d at 186.

The trial court denied the officers and directors motion finding that the above quoted indemnity provision only applied to actions brought against such officers/directors *by third parties* and not to actions *between the association and its own officers/directors*. 461 So.2d at 1352. The Fourth District Court of Appeal reversed and held that the officers/directors were entitled to indemnification. 436 So.2d at 186-187. The Fourth District Court of Appeal noted that neither of the parties mentioned Fla. Stat. §607.014[11] in any of their briefs and determined that the above quoted indemnity provision applied to the action by the association against its own directors in light of this statutory provision:

> "Whether we apply section 607.014(2) or (6), the association in this case expressly undertook in Article IV to indemnify the officers and directors in circumstances such as the present; namely, the successful defense of an action brought by the association." *Id*. at 187.

This Court granted certiorari and held that: "the trial court properly struck the lessors' [directors] motion for attorney's fees." 461 So.2d at 1353. In determining that the directors were <u>not</u> entitled to indemnification under the above quoted provision from the Articles of Incorporation, this Court specifically stated: "The

[11] Renumbered as Fla. Stat. §607.0850.

fact that this is an action for breach of fiduciary duty and unjust enrichment further convinces us that the lessors' indemnification argument must fail." *Id.* at 1352-1353. This Court specifically adopted the reasoning by the Fourth District Court of Appeal in *Century Village, supra*:

> "We agree with the following answer from *Century Village* to a similar contention by a lessor:
>
> *Accepting the lessor's contention would amount to accepting the incongruous theory that although the appellees* [condominium associations] *may be successful in their litigation, they would nevertheless have to satisfy their own judgment in addition to paying the lessor's costs. The law will not sanction such an anomaly.*
>
> We find no applicable statutory or contractual basis for an award of attorney's fees to the lessors. The trial court properly struck the lessors' motion for attorney's fees." [Emphasis Supplied]. *Id.*

In *Old Port Cove Property Owners Association, Inc., supra,* a developer successfully defended against a property owner association's breach of fiduciary duty claim against him. 500 So.2d at 336. While the trial court entered an order awarding indemnification to the developer under a contractual provision in the association's Articles of Incorporation, the Fourth District Court of Appeal reversed the award adopting the reasoning from its earlier decision in *Century Village, supra,* and of this Court in *Penthouse North Association, supra*. *Id.*

The language in Article XII of the Association's Bylaws is very similar to the language of the indemnity provisions in the above discussed cases especially

the Articles of Incorporation in *Penthouse North Association, supra*. However, indemnification under such a contractual provision is only available where the officer/director is sued *by a third party* as opposed to by the association itself and where the officer/director has not engaged in intentional wrongdoing (as here).

As this Court reasoned long ago in *Penthouse North Association, supra*, accepting the Former Directors contention that they can pursue and recover such contractual indemnity in an action against them for breach of fiduciary duty would amount to accepting the incongruous theory that although the Association has now succeeded in establishing that the Former Directors in fact breached their fiduciary duties (by engaging in intentional misconduct), the Association must, nevertheless, still indemnify them. This Court was quite clear in *Penthouse North Association, supra*, that: "*the law will not sanction such an anomaly*". 461 So.2d at 1352. Accordingly, the *Wendt* decision and Dismissal Order must be affirmed since the Former Directors cannot state a claim for indemnification pursuant to Article XII of the Association's Bylaws.

Notably, the Former Directors fail to cite a single case where an officer/director was sued for breach of fiduciary duty by the corporation/association they serve and where, *despite having been found to have breached such duty*, they were permitted to pursue (and obtain) indemnification pursuant to a contractual provision similar to the language set forth in Article XII

of the Association's Bylaws. Instead, the Former Directors cite several cases *from other jurisdictions* where contractual indemnification was permitted in actions by corporations against their own officers/directors. [IB. pp.19-21].[12] None of these cases have any relevance since Florida law is controlling and there is precedent on the issue as set forth by this Court in *Penthouse North Association, supra*, as well as in *Century Village* and *Old Port Cove Property Owners Association, Inc., supra.*

Moreover, the cases relied upon by the Former Directors all involve requests by the officer/director for advancement of indemnity *prior to any type of adjudication of wrongdoing by the officer/director* and they all involve *unqualified* mandatory indemnification provisions containing no exceptions precluding indemnity where the officer/director has been found to have engaged in gross negligence or willful misconduct. Accordingly, all of these cases are factually distinguishable since a jury has already determined that the Former Directors beached their fiduciary duties to the Association and Article XII precludes indemnification under such circumstances.[13]

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[12] *See, Radiancy, Inc. v. Azar*, 2006 WL 224059 (Del.Ch.2006); *Reddy v. Electronic Data Systems Corporation*, 2002 WL 1358761 (Del.Ch.2002); *Ridder v. CityFed Financial Corporation*, 47 F.3d 85 (3d Cir. 1995); *Westar Energy, Inc. v. Lake*, 493 F.Supp.2d 291 (S.D.NY.2006); *Pearson v. Exide Corp.*, 157 F.Supp.2d 429 (E.D.Pa.2001).

[13] The Former Directors also cite *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025 (9th Cir. 1992). [IB. p.19]. However, *Atari* is inapposite since it does not involve Florida law. Moreover, as the Former Directors point out, while the officers in the

3. Article XII Does Not Express In Clear And Unequivocal Terms An Intention To Indemnify The Former Directors For Their Own Wrongful Conduct.

"Where an indemnity provision is included as an incident to a contract, the main purpose of which is not indemnification, the indemnity provision must be construed strictly in favor of the indemnitor." *See, U.S.B. Acquisition Company, Inc. v. United States of America*, 560 So.2d 1075, 1079 (Fla. 4th DCA 1995). Similarly, "contracts providing indemnification for one's own negligence are disfavored in Florida and are strictly construed. Such contracts will be enforced only if they express an intent to indemnify in clear and unequivocal terms against the indemnitee's own wrongful acts." *See, United Parcel Service of America, Inc. v. Enforcement Security Corporation*, 525 So.2d 424, 425 (Fla. 1st DCA 1987) [quoting from *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equip. Co.*, 374 So.2d 487, 489 (Fla. 1979)]; *H & H Painting & Waterproofing Co. v. Mechanic Masters, Inc*., 923 So.2d 1227, 1228 (Fla. 4th DCA 2006) (same).

"Unless an indemnity agreement clearly and unequivocally provides for indemnification for the indemnitee's own negligence, that obligation will not be

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Atari case were granted indemnification, they were: "*found to be not liable"*. [IB, p.19]. That is fundamentally different from the facts of this case in light of the jury's determination and the recent decision by the Fourth District Court of Appeal reversing the order granting a new trial. [AA.1-8].

inferred." *See, O'Connell v. Walt Disney World Company*, 413 So.2d 444, 447 (Fla. 5th DCA 1982). "[C]ontracts purporting to indemnify a party against its own negligence will only be enforced if they clearly express such an intent, [citations omitted], and a general provision indemnifying the indemnitee '*against any and all claims,*' standing alone, is not sufficient." *See, Camp, Dresser & McKee, Inc. v. Paul H. Howard Company*, 853 So.2d 1072, 1077 (Fla. 5th DCA 2003), review denied, 884 So.2d 23 (Fla.2004).

The dismissal of the Article XII indemnity claim must be affirmed since Article XII clearly does <u>not</u> express an intention in "clear and unequivocal terms" to indemnify the Former Directors for their own wrongdoing against the Association (much less for intentional misconduct). Quite to the contrary, the language in Article XII makes clear that the Former Directors cannot be indemnified for their own wrongful misconduct: "…*except to matters wherein he shall be finally adjudged in such action, suit or proceeding, to be liable for or guilty of gross negligence or willful misconduct...*". [R.4, ¶19], [R.76]. Accordingly, the *Wendt* decision and Dismissal Order must be affirmed as relating to the dismissal of the Former Directors' indemnity claim pursuant to Article XII of the Association's Bylaws.

D. The Former Directors Cannot State A Cause Of Action For Indemnification Pursuant To Fla. Stat. §607.0850(3)

The Former Directors also sought indemnification pursuant to Fla. Stat. §607.0850(3). [R.5-7, ¶27-¶32]. However, such indemnification is only permissible if the director/officer has been successful in defending against the claim brought against them on the merits:

> To the extent that a director, officer, employee, or agent of a corporation *has been successful on the merits or otherwise in defense of any proceeding referred to in subsection (1) or subsection (2), or in defense of any claim, issue, or matter therein,* he or she shall be indemnified against expenses actually and reasonably incurred by him or her in connection therewith. [Emphasis Supplied]

The Former Directors fail to cite a single case where an officer/director was permitted to pursue (much less obtain), such indemnity where it has been determined that they breached their fiduciary duty to the corporation/association which they serve and from whom they are seeking such indemnification. The Association is unaware of the existence of any such decision and this Court obviously should not set such a precedent since it would contradict the plain language of §607.0850(3) and such a precedent would also be against Florida law and public policy precluding tortfeasors from being indemnified for their own intentional wrongdoing.

The Former Directors cite *Winner v. Cataldo*, 559 So.2d 696 (Fla. 3d DCA 1990). [IB, p.11]. However, *Winner* is distinguishable since Cataldo did not obtain an indemnity award pursuant to Fla. Stat. §607.014(3).[14] Rather, the Third District Court of Appeal merely noted, in dicta, that the corporation was obligated to indemnify Cataldo pursuant to this statutory provision <u>because he prevailed in the action brought against him by the corporation</u>:

> "Additionally, whether the claim was frivolous or not, *once Cataldo won*, the corporation was obliged to indemnify him under §607.014(3)." [Emphasis Supplied] *Id.* at 697.

The Former Directors also rely on *O'Brien v. Precision Response Corp.*, 942 So.2d 1030 (Fla. 4th DCA 2006). [IB, p.16]. However, *O'Brien* is factually distinguishable since the officer (O'Brien), obtained indemnity pursuant to Fla. Stat. §607.0850(3) <u>because he prevailed on the merits of the claims brought against him</u> in the course of the arbitration proceedings:

> "Because the Arbitration panel indisputably held that the claims of PRC against O'Brien had failed, *O'Brien was successful on the merits "or otherwise" as to all legal theories asserted against him by PRC*." [Emphasis Supplied] *Id.* at 1033.

Based on the foregoing, the *Wendt* decision and Dismissal Order as relating to the dismissal of the indemnification claim pursuant to Fla. Stat. §607.0850(3) must be affirmed.

[14] Renumbered as Fla. Stat. §607.0850(3).

E. The Former Directors Cannot State A Cause Of Action For Indemnification Pursuant To Fla. Stat. §607.0850(9)(c).

The Former Directors also sought indemnification pursuant to Fla. Stat. §607.0850(9)(c). [R.7-8, ¶33-¶37]. This provision states the following:

> The director, officer, employee, or agent is fairly and reasonably entitled to indemnification or advancement of expenses, or both, *in view of all the relevant circumstances*, regardless of whether such person met the standard of conduct set forth in subsection (1), subsection (2), or subsection (7). [Emphasis Supplied]

The Former Directors fail to cite a single decision from any Florida court where an officer/director has been permitted to pursue (much less obtain), such indemnification where they are seeking it from the party that has sued them for breach of fiduciary duty and where such intentional misconduct has been determined to have been committed by a jury (as here). The Association is not aware of any such decision and setting such a precedent under these circumstances would be contrary to Florida law, public policy, and common sense.

The Former Directors cite *Myakka Valley Ranches Improvement Association, Inc. v. Bieschke*, 610 So.2d 3 (Fla. 2d DCA 1992) in support of their claim for indemnity pursuant to Fla. Stat. §607.0850(9)(c). [IB, p.14]. However, *Myakka* is factually distinguishable since the former directors who were seeking indemnity pursuant to Fla. Stat. §607.014(9)(c),[15] prevailed in their action against

[15] Renumbered as Fla. Stat. §607.0850(9)(c).

the association to allow them to review the corporate books and records. *Id.* In contrast, in the case *sub judice*, the Former Directors seek indemnity pursuant to §607.0850(9)(c) yet they have lost the lawsuit brought against them by the Association for breach of fiduciary duty.

The Former Directors also cite *Turkey Creek, supra*, in support of their indemnity claim pursuant to Fla. Stat. §607.0850(9)(c). [IB, pp.14-15]. However, in that case, the Second District Court of Appeal reversed an award of indemnification to the former developer and directors of the Turkey Creek Master Owners Association that was made pursuant to Fla. Stat. §607.0850(9)(c). The case was remanded for the trial court: "*to consider the relevant circumstances*" as required by §607.0850(9)(c). 610 So.2d at 4. However, there is no subsequent reported decision discussing what the "*relevant circumstances*" were in that case much less reflecting whether the developer and the directors ultimately obtained indemnification.

In sum, the *Wendt* decision and Dismissal Order as relating to the dismissal of the claim for indemnification pursuant to §607.0850(9)(c) must be affirmed. The "*relevant circumstances*" are that the Former Directors breached their fiduciary duties to the Association by engaging in the intentional misconduct described in the Association's Second Amended Complaint. [R. 90, ¶19]. There is not a single case which even remotely suggests that the Former Directors can

pursue an indemnity claim based on Fla. Stat. §607.0850(9)(c) under such circumstances.

II. THE INDEMNIFICATION CLAIMS HAVE BEEN WAIVED SINCE THEY WERE COMPULSORY COUNTERCLAIMS THAT WERE MATURE/RIPE FOR ADJUDICATION IN THE ASSOCIATION'S LAWSUIT YET WERE NEVER RAISED BY THE FORMER DIRECTORS IN THEIR COUNTERCLAIM.

In moving to dismiss the Indemnification Complaint, the Association argued that although the Former Directors asserted a Counterclaim for breach of contract and other relief in the Association's Lawsuit [R.215-264], no indemnity claims were ever raised during the three and a half (3½) years that preceded the trial in February, 2007. As such, the Association moved to dismiss the Indemnification Complaint on the basis of waiver since the indemnity claims were compulsory counterclaims pursuant to Rule 1.170(a), Fla.R.Civ.P. [R.151-152]. The trial court agreed as reflected in the Dismissal Order. [R.266]. While the Former Directors thereafter sought reversal of the Dismissal Order arguing that the indemnity claims were not compulsory counterclaims, the Fourth District Court of Appeal did not address this particular issue in its decision in *Wendt*.[16]

[16] "Because the trial court rightly found that the directors' complaint for contractual and statutory indemnification did not state a cause of action, *it is not necessary for this court to address the trial court's alternative ruling that the directors were required to have filed those claims as compulsory counterclaims in the original lawsuit."* [A.4].

The Former Directors have now raised the issue in this Court, once again arguing that the Dismissal Order must be reversed because the indemnity claims were not compulsory counterclaims. [IB. pp. 24-28]. While this issue does not serve as a basis for this Court to exercise its discretionary jurisdiction, the Court does appear to have discretionary authority to consider the issue since it was briefed in the trial court proceedings and is potentially dispositive of the entire case. *See, Savona v. Prudential Insurance Company Of America*, 648 So.2d 705, 707 (Fla. 1995) ("We have held that we have the authority to consider issues other than those upon which jurisdiction is based, but this authority is discretionary and should be exercised only when these other issues have been properly briefed and argued, and are dispositive of the case"), citing, *Savoie v. State of Florida*, 422 So.2d 308, 312 (Fla. 1982).

The Association maintains that what is dispositive of this entire lawsuit is the recent decision on April 14, 2010 by the Fourth District Court of Appeal in *La Costa Beach Resort Condominium Association, Inc. supra*, which has now restored the jury's verdict that the Former Directors breached their fiduciary duties to the Association (subject to the motions for rehearing and certification identified in footnote two above). [AA.1-8]. As such, the Former Directors simply cannot state the causes of action for indemnity set forth in the Indemnification Complaint under any circumstances since they breached their fiduciary duties to the

Association by engaging in the intentional misconduct described in the Second Amended Complaint. Nonetheless, since this Court appears to have the discretion to consider the compulsory counterclaim and waiver issues, the Association addresses these issues on the merits in the event that the Court decides to consider them.

Pursuant to Rule 1.170(a), Fla.R.Civ.P., a party is required to assert all compulsory counterclaims which they have against the opposing party if such claims arise out of the transaction or occurrence which is the subject matter of the opposing party's claim.[17] "Failure to raise a compulsory counterclaim *in the first suit* will result in a waiver of that claim." *See*, *Londono v. Turkey Creek, Inc*., 609 So.2d 14, 19 (Fla. 1992); *Biondo v. Powers*, 805 So.2d 67, 69 (Fla. 4th DCA 2002) (same).

"A compulsory counterclaim is 'a defendant's cause of action arising out of the transaction or occurrence that formed the subject matter of the plaintiff's claim.'" *Londono*, 609 So.2d at 19, quoting from, *Yost v. American National Bank*, 570 So.2d 350, 352 (Fla. 1st DCA 1990). In *Londono*, this Court held that "the

[17] The Rule states: A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction…

'logical relationship test' is the yardstick for measuring whether a claim is compulsory":

> "[A] claim has a logical relationship to the original claim if it arises out of the same aggregate of operative facts as the original claim in two senses: (1) that the same aggregate of operative facts serves as the basis of both claims; or (2) that the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise remain dormant." 609 So.2d at 20.

The Former Directors' indemnity claims clearly have a logical relationship to the breach of fiduciary duty claim in the Association's Lawsuit and thus were compulsory. The indemnity claims not only related to and arose directly out of the same aggregate set of operative facts as the breach of fiduciary duty claim but the indemnity claims were also *activated* by the breach of fiduciary duty claim. The indemnity claims could not be brought by the Former Directors but for the Association's assertion of the breach of fiduciary duty claim against them.

Notwithstanding the foregoing, the Former Directors suggest that the indemnity claims were not compulsory and that there was no waiver of such claims for two reasons. First, Fla. Stat. §607.0850(9) *"expressly recognizes claims for corporate indemnification as independent actions that do not ordinarily arise out of the transaction or occurrence that is the subject matter of the underlying proceeding"*. [IB. p.24]. Second, the indemnity claims *"…were not mature as a*

matter of law". [IB. p26]. However, both of these arguments fail for the following reasons.

A. The Forum Alternatives In Fla. Stat. §607.0850(9) Do Not Allow The Former Directors To Assert Their Indemnity Claims In Any Forum Other Than Their Counterclaim In The Association's Lawsuit Since They Never Ceased Being Parties In That Lawsuit.

Fla. Stat. §607.0850(9) states the following, in pertinent part:

> …[A] director, officer, employee, or agent of the corporation who is *or was a party to a proceeding***,** may apply for indemnification or advancement of expenses, or both, to the court conducting the proceeding, to the circuit court, or to another court of competent jurisdiction… [Emphasis Supplied].

The Former Directors suggest that: *"[T]he plain language of Fla. Stat. §607.0850(9) would be meaningless if indemnification claims were necessarily compulsory counterclaims by nature"*. [IB. p.25]. In other words, the Former Directors maintain that the indemnity claims cannot be deemed compulsory since they interpret the above quoted language from the statute as allowing them to assert the claims *either* in the Association's Lawsuit or in a separate lawsuit (as they have done).

The Former Directors misconstrue the statute. The above emphasized language ("*…or was a party to a proceeding…*") makes clear that the alternative forums to assert an indemnity claim (other than in the court conducting the proceeding on the liability claim against the officer/director), are available to an

officer/director who *was* a defendant in a proceeding originally brought against them but is no longer a party to such proceeding and as such, they have no choice other than to pursue their indemnity claims *in a separate action*. The alternative forums for asserting indemnity claims clearly do not apply to the Former Directors since they were *always* parties in the Association's Lawsuit. Thus, nothing prevented them from asserting the indemnity claims in their Counterclaim (other than their neglect in failing to do so).

Moreover, interpreting Fla. Stat. §607.0850(9) in the manner suggested by the Former Directors (i.e. - that they can assert the indemnity claims in a separate lawsuit independent of their Counterclaim in the Association's Lawsuit), would render Rule 1.170(a), Fla.R.Civ.P. (compulsory counterclaims) meaningless.[18] "The purpose of the compulsory counterclaim is to promote judicial efficiency by requiring defendants to raise claims arising from the same 'transaction or occurrence' as the plaintiff's claim." *Londono,* 609 So.2d at 19. The Former Directors interpretation and application of the alternative forums language in §607.0850(9) for asserting indemnity claims clearly runs contrary to such

[18] Such an interpretation must be avoided since it violates the well-settled rule of statutory construction that the language of statutes and rules of civil procedure "are to be read in pari materia." *Cardinal v. Wendy's Of South Florida, Inc*., 529 So.2d 335, 337 (Fla. 4th DCA 1988) (applying the in pari materia principle to Fla. Stat. §38.10 and Rule 1.432, Fla.R.Civ.P.).

principles of judicial efficiency/economy and undermines the very purpose of the compulsory counterclaim rule set forth in Rule 1.170(a), Fla.R.Civ.P.

B. The Indemnification Claims Were Mature/Ripe For Adjudication When The Former Directors Filed Their Counterclaim In The Association's Lawsuit.

The Former Directors erroneously suggest that the indemnity claims were not compulsory and have not been waived because: "*they were not mature as a matter of law…*" [IB. pp.26-28]. Yet, the Former Directors expressly alleged in the Indemnification Complaint that the Association's Second Amended Complaint for breach of fiduciary duty was: "*devoid of allegations of willful or knowing misconduct on the part of the DIRECTORS.*" [R.3, ¶13]. Assuming, *arguendo*, that such allegations were true, the Former Directors ability to sue for indemnity clearly matured and came into existence, at the very latest, when the Second Amended Complaint was filed in the Association's Lawsuit supposedly lacking such allegations of willful or knowing misconduct.[19]

[19] The Former Directors' reliance on *Kellogg v. Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A.*, 807 So.2d 669 (Fla. 4th DCA 2002) is misplaced. [IB. p.27]. There, the client's legal malpractice claim against the Fowler,White law firm was not mature/compulsory at the time of Fowler, White's lawsuit against its client (to recover for unpaid attorneys fees in connection with its representation of the client in certain bankruptcy proceedings), *because of the client's appeals that were pending in the Eleventh Circuit Court of Appeal relating to the bankruptcy proceedings*. *Id.* at 672. The client's malpractice claim did not mature until the conclusion of the appeals.

The indemnity claims actually matured earlier than the filing of the Association's Second Amended Complaint. The claims matured in July, 2003 when the Association filed its lawsuit since that is when the Former Directors first began incurring expenses in defending themselves against the breach of fiduciary duty claim. [R.3, ¶14]. *Compare, Chew v. Lord,* 181 P.3d 25 (Wash.App.2008). In that case, Robert Lord ("Lord"), was a participant in a scavenger hunt and sued, amongst others, the operator of the hunt, Chee Chew ("Chew"), for personal injuries sustained during the hunt in a Nevada lawsuit. Although Lord had signed a waiver of liability form containing certain indemnification provisions in favor of Chew, Chew failed to assert <u>any</u> indemnity claims against Lord in the Nevada personal injury action.

Instead, like the Former Directors, Chew subsequently filed a *separate lawsuit* in Washington seeking indemnification from Lord pursuant to the waiver of liability form. However, the Washington court dismissed Chew's indemnification claims as they were compulsory counterclaims that Chew was required to assert in Lord's Nevada personal injury action (which he never did). Although Chew tried to avoid the indemnity claims being labeled as compulsory by arguing that they were not mature at the time he filed his answer in the Nevada personal injury action (*Id*. at 29), the Washington court <u>disagreed</u> noting that the indemnity claims had

matured at that time since Chew had already incurred defense costs in the Nevada action:

> "[*A*]*t that time* [when Chew filed his answer in the Nevada personal injury action], *he had already incurred legal costs associated with defending the Nevada action."* [Emphasis Supplied] *Id*. at 30.

The Former Directors cite *Ingersoll-Rand Co. v. Valery Energy Corp.*, 997 S.W.2d 203 (Tex.1999), in support of the argument that their indemnity claims were not compulsory counterclaims given that there was no judgment against the Former Directors at the time the Association brought its lawsuit against them and thus the claims had not yet matured. [IB, pp.27-28]. However, in that case, the Texas Supreme Court noted that under Texas law (not Florida law), there are two types of indemnity agreements – those indemnifying *against liabilities* and those indemnifying *against damages*. *Id.* at 207. The court determined that the indemnity agreement at issue in that case was against liabilities since it contained extremely broad language holding the indemnities: "*harmless*" against "*all claims*" and "*liabilities*". *Id.* The court noted that a claim under a liability indemnification clause: "*does not accrue, and thus is not mature, until the indemnitee's liability to the party seeking damages becomes fixed and certain.*" *Id*. at 208.

In contrast, Article XII of the Association's Bylaws contains a narrower indemnity provision *against damages* since it does not contain any of the above quoted language from the broader indemnity provision in *Ingersoll-Rand*. The

Texas Supreme Court cites in its decision to *Fidelity Mutual Life Insurance Company v. Kaminsky,* 820 S.W.2d 878 (Tex.App.1991), noting that a claim for this type of indemnity (against damages), is compulsory since it accrues when the indemnitee first begins incurring fees and costs in defending themselves:

> "In *Kaminsky ,the court concluded that a contractual claim for attorney's fees, even though contingent on the outcome of the suit, was mature and compulsory*. [footnote omitted]. The contractual provision on which Dr. Kaminsky relied established his contractual right to attorney's fees contingent on the result of the suit, but it did not indemnify him against other liabilities generally. It was not an indemnification agreement. Thus, the general rule that a cause of action accrues when facts come into existence that authorize the claimant to seek a judicial remedy applied in *Kaminsky* [footnote omitted]. *Dr. Kaminsky's claim for attorney's fees accrued when he first incurred fees*." [Emphasis Supplied] 997 S.W.2d at 210.

The indemnity claim based on Article XII of the Association's Bylaws had also matured when the Association commenced its lawsuit against the Former Directors in July, 2003 since Article XII reflects that the obligation to indemnify comes into existence upon the filing of: "…any action, suit, or proceeding to which he may be made a party by reason of his being or having been a Director or Officer of the Association…". [R.4, ¶19]. *Compare, Safway Steel Products v. Casteel Construction Company*, 1998 WL 792189 (N.D.Ind.1998).

In that case, Randall Corbett ("Corbett"), was an employee of Casteel Construction Corporation who was injured after picking up certain scaffolding equipment from Safway Steel Products ("Safway"). Corbett sued Safway in an

action for personal injuries which Safway settled by paying Corbett $80,000.00 *Id*. at 2. Although Corbett signed a rental agreement when he picked up the scaffolding equipment containing certain indemnification provisions in favor of Safway, Safway failed to assert any indemnity claims against Corbett in the personal injury action.

Safway subsequently filed a *separate lawsuit* seeking indemnification from Corbett (and his employer), pursuant to the indemnification provision in the rental agreement Corbett had signed. However, Safway's indemnity claims were dismissed as they were compulsory counterclaims that Safway was required to assert in Corbett's personal injury action (which Safway never did). Although Safway tried to avoid the indemnity claims being labeled as compulsory by arguing that they were not mature at the time it filed its responsive pleadings in Corbett's personal injury action (*Id*. at 4), the court disagreed noting that:

> "[I]f the indemnification clause in the document labeled 'Rental Agreement' is enforceable, the language *creates an obligation to indemnify upon the filing of 'all actions or claims' against Safway*. According to that language, this court must conclude, as did the court in *Lear*,[20] that *the right to indemnification became an enforceable right when Corbett filed his personal*

[20] Referring to *Lear Resources, Inc. v. Uland*, 485 N.E.2d 134 (Ind.App.1985). In that case, the contractual indemnification clause created the obligation to indemnify: "*against all claims, suits, obligations, liabilities and damages*." *Id.* at 137. Based on the plain language of the indemnity provision, the court concluded that if the indemnity clause was enforceable, the right to be indemnified *came into being when a claim was filed* rather than with the entry of judgment. *Id.* The court further held that the right to enforce the indemnification clause *clearly existed as*

> *injury lawsuit in state court***.** *And, because Safway failed to assert a right to indemnification against Corbett in the personal injury action, Safway is barred from asserting that right in the present suit."* [Emphasis Supplied]. *Id.*

Compare, Mobile Power Enterprises, Inc. v. Power Vac, Inc., 496 F.2d 1311 (10th Cir. 1974) (In a lawsuit for personal injuries and property damage by a lessee against a lessor of certain equipment, the lessor could not recover attorneys fees and costs incurred in defending the lawsuit pursuant to an indemnity provision in the lease agreement since the lessor failed to assert the indemnity claim as a compulsory counterclaim during the course of the lessee's lawsuit); *Waikiki Hobron Associates v. Investment Mortgage, Inc.*, 13 B.R. 700, 703 (Bankr.D.Haw.1981) ("For procedural purposes a claim for indemnification *is ripe for adjudication and may be tendered in a pending action in which primary liability is being adjudicated").*

In sum, the Former Directors' indemnity claims had clearly matured at the time the Association commenced its lawsuit against the Former Directors. As such, the Former Directors were obligated to assert such claims in the Counterclaim they filed in the Association's Lawsuit. However, the Former Directors never raised such compulsory claims <u>despite having three and a half (3½) years to do so prior to the trial</u>. As such, they waived their right to assert such claims.

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either a claim or a defense in the original suit and, because it was never raised, *it was barred as a basis for subsequent legal action.*

Despite the foregoing, the Former Directors persist in arguing that their indemnification claims: "*are not compulsory counterclaims"* [IB, p.25]. Yet, they fail to cite a single Florida case standing for that proposition. Instead, they cite to *International Airport Centers, L.L.C. v. Citrin*, 455 F.3d 749 (7th Cir. 2006) and *Battenfeld Of America Holding Co., Inc., et al v. Baird, Kurtz & Dobson*, 1999 WL 1096047 (D.Kan.1999) in support of such an argument. [IB, pp.25-26]. However, both of these cases are inapposite.

In *International Airport Centers,* an employee (Citrin), was sued by his employer for breach of fiduciary duty in the Northern District Court of Illinois. *Id.* at 749. Citrin brought a separate lawsuit against his employer in the Delaware Chancery Court seeking advancement of his expenses in defending against the employer's lawsuit based on a provision in his employment agreement entitling him to have his employer pay his expenses of defending any suit brought against him: "*in advance of the final disposition of such action*." *Id.* at 751. The employer filed a motion to enjoin Citrin from seeking such advancement which was denied by the Illinois District Court. On appeal, the Seventh Circuit Court of Appeals affirmed the denial of the motion determining that the advancement claim was not a compulsory counterclaim.

In reaching that determination, the Seventh Circuit Court of Appeals specifically noted that the advancement claim was not compulsory (and thus did not have to be asserted in the employer's action), because Citrin's entitlement to advancement was *independent* of the merits and outcome of the employer's suit against him:

> "And since entitlement to advancement *is independent of the merits of the suit for which the money is sought* [citations omitted], *the claim for advancement is not a compulsory counterclaim to that suit*. For the claim does not arise out of the litigation; it arises out of the employment contract**.**" *Id*. at 715. [Emphasis Supplied]

Unlike Citrin's advancement claim in *International Airport Centers*, the Former Directors' indemnity claims are compulsory since entitlement is <u>not</u> independent of the merits of the suit for which the money is sought (i.e. – the Association's Lawsuit). To the contrary, the Former Directors' entitlement is inextricably intertwined with the merits of the Association's breach of fiduciary duty claim. For example, indemnity based on Article XII of the Association's Bylaws is not available if the Former Directors are: "…*finally adjudged in such action, suit or proceeding, to be liable for or guilty of gross negligence or willful misconduct."* [R.4, ¶19], [R.76]. Indemnity based on Fla. Stat. §607.0850(3) requires the Former Directors to be: "…*successful on the merits or otherwise in defense of any proceeding…*". Indemnity based on Fla. Stat. §607.0850(9)(c) is

only permissible if the court determines that the Former Directors are entitled to it: *"..in view of all the relevant circumstances…"*

Based on all of the foregoing, *International Airport Centers* supports the Association's position that the Former Directors' indemnity claims are compulsory counterclaims that had to be asserted in their Counterclaim filed in the Association's Lawsuit since they arise out of and are intertwined with the merits of that suit.[21]

The Former Directors also suggest that the indemnity claims were not mature when they filed their answer to the Association's Second Amended Complaint because no payments had yet been made as of that time on the principal's liability.[22] However, the Fourth District Court of Appeal in *Wendt* did not have

[21] The Former Directors' reliance on *Battenfeld Of America Holding Co., Inc*., *supra*, is also misplaced since the District Court never addressed whether Dr. Kruger's claim against Baird, Kurtz & Dobson ("BKD") for mandatory indemnification pursuant to K.S.A. §17-6305 was compulsory such that Dr. Kruger waived the claim by failing to raise it in the lawsuit prior to being dismissed as a party. Unlike the Association in the case *sub judice*, BKD never made the argument that Dr. Kruger's indemnity claim was compulsory and had been waived. Thus, the District Court was never called upon to address those issues.

[22] The Former Directors rely on the following cases in support of this argument. *See, U.S. v. Olavarrieta*, 812 F.2d 640, 644 (11th Cir. 1987); *Alvarez v. Apollo Ship Chandlers, Inc*., 2002 WL 31933666 (S.D.Fla.2002); *Dominion of Canada v. State Farm And Casualty Co*., 754 So.2d 852 (Fla. 2d DCA 2000); *Attorney's Title Insurance Fund, Inc. v. Punta Gorda Isles, Inc*., 547 So.2d 1250 (Fla. 2d DCA 1989); *Fireman's Fund Insurance Company v. Rojas*, 409 So.2d 1166 (Fla. 3d DCA 1982). [IB. pp.26-27].

jurisdiction to consider this argument (nor does this Court), since it was not raised in the Former Directors' memorandum in opposition to the motion to dismiss. [R.154-170]. Thus, it has not been preserved for appellate review. As this Court pointed out in *Savona, supra*, it only has the discretionary authority to consider issues other than those upon which its jurisdiction is based *when such other issues have been properly briefed and argued below***.** 648 So.2d at 707. "It is well settled that arguments raised for the first time on appeal are not preserved and are therefore waived." *Dade County School Board v. Radio Station WQBA,* 731 So.2d 638, 644 (Fla. 1999).[23]

Even assuming, *arguendo,* that this Court had jurisdiction to consider this argument and the cases cited in support (footnote twenty-two), they are inapposite since they all involved indemnification claims *whose existence was contingent upon a finding of liability by an insured to a third-party* (i.e. – they were indemnity claims asserted in the context of lawsuits by sureties/insurance companies *against*

[23] While the Former Directors did briefly refer to this argument in their Motion For Reconsideration Or Rehearing regarding the Dismissal Order [R. 270-271, ¶8], that motion did not preserve the argument for appellate review. The rehearing motion was abandoned by virtue of the Former Directors having filed their Notice of Appeal from the Dismissal Order *prior to entry of an order on the rehearing motion. See,* Rule 9.020(h)(3), Fla.R.App.P. (stating that, if a notice of appeal is filed before an order is entered disposing of a timely filed motion for rehearing, the motion will be deemed abandoned).

third-party tortfeasor(s) who were responsible for the damages paid out by the sureties/insurers on behalf of their insureds).[24]

Such indemnification claims are fundamentally different than the indemnity claims in the case *sub judice* which clearly do not involve contingent third-party indemnity claims by an insurer against a third-party tortfeasor who is responsible for the damages paid by the insurer on behalf of their insured. To the contrary, rather than seeking to recoup payments from the Association for money paid by the Former Directors to third-parties who have been injured by the Association's conduct, the Former Directors are seeking to be indemnified *for their own wrongdoing – their commission of intentional misconduct – breach of fiduciary duty.* [AA. p.7]. Thus, even if this argument was somehow preserved for appellate review (which it clearly was not), the cases relied upon by the Former Directors have absolutely no bearing on the issue of *when* their indemnity claims matured since they are not contingent indemnity claims.

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[24] *See, Olavarrieta, supra,* citing to *ITT Rayonier, Inc. v. Southeastern Maritime Co.,* 620 F.2d 512, 514 (5th Cir. 1980) which sets forth the proposition that a surety's *third-party claim* for indemnification *against a third party tortfeasor* does not accrue until the surety had paid the liability of its principal to the injured party; *Alvarez, supra,* involving *third-party* indemnification claims by defendant against its insurer; *Dominion of Canada, supra,* involving *third-party* indemnification claims by an insurer against a separate tortfeasor; *Attorney's Title Insurance Fund, Inc., supra,* involving a *third-party* subrogation claim by a title insurer against the seller of the property at issue; *Fireman's Fund Insurance Company, supra,* involving a *third-party* indemnification claim by an insurer against a separate tortfeasor.

CONCLUSION

The *Wendt* decision and Dismissal Order must be affirmed since the Former Directors cannot state any of the causes of action set forth in the Indemnification Complaint for all of the reasons set forth hereinabove.

The jury's verdict that the Former Directors breached their fiduciary duties to the Association (by engaging in the intentional misconduct described in the Second Amended Complaint filed in the Association's Lawsuit), has now been restored as a result of the Fourth District Court of Appeal's recent April 14, 2010 decision in *La Costa Beach Club Resort Condominium Association, Inc. supra.* [AA.1-8]. Notwithstanding this, the Former Directors ask this Court to remand the action in order for the Former Directors to proceed forward on the indemnity claims.

The Former Directors would have this Court ignore well established Florida law and public policy and somehow set the illogical precedent that they can pursue (and potentially obtain), indemnification from the Association which has now successfully sued them for their own intentional misconduct and breaches of fiduciary duties to the Association. Obviously, such a precedent cannot be set as it would fly in the face of Florida law and public policy precluding indemnification of tortfeasors for their own intentional misconduct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of Respondent's Answer Brief On The Merits was served by U.S. Mail on this 3rd day of June, 2010 to: Keith T. Grumer, Esquire & Rowena Reich, Esquire, Grumer & Macaluso, P.A., *Attorneys For Petitioners*, One East Broward Blvd., Suite 1501, Fort Lauderdale, FL 33301.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, that Respondent's Answer Brief On The Merits complies with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure in that Times New Roman 14 point font has been used throughout the entire brief.

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