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.

PETITIONERS' REPLY BRIEF ON THE MERITS

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

Keith T. Grumer, Esq.
Florida Bar No. 504416
Rowena D. Reich, Esq.
Florida Bar No. 549592
Grumer & Macaluso, P.A.
Attorneys for Petitioners
One East Broward Boulevard
Suite 1501
Ft. Lauderdale, Florida 33301
Telephone: (954) 713-2700
Facsimile: (954) 713-2713

TABLE OF CONTENTS

Page No.

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Other Authorities

Rules

PRELIMINARY STATEMENT

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

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

The action filed by DIRECTORS against ASSOCIATION under Broward County Circuit Case No. 07-035738 styled *DONALD WENDT, KENNY WENDT and CLARKE WARNE, Plaintiffs, v. LA COSTA BEACH RESORT CONDOMINIUM ASSOCIATION, INC., Defendant* is referred to herein as the "Indemnification Action".

The initial complaint filed in the Indemnification Action is referred to herein as the "Complaint". (R 1-108)

The final order entered in the Indemnification Action dismissing the Complaint *with prejudice* is referred to herein as the "Dismissal Order". (R 265, 266)

The decision on appeal, *Wendt v. La Costa Beach Resort Condominium Association, Inc.*, 14 So.3d 1179 (Fla. 4th DCA 2009), is referred to herein as the "Decision".

The prior action filed by ASSOCIATION against DIRECTORS under

Broward County Circuit Case No. 03-12095 styled *La Costa Beach Resort Club Condominium Association, Inc., Plaintiff vs. Alphonso Carioti, et al., Defendants* is referred to herein as the "Earlier Action". (R 86-91)

The mandatory indemnification provision contained in Article XII of ASSOCIATION's By-laws which reads:

> 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 added.)

is referred to herein as the "Indemnification Provision". (R76)

References to DIRECTORS' Appendix are designated as "A" followed by the page number(s).

References to ASSOCIATION's Answer Brief On The Merits are designated as "AB" followed by the page number(s) when applicable.

References to DIRECTORS' Initial Brief On The Merits are designated as "IB" followed by the page number(s) when applicable.

References to DIRECTORS' Jurisdictional Brief are designated as "JB" followed by the page number(s) when applicable.

References to the Record are designated as "R" followed by the page

number(s) and paragraph number(s) when applicable.

SUMMARY OF ARGUMENT

This case presents the important question of law as to whether §607.0850(9), *Fla. Stat.* gives corporate officials the right to seek court ordered indemnification in connection with an action brought against them by the indemnitor corporation. The Decision is an aberration with adverse implications for all corporate officials who depend upon protection from undue financial risk in the form of indemnification.

The Decision's holding that DIRECTORS, as corporate indemnitees, cannot state a cause of action under §607.0850(9), *Fla. Stat.* in connection with the Earlier Action brought by ASSOCIATION in the absence of a claim for common law indemnity eviscerates important rights bestowed by the plain language of Florida law. The Decision must be reversed because it contravenes significant public policy considerations favoring indemnification of corporate officials and recognizing "excessive risks to officers and directors will tend to discourage any responsible individual from serving". Jennings and Horky, *Indemnification of Corporate Officers and Directors*, 15 Nova L. Rev. 1357, 1359 (1991); *Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002) citing *VonFeldt v. Stifel Financial Corp.* 714 A.2d 79, 84-85 (Del. 1998) (Narrow statutory construction that would disserve these policies to be eschewed.)

Express limitations set forth in §§607.0831, 607.0850 and 617.0831 *Fla. Stat.* and exclusionary contractual language, such as the exception for "matters

wherein he shall be finally adjudged . . . liable for or guilty of gross negligence or willful misconduct" contained in the Indemnification Provision preclude indemnification for specific types of wrongful conduct.[1] ASSOCIATION's focus upon commercial case law is misplaced because these limitations directly address the policy concerns which have led to the disfavor of commercial exculpatory clauses. (AB14-17, 26-27)

ASSOCIATION's argument that all breaches of fiduciary duty rise to a level of intentional misconduct which precludes indemnification is untenable. The plain language of §607.0850, *Fla. Stat.* is consistent with the immunity from personal liability afforded by §607.0831, *Fla. Stat.* and expressly contemplates the availability of indemnification in connection with an action brought by the indemnitor corporation notwithstanding liability or guilt, unless there is a judgment or other final adjudication establishing the nonindemnifiable conduct that is specifically delineated by these statutes.

Fla. R. Civ. P. 1.170(a) did not compel DIRECTORS to assert their indemnification claims as compulsory counterclaims in the Earlier Action because DIRECTORS' statutory causes of action do not arise out of the tortious conduct

[1] §617.0831, *Fla. Stat.* renders the indemnification provisions of §§607.0831 and 607.0850, *Fla. Stat.* applicable to not for profit corporations organized pursuant to *Chap.* 617, such as ASSOCIATION, and rural electric cooperatives organized pursuant to *Chap.* 425. (R87¶3) See also §718.111(1)(d), *Fla. Stat.* eff. October 1, 2008; §721.13(13), *Fla. Stat.* eff. May 27, 2010.

sued upon in the Earlier Action. Moreover, the plain language of §607.0850(9), *Fla. Stat.* expressly authorizes the filing of a separate action and implicitly recognizes, as a practical matter, that an indemnification claim cannot be decided before final adjudication of the underlying proceeding.

This Court's exercise of jurisdiction is warranted to resolve the interdistrict conflict and misapplication of *Penthouse North Ass'n, Inc. v. Lombardi,* 461 So.2d 1350 (Fla. 1984) discussed below, to ensure consistent application of §607.0850, *Fla. Stat.* and to preclude "further advancement of an incorrect principle of law". *P.N.R., Inc. v. Beacon Property Management, Inc.*, 842 So.2d 773, 776-777 (Fla. 2003) citing *The Florida Star v. B.J.F.*, 530 So.2d 286, 288 (Fla. 1988) The Decision and the Dismissal Order must be reversed because DIRECTORS properly stated causes of action under all three (3) counts of the Complaint.

ARGUMENT

I. THE EXERCISE OF JURISDICTION IS NECESSARY TO ENSURE CONSISTENT APPLICATION OF §607.0850, *FLA. STAT.*

This Court has discretionary jurisdiction pursuant to Art. V, §§3(b)(3) and 3(b)(4), *Fla. Const.* because the Decision conflicts with *Turkey Creek Master Owners Ass'n, Inc. v. Hope*, 766 So.2d 1245, 1247 (Fla. 1st DCA 2000), as certified by the Fourth District, and with *Myakka Valley Ranches Imp. Ass'n, Inc. v. Bieschke*, 610 So.2d 3 (Fla. 2nd DCA 1992) on the same question of law. (JB4-5)

This Court also has discretionary jurisdiction pursuant to Art. V, §3(b)(3),

Fla. Const. based upon misapplication of *Penthouse North Ass'n, Inc. v. Lombardi*.[2] The Decision holds "[t]he trial court's decision is consistent with prior decisions . . . of our supreme court" and cites *Penthouse North*, 461 So.2d at 1352-1353 for the general principle that corporate directors have no right to indemnification in connection with an action for breach of fiduciary duty. (A3) *Penthouse North* is misapplied because that decision was reached in the absence of a governing statute.[3]

Penthouse North is also misapplied and must be factually distinguished because that case involved *developer* directors of a condominium association. The legislature directly addressed the unique anomaly involving developer directors recognized by early condominium case law in the 1987 amendment to §617.028, *Fla. Stat.* (now §617.0831, *Fla. Stat.*) by excepting developer appointees from entitlement to the immunity and indemnification created by Ch. 607 and extended by Ch. 617 to not for profit officials, including unit owner directors of

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[2] See *Wallace v. Dean*, 3 So.3d 1035, 1040 (Fla. 2009); *Sacks v. Sacks*, 267 So.2d 73 (Fla. 1972)

[3] This Court expressly held the indemnification provisions of §607.014, *Fla. Stat.* (substantively similar to the current version of §607.0850, *Fla. Stat.*) did not control and quashed the decision in *Penthouse North Association, Inc. v. Lombardi*, 436 So.2d 184 (Fla. 4th DCA 1983), in part, on ex post facto grounds. However, this Court took no issue with the Fourth District's statutory construction and conclusion that "as can be seen from section 607.014(2) an officer and director **is** entitled under certain circumstances, to indemnity, notwithstanding adjudication of liability against him in favor of the corporation". *Id.* at 187 (Emphasis added.)

condominium and timeshare boards.[4,5] (IB9-10)

II. DIRECTORS HAVE THE RIGHT TO SEEK COURT ORDERED INDEMNIFICATION BECAUSE THERE IS NO ADJUDICATION AGAINST THEM ESTABLISHING INTENTIONAL MISCONDUCT OR OTHER NON-INDEMNIFIABLE CONDUCT

The Complaint alleges, in pertinent part: "[t]here has been no final adjudication in the Suit holding DIRECTORS liable for or guilty of gross negligence or willful misconduct."(R4¶20) The Complaint is devoid of allegations concerning any jury determination or verdict in the Earlier Action. ASSOCIATION's reliance upon the Earlier Action is procedurally improper to the extent such reliance requires consideration of facts outside the four corners of the Complaint to which a court is restricted on a motion to dismiss. *Straub v. Lehtinen, Vargas & Riedi, P.A.*, 2007 WL 4409483,*2 (Fla. 4th DCA 2007)(Consideration of wording of bankruptcy order improper where order was referenced by complaint but not attached.); *Garnac Grain Co. v. Mejia*, 962 So.2d 408,410-411 (Fla. 4th

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[4] The decisions in *Penthouse North, Old Port Cove Property Owners Association, Inc. v. Ecclestone*, 500 So.2d 331 (Fla. 4th DCA 1986) and *Century Village, Inc.* v. *Chatham Condominium Associations*, 387 So.2d 523 (Fla. 4th DCA 1980) are not determinative of rights afforded by §607.0850, *Fla. Stat.* because they were all decided in the absence of a controlling indemnification statute. (IB9-10)

[5] The provisions of Florida law governing corporate indemnification were substantially revised by Ch. 87-245, *Laws of Fla.* eff. July 1, 1987. Ch. 88-403, §1, *Laws of Fla.* expanded the statutory exclusion to include directors appointed by the developer of a time-share managing entity. §617.028, *Fla. Stat*. was repealed by Ch. 90-179, §128, *Laws of Fla*. and replaced with substantively similar language in §617.0831, *Fla. Stat.* by Ch. 90-179, §53, *Laws of Fla.* eff. July 1, 1991.

DCA 2007)(Trial court erroneously ventured outside four corners of complaint when it took judicial notice of final judgment of dissolution of marriage.)

The final outcome of ASSOCIATION's appeal in the Earlier Action will not be dispositive of DIRECTORS' entitlement to seek court ordered indemnification even if it is adverse to DIRECTORS and could be properly considered in this appeal because ASSOCIATION's claim of a jury determination that DIRECTORS engaged in "intentional misconduct" is fallacious.[6] (AB2, 6, 17, 18, 19, 25, 29, 30) The jury in the Earlier Action did find a breach of duty but there are no findings as to any intentional misconduct or derivation of an improper personal benefit against any of the DIRECTORS.(R211-214) No such finding can be inferred against DIRECTORS because the jury was instructed, over DIRECTORS' objection, that "[a] director further breaches his duty by failing to do something a reasonably careful person would do under like circumstances" and was ***not*** instructed on intent or willfulness. (A9,L.10-20, A14-16) Willfulness requires a jury determination. *Taylor v. Wellington Station Condominium Association, Inc.*, 633 So.2d 43, 44-45 (Fla. 5th DCA 1994)(Summary judgment improper in action against officer for

[6] DIRECTORS' Motions for Rehearing, Rehearing En Banc and Certification remain pending before the Fourth District in Case No. 4D07-4838 styled *La Costa Beach Club Resort Condominium Association, Inc. v. Carioti, et al*. (AB3, fn. 2) DIRECTORS' appeal of the final judgment in the Earlier Action also remains pending before the Fourth District in 4D07-1717 styled *Donald Wendt, Clarke Warne and Kenny Wendt, Appellants, v. La Costa Beach Resort Condominium Assoc., Inc., Appellee.* and is stayed pending the outcome of Case No. 4D07-4838.

breach of fiduciary duty based upon factual issues as to whether breach was willful and whether "conduct was sufficient to rise to the level necessary to indicate individual liability".)

A. §§607.0831(1) and 607.0850, *Fla. Stat.* Afford Immunity From Liability and Permit Indemnification For Negligent Breaches Of Duty

A mere breach of fiduciary duty, especially the simple failure "to do something a reasonably careful person would do" as the jury was instructed in the Earlier Action, does not result in liability or preclude corporate indemnification under Florida law. §607.0831(1), *Fla. Stat.* entitled "Liability of directors" often bestows immunity upon corporate directors from liability for breaches of fiduciary duty by providing "a director is not personally liable for monetary damages to the corporation" unless "the director breached . . . his . . . duties as a director" ***and*** such breach constitutes: (i) a violation of criminal law, subject to certain exceptions; (ii) a transaction from which the director derived an improper personal benefit; (iii) a circumstance under which the liability provisions of s. 607.0834 are applicable; or (iv) a conscious disregard for the best interest of the corporation or willful misconduct. §607.0850(7), *Fla. Stat.* is consistent with §607.0831(1), *Fla. Stat.* and precludes indemnification only when there is a judgment or other final adjudication establishing such conduct. These limitations "ensure that corporate officials do not evade the consequences of their own misconduct". *Stockman v Heartland Industrial Partners, L.P.*, 2009 WL 2096213, *10 (Del. Ch. 2009)

The immunity created by §607.0831, *Fla. Stat.* requires "recklessness or an act or omission ... committed in bad faith or with malicious purpose" to establish director liability for breaches of fiduciary duty. *Atherton v. FDIC*, 519 U.S. 213, 228 117 S.Ct. 666, 675, 136 L.Ed.2d 656 (1997); *FDIC v. Gonzalez-Gorrondona*, 833 F. Supp. 1545, 1556 (S.D. Fla. 1993)(Statute governing director liability insulates directors from liability for gross negligence and permits liability only for greater derelictions.)[7]

ASSOCIATION's notion that all breaches of fiduciary duty are intentional torts is not well founded and reliance upon *Halkey-Roberts Corp. v. Mackal*, 641 So.2d 445 (Fla. 2nd DCA 1994) is misplaced. (AB15-16) *Halkey-Roberts Corp.* is

[7] See *Raphael v. Silverman*, 22 So.3d 837, 839 (Fla. 4th DCA 2009)(Affirming dismissal of breach of fiduciary duty claim where allegations against condominium directors were insufficient to establish "some form of 'self-dealing'" necessary to meet statutory requirement of derivation of improper "personal benefit".); *Sonny Boy, LLC v. Asnani*, 879 So.2d 25 (Fla. 5th DCA 2004) (Affirming judgment on the pleadings in favor of condominium directors in action for breach of fiduciary duty relating to maintenance of common areas.); *Fox v. Professional Wrecker Operators of Fla., Inc.*, 801 So.2d 175 (Fla. 5th DCA 2001)(Affirming dismissal of claims against directors of nonprofit corporation for breaches of fiduciary duty relating to financial mismanagement.); *Perlow v. Goldberg*, 700 So.2d 148 (Fla. 3rd DCA 1997) (Affirming dismissal of claim for breach of fiduciary duty against condominium directors relating to administration of insurance proceeds.); *Curbelo v. Sweetwater Creek Homeowners Condominium Assoc., Inc.*, 653 So.2d 1073 (Fla. 3rd DCA 1995) (Reversing directed verdict against condominium directors in action for breach of fiduciary duty relating to errors and omissions.); *Munder v. Circle One Condominium, Inc.*, 596 So.2d 144 (Fla. 4th DCA 1992) (Reversing judgment against president of developer corporation for breach of fiduciary duty where condominium developer simply failed to renew fire insurance policy.)

cited in *Salkin v. Chira*, 353 B.R. 693, 730 (Bankr. S.D. Fla. 2006) where that court expressly noted "a breach of fiduciary duty need *not* rise to the level of an intentional tort".)(Citation omitted)(Emphasis added.)

> A claim for breach of fiduciary duty may arise out of either negligent or intentional conduct. When the conduct underlying the breach is intentional, the breach is intentional; when the conduct underlying the breach is negligent, the breach is negligent.

Palafrugell Holdings, Inc. v. Cassel, 825 So.2d 937, 939 fn. 1 (Fla. 3rd DCA 2001)(Citations omitted.) See also *Mainer v. Wachovia Bank, N.A.*, 2005 WL 670293, *9 (S.D. Fla. 2005) (Expressly distinguishing four different tort claims and holding exculpatory contract at issue required proof of more than mere negligence for recovery on claims for breach of fiduciary duty and common law negligence while securities fraud and common law fraud are "intentional torts" of which "bad faith, gross negligence, or willful misconduct" were "already an element".); *Horizons Rehabilitation, Inc. v. Healthcare and Retirement Corp.*, 810 So.2d 958, 964 (Fla. 5th DCA 2002)("[O]ne may file a claim for breach of fiduciary duty as either a negligent or an intentional tort."); *Niles v. Mallardi*, 828 So.2d 1076, 1078, fn. 1 (Fla. 4th DCA 2002) ("That theory of recovery [breach of fiduciary duty] is broad, and can include conduct which is merely negligent but does not rise to a level of fraud.")

ASSOCIATION named Alphonso Carioti, not DIRECTORS, as the primary defendant in the Earlier Action and collectively alleged time share weeks were

"allowed" to be used without benefit to ASSOCIATION. (R86, 87 ¶4, 90 ¶19) ASSOCIATION made no specific allegations against DIRECTORS as to intent, willfulness or bad faith. (R86-91) DIRECTORS, on the other hand, expressly allege in the Complaint they acted in good faith and in a manner each reasonably believed to be in, or not opposed to, the best interests of ASSOCIATION with regard to the exercise of their business judgment. (R6,¶31, R7-8,¶36) Such allegations must be taken as true on a motion to dismiss. *Wallace v. Dean,* 3 So.3d at 1042. ASSOCIATION recognizes "[t]he *Turkey Creek* decision clearly holds that a trial court cannot award indemnification pursuant to §607.0850(9)(c), *Fla. Stat*. based solely on the language of this statutory provision coupled with the allegations in the parties' pleadings". (AB at 12 citing 766 So.2d at 1246) The denial of indemnification under §607.0850(9)(c), *Fla. Stat.* based on the indemnitor's allegations is equally erroneous.

Neither the jury verdict, if ultimately restored, nor ASSOCIATION's allegations in the Earlier Action are legally sufficient to preclude DIRECTORS from stating a cause of action under §607.0850(9), *Fla. Stat.* for court ordered indemnification as a matter of law.

B. ASSOCIATION Is Obligated To Provide Indemnification By The Mandatory Language Of Its Bylaws

ASSOCIATION argues the Indemnification Provision must be limited to third party actions in an effort to avoid mandatory obligations created by its own

bylaws and looks to a litany of commercial cases reflecting disfavor of exculpatory clauses which enable a party to contractually avoid liability resulting from its own intentional misconduct.

The Third Circuit Court Of Appeals found commercial cases inapposite and rejected a similar argument in *American Society For Testing And Materials v. Corrpro Companies, Inc.*, 478 F.3d 557, 575 (3rd Cir. (Pa.) 2007). (Nonprofit indemnitor held obligated by mandatory indemnification provision in its bylaws to indemnify its committee members for fees and costs incurred in underlying antitrust litigation.)

> . . . ASTM could have adopted a bylaw reserving discretion in itself to determine whether in a particular case it would indemnify a person seeking indemnification. But it eschewed that approach and instead used the mandatory words that a person protected "shall be indemnified" in the circumstances the bylaw sets forth. We can understand why ASTM took that approach as it encourages persons to participate in its activities. Moreover, ASTM had a particular reason to take the mandatory obligation approach as its members serve in standard-setting activities without pay or other compensation and might be unwilling to do so without protection against liability for their activities. Nevertheless, in view of the fact that ASTM adopted the mandatory right to indemnification approach, it is difficult to understand how it can abandon that approach retroactively by reliance on the business judgment rule when a protected person seeks to be indemnified.

Id. at 573, fn. 18. The Third Circuit found that even if commercial cases were not inapposite, those policy considerations were adequately addressed by their statutory language which, like Florida, prohibits indemnification if a party has not

acted in good faith. *Id.* at 575. See also *ADM. Corp. v. Thomson*, 707 F.2d 25 (1st Cir. 1983)(Former officer unsuccessfully sued for breach of fiduciary duty entitled to indemnification for legal expenses under corporate bylaws.)

The Supreme Judicial Court of Maine also rejected the notion that an indemnification agreement should be narrowly construed to prevent indemnification of an officer or director in connection with an action brought by the corporation and concluded a contrary public policy was established when the exclusion for such an action was deleted from their state statutes. *Bates Fabrics, Inc. v. LeVeen*, 590 A.2d 528, 531-532 (Me. 1991). Florida law also has no such exclusion and, instead, expressly empowers a corporation to indemnify "any person, who was or is a party to any proceeding by or in the right of the corporation". §607.0850(2), *Fla. Stat.* That phrase has been expressly construed to include direct actions by the corporation. *MCI Communications Corp. v. Wanzer*, 1990 WL 91100, *3-*7 (Del. Super. 1990)

The Indemnification Provision is authorized by §607.0850(7), *Fla. Stat.* and properly construed "so as to achieve where possible the beneficial purposes that indemnification can afford". *Stockman*, 2009 WL 2096213 at *18 DIRECTORS are entitled to indemnification pursuant to the Indemnification Provision because DIRECTORS have not been finally adjudged liable for or guilty of "gross negligence or willful misconduct", as more particularly discussed above, and it is a

mandatory provision that is not limited to third party actions by Florida law. The application of commercial case law is ill reasoned because the involved policy concerns are directly addressed in this corporate context by contractual and statutory exceptions which preclude indemnification when certain wrongful conduct is found to exist.[8]

C. DIRECTORS Properly Stated Causes Of Action

The Decision affirming the trial court's dismissal of all three (3) counts of the Complaint *with prejudice* is erroneous and must be reversed. DIRECTORS properly stated a cause of action pursuant to the plain language of §607.0850(9)(b), *Fla. Stat.* under Count I of the Complaint because ASSOCIATION's adoption of the Indemnification Provision is an exercise of power granted by §607.0850(7), *Fla. Stat.* and there is no "judgment or other final adjudication" against DIRECTORS establishing any of the prohibitive conduct excluded by the terms of the Indemnification Provision or delineated by §607.0850(7). DIRECTORS properly stated a cause of action pursuant to the plain language of §607.0850(9)(a), *Fla. Stat.* under Count II of the Complaint and are entitled to seek a court determination as to whether they are fairly and reasonably entitled to indemnification in view of all circumstances of the case despite any adjudication of

[8] The limitations on indemnification and advancement set forth in §607.0850(7), *Fla. Stat.* would include a blanket exception for all actions by the corporation if ASSOCIATION was correct.

liability in the Earlier Action to the extent of their success on the merits or otherwise in defense of claims, issues or matters in the Earlier Action.

DIRECTORS properly stated a cause of action pursuant to the plain language of §607.0850(9)(c), *Fla. Stat.* under Count III of the Complaint and are entitled to seek a court determination as to whether they are fairly and reasonably entitled to indemnification in view of all the relevant circumstances, regardless of whether they met the standard of conduct set forth in §§607.0850(2) or (7), *Fla. Stat.* because DIRECTORS are uncompensated volunteers who acted in good faith and in a manner they believed to be in the best interests of ASSOCIATION. The cause of action for indemnification created by this subsection permits a court to order indemnification even if the indemnitee does not ultimately prevail on the merits of the underlying action when it is fair and reasonable to do so. See Ch. 8, Subch. E, Introductory Comment, §2, *Model Bus. Corp. Act*. The indemnification contemplated by this subsection offers an appropriate remedy for the miscarriage of justice in the Earlier Action that the trial court sought to correct by ordering a new trial should the Fourth District's reversal of that order ultimately become final. (A18-21)

III. CLAIMS FOR CORPORATE INDEMNIFICATION AND ADVANCEMENT ARE INDEPENDENT ACTIONS AND EXPRESSLY CONTEMPLATED AS SUCH BY §607.0850(9), *FLA. STAT.*

DIRECTORS' claims for indemnification and advancement arise from rights

created by §607.0850, *Fla. Stat.* and by ASSOCIATION's Bylaws whereas the Earlier Action arose out of alleged tortious conduct. [9] ASSOCIATION's argument that DIRECTORS waived each of the three (3) separate causes of action dismissed with prejudice below by failing to assert them as compulsory counterclaims in the Earlier Action is unfounded because DIRECTORS' claims do not arise out of the same transaction or occurrence as the Earlier Action.[10] (IB25-26)

ASSOCIATION's argument also contravenes the plain language of §607.0850(9), *Fla. Stat.* which provides a corporate official "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 added.) ASSOCIATION admits "alternative forums to assert an indemnity claim. . . are available to an officer/director who *was* a defendant in a proceeding. . ."). (AB36-38) The very availability of "an alternative forum" refutes any notion that statutory

[9] ASSOCIATION concedes jurisdiction to consider this issue even though it was not reached by the Fourth District. (AB33, 34)

[10] ASSOCIATION's reliance upon commercial cases like *Chew v. Lord*, 181 P.3d 25 (Wash.App. 2008); *Safway Steel Products v. Casteel Const. Co*., 1998 WL 792189 (N.D. Ind. 1998); *Lear Resources, Inc. v. Uland*, 485 N.E.2d 134 (Ind. App. 1985); *Mobile Power Enterprises, Inc. v. Power Vac, Inc.*, 496 F.2d 1311 (10th Cir. 1974) and *Waikiki Hobron Associates v. Investment Mortgage, Inc.*, 13 B.R. 700, 703 (Bankr.D.Haw. 1981) is misplaced because both the underlying claims and the right to indemnity arose out of a singular commercial transaction and no controlling indemnification statutes are involved in those cases.

indemnification claims are compulsory in nature under *Fla. R. Civ. P.* 1.170(a) as an alternative forum would not be needed if such claims are waived under the rule.

ASSOCIATION argues §607.0850(9), *Fla. Stat.* required DIRECTORS to bring their claims as compulsory counterclaims in the Earlier Action because DIRECTORS are[is] still defendants in the Earlier Action. (AB36-38) ASSOCIATION's construction of the statute was rejected in *Landry v. Fidelity & Deposit Co. Of Maryland*, 2002 WL 1009478 (E.D. La. 2002)(Identical statutory language "who is a party to a proceeding" held ***not*** to require application for indemnification be made during "pendency of the underlying proceeding".) Florida, Colorado and Utah add the phrase "or was" in order to eliminate any ambiguity created by the present tense verb "is" and make clear that alternative forums are available to all indemnitees.[11] §607.0850(9), *Fla. Stat.* is based upon *Model Bus. Corp. Act* §8.54 (the "Model Act"). The Official Comment to that section explains "[a]pplication for indemnification under section 8.54 may be made **either** to the court in which the proceeding was heard **or** to another court of appropriate jurisdiction". (Emphasis added.)

It is procedurally impractical to require indemnification claims to be

[11] §7-109-105(1), *Col. Rev. Stat.*, §7-129-105(1), *Col. Rev. Stat.*; §16-10a-905, *Utah Code*, §16-6a-905, *Utah Code*. §16-6a-905(1), *Utah Code* clearly provides:

> . . . a director of the nonprofit corporation who is or was a party to a proceeding may apply for indemnification to: (a) the court conducting the proceeding; or (b) another court of competent jurisdiction.

advanced as compulsory counterclaims because consideration of such claims "prior to the final disposition of the underlying action" is a "wasteful process". *Advanced Mining Sys., Inc. v. Fricke*, 623 A.2d 82, 84-85 (Del.Ch. 1992) See also *In re Ransome Group Investors I, LLLP*, 424 B.R. 547, 554 (M.D. Fla. 2009) ("[I]ndemnification dispute generally cannot be resolved until after the merits of the underlying controversy are decided because the good faith standard requires a factual inquiry into the facts that gave rise to the lawsuit."); *Paolino v. Mace Security Int'l, Inc.*, 985 A.2d 392, 397 (Del. Ch. 2009)(Allowing advancement claim to proceed but staying indemnification claim as premature and recognizing entitlement may turn on the outcome of the underlying action.); *T.S. Kaung v. Cole National Corp.*, 884 A.2d 500, 509 (Del. 2005)("[R]ight to indemnification is a decision that must necessarily await the outcome of the . . . litigation."); *Scott v. Poindexter*, 53 S.W.3d 28, 34 (Tex. App.-San Antonio 2001).

The Dismissal Order is erroneous and must be reversed because §607.0850(9), *Fla. Stat.* expressly authorizes separate actions and *Fla. R. Civ. P.* 1.170(a) does not bar the statutory claims asserted in the Complaint.

CONCLUSION

The objective of Florida law is to encourage qualified individuals to participate in corporate governance by affording protection from personal liability in the form of statutory immunity and indemnification to corporate officials who do nothing wrong or who are merely negligent. §§617.0831, 607.0831 and

607.0850, *Fla. Stat.*

DIRECTORS meet the statutory criteria to state a cause of action seeking court ordered indemnification and advancement because they are uncompensated volunteers who acted in good faith and there is ***no*** final adjudication against any of them establishing nonindemnifiable conduct. (R6,¶31, R7-8,¶36) An adverse final outcome of ASSOCIATION's appeal in the Earlier Action will not be dispositive of the merits of the Indemnification Action because the jury in the Earlier Action neither considered nor made findings as to any of the preclusive conduct delineated by §607.0850(7), *Fla. Stat* or excluded by the terms of the Indemnification Provision.

The fundamental purpose of §607.0850(9), Fla. Stat. is to prevent a corporate indemnitor, like ASSOCIATION, from being the corporate indemnitee's judge and jury. DIRECTORS are entitled to a trial on the merits of their claims. The Decision and the Dismissal Order must be reversed because DIRECTORS properly stated causes of action pursuant to §607.0850, *Fla. Stat.* under all three counts of the Complaint. Alternatively, the Decision and Dismissal Order should be reversed in part with directions that DIRECTORS be granted an opportunity to amend. (IB22)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this ____ day of July 2010 to: Michael W. Moskowitz, Esq., and Scott M. Zaslav, Esq., Moskowitz, Mandell, Salmin & Simowitz, P.A., Attorneys For Respondent, 800 Corporate Drive, Suite 500, Fort Lauderdale, Florida 33334.

Respectfully Submitted,
GRUMER & MACALUSO, P.A.
Attorneys for Petitioners
One East Broward Boulevard
Suite 1501
Ft. Lauderdale, Florida 33301
(954) 713-2700 (Broward)
(954) 713-2713 (Fax)

By: _____
KEITH T. GRUMER
Fla. Bar No. 504416

By: _____
ROWENA D. REICH
Fla. Bar No. 549592

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of *Fla. R. App. P.* 9.210(a)(2).

By: _____
KEITH T. GRUMER