IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-21

LOWER TRIBUNAL CASE NO. 3D08-1713

BANCO INDUSTRIAL DE VENEZUELA, C.A., MIAMI AGENCY, a foreign corporation, and BIV INVESTMENTS AND MANAGEMENT, INC., a Florida corporation, a/k/a BIV INVERSORES Y PROMOTORES,

Petitioners,

v.

ESPERANZA DE SAAD and JOSEPH BEELER, P.A.,

Respondents.

RESPONDENT JOSEPH BEELER, P.A.'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

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Citations to the opinion of the Third District Court of Appeal that is the subject of the Petition in this case, *Banco Indus. de Venez., C.A. v. de Saad*, 21 So. 3d 46 (Fla. 3d DCA 2009), will appear as "Op. at __." A copy of the Third District's opinion is attached hereto under Tab A.

Further, Petitioners Banco Industrial de Venezuela, C.A., Miami Agency and BIV Investments and Management, Inc. will be referred to collectively herein as BIV.

STATEMENT OF THE CASE AND THE FACTS

This case presents a straightforward application of Florida's indemnification statute, Fla. Stat. § 607.0850. Esperanza de Saad is the former vice-president and general manager of BIV's Miami Agency. Op. at 2. In May 1998 the United States indicted de Saad on ten counts of money laundering and one count of conspiracy to launder money while acting in her capacity as BIV's vice-president. *Id.* Faced with those charges, de Saad retained Joseph Beeler, P.A. as her lead defense counsel and, as part of their fee agreement, assigned to the law firm the right to seek indemnification against BIV as security for unpaid fees, costs, and expenses. *Id*. Following a lengthy jury trial, United States District Judge Bernard A. Friedman ***acquitted*** de Saad on all charges as a matter of law. *Id.* at 2–3.

The Government then filed a notice of appeal of the court's final judgment acquitting de Saad. *Id.* at 3. Seven months after her acquittal, the Government charged de Saad with a new offense, a single count of money structuring, to which de Saad pled guilty on the condition that the Government dismiss its appeal of the judgment acquitting her on all money laundering and conspiracy charges. *Id*.

Thereafter, de Saad brought the instant action against BIV, seeking indemnification for the attorneys' fees and costs incurred in the defense of the money laundering and conspiracy charges, and seeking past wages for BIV's breach of her employment agreement. *Id.* Also, Joseph Beeler, P.A. filed a

complaint in intervention. *Id.* The trial court, the Honorable Robert N. Scola, Jr., presiding, entered summary judgment on liability in favor of de Saad and Joseph Beeler, P.A. on the indemnification counts. *Id*. It then held a bench trial on damages, awarding damages on the money laundering and conspiracy charges for which de Saad was acquitted, while ***awarding no damages whatsoever (because none were requested)*** on the subsequent money structuring charge. *Id*. at 3–4.

As for the breach of contract count, the court granted summary judgment in favor of de Saad and the law firm but only awarded damages to de Saad. *Id.* at 4.

On appeal, the Third District affirmed. It reviewed the mandatory indemnification provisions in Florida's indemnification statute, Fla. Stat. § 607.0850(1) & (3), which require that a corporation indemnify an officer prosecuted "by reason of the fact" that she was an officer "[t]o the extent" that she has been "***successful on the merits or otherwise***" in defense of the prosecution or "in defense of any claim, issue, or matter therein." Op. at 4–5 (emphasis in original). The court also observed that Delaware's indemnification statute "is strikingly similar to section 607.0850," and it reviewed analogous decisions from the Delaware courts. *Id*. at 5–7. And, as de Saad was not convicted of the money laundering and conspiracy offenses – she was, in fact, ***acquitted*** on those charges – the Third District held that de Saad (and the law firm) were entitled to mandatory indemnification in the defense of those charges. *Id.* at 7.

The Third District also rejected BIV's contention that subsection (7) of section 607.0850 applied in this case, stating that subsection (7) applies to claims for "***voluntary*** indemnification by the corporation ***separate and apart*** from the ***mandatory*** indemnification required by subsections (1) and (3)." *Id.* at 7 n.4 (emphasis supplied) (comparing *Alternative Development, Inc. v. St. Lucie Club & Apartment Homes Condominium Ass'n*, 608 So. 2d 822 (Fla. 4th DCA 1992)).[1]

Following the Third District's decision, BIV sought rehearing, rehearing en banc, and certification to this Court, which the Third District denied. BIV now seeks to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

As shown by the plain language of Florida's indemnification statute, it is the Legislature's considered (and unremarkable) judgment that a corporate officer should be indemnified on criminal charges for which she was successful. The Third District's decision faithfully follows the plain language of the indemnification statute and, with it, the public policy of this State.

Seeking to invoke this Court's jurisdiction, however, BIV ignores pertinent parts of Florida's indemnification statute to argue that the Third District's decision

[1] The Third District also affirmed summary judgment on BIV's breach of de Saad's employment agreement, as it was undisputed that BIV neither terminated de Saad nor paid her compensation following clarification of the Government's charges. Op. at 8. As Joseph Beeler, P.A. obtained no recovery on the claims for breach of de Saad's employment contract, *see id.* at 4, it relies upon and adopts the additional arguments in de Saad's jurisdictional brief in this Court.

is contrary to the statute and conflicts with the Fourth District's decision in *Alternative Development, Inc. v. St. Lucie Club & Apartment Homes Condominium Ass'n*, 608 So. 2d 822 (Fla. 4th DCA 1992). Among other things, BIV fails to quote accurately subsection (7) of the statute, conspicuously omitting statutory language making plain that the limitations on indemnification in that subsection only apply to voluntary indemnification by a corporation outside of the statute.

Likewise, failing to quote pertinent language under subsection (3), BIV urges this Court to accept jurisdiction, claiming that this case is "critically important," BIV Br. at 3, because de Saad, having been acquitted of all money laundering and conspiracy charges, pled guilty to a subsequent charge of money structuring. However, putting aside BIV's hyperbole, the statute makes plain that an officer must be indemnified on all charges for which she is successful, even if unsuccessful on a separate – and, in this case, subsequent – charge. That being the Legislature's longstanding statutory decision, the Third District's decision breaks no new ground and does not warrant the exercise of discretionary review.

ARGUMENT

THE COURT SHOULD DECLINE TO EXERCISE DISCRETIONARY JURISDICTION

I. Florida's Indemnification Statute

Because BIV fails to accurately describe or review Florida's indemnification statute (*i.e.*, the pertinent law), we begin with a brief overview of the statute.

By its plain language, the statute provides for mandatory indemnification to the extent that the officer has been successful in whole ***or in part*** in the defense of a proceeding. Complete success is not required; rather, section 607.0850(3) expressly provides that:

> (3) ***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.); *see id.* § 607.0850(1) (indemnification statute covers proceedings against an officer "by reason of the fact" that she was a corporate officer). Thus, to obtain mandatory, court-ordered indemnification, an officer, such as de Saad, must only show that (1) she was successful in whole or in part in the defense of a proceeding and (2) the proceeding resulted from alleged conduct committed by the officer in her capacity as an officer.

In contrast, under subsection (7), a corporation may decide to voluntarily indemnify an officer. But, in those circumstances, other factors must be present:

> (7) The ***indemnification*** and advancement of expenses provided ***pursuant to this section are not exclusive***, and ***a corporation may make any other or further indemnification*** or advancement of expenses of any of its directors, officers, employees, or agents, under any bylaw, agreement, vote of shareholders or disinterested directors, or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office. ***However***, indemnification or advancement of expenses shall not be made to or on behalf of any director, officer, employee, or

> agent if a judgment or other final adjudication establishes that his or her actions, or omissions to act, were material to the cause of action so adjudicated and constitute:
>
> (a) A violation of the criminal law, unless the director, officer, employee, or agent had reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful;
>
> (b) A transaction from which the director, officer, employee, or agent derived an improper personal benefit. . . .

(Emphasis supplied.)

BIV rewrites or ignores these statutory provisions in a number of different ways, attempting to create a conflict, manufacture false legislative intent, and urge that this case is critically important when it actually involves a straightforward application of the statute. In particular, BIV fails to quote in full the operative language of subsection (3), which provides that partial success still gives rise to mandatory indemnification, making but a single, incomplete reference to subsection (3) in its jurisdictional brief. *See* BIV Br. at 7.

BIV also improperly transfers elements applicable where the corporation seeks to voluntarily indemnify its officer under subsection (7) to the situation presented here, that is, mandatory, court-ordered indemnification under subsection (3). Indeed, subsection (7) contains absolutely no reference to mandatory indemnification under subsection (3) – rather, the first sentence of subsection (7) and the word "***However***" that begins the second sentence show that subsection (7)

only applies to voluntary indemnification by a corporation – statutory language that BIV wholly omits from its jurisdictional brief. *See* BIV Br. at 2 n.3 (claiming to quote "in relevant part" subsection (7), but omitting the entire first sentence of that subsection and the word "However" that begins the second sentence).

Subsection (9) of the Florida statute confirms this analysis. Under subsection (9)(a), the court awards mandatory indemnification when the requirements of subsection (3) are met, with the statute making no mention whatsoever of subsection (7). In contrast, subsection (9)(b), references subsection (7) and applies to indemnification "by virtue of the exercise by the corporation of ***its power*** pursuant to subsection (7)." (Emphasis supplied). Finally, subsection (9)(c) permits a court to order indemnification "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)." Thus, subsection (7) only has relevance when a corporation decides to provide voluntary indemnification and has no application to mandatory indemnification.

Having failed to fairly present Florida's indemnification statute, BIV creates false arguments to invoke this Court's jurisdiction – arguments that we now refute.

II. No Conflict Is Presented Here or Reason to Exercise Jurisdiction

BIV argues that the Third District's decision conflicts with the decision in *Alternative Development, Inc. v. St. Lucie Club & Apartment Homes Condominium*

Ass'n, 608 So. 2d 822 (Fla. 4th DCA 1992), BIV Br. at 5, and that this Court should exercise its discretionary jurisdiction because, according to BIV, the Third District "turned [subsection (7)] on its head" when rejecting BIV's argument that subsection (7) applies to mandatory indemnification under subsections (1) and (3), *id*. at 7. BIV also claims that the Third District's decision "misapprehended the significant differences between Delaware's and Florida's indemnification statutes," and is contrary to "public policy" as enacted by the Florida Legislature in this state's indemnification statute. *Id*. at 3. BIV is mistaken.

First, no conflict exists here. In *Alternative Development, Inc*., officers were seeking indemnification in a suit brought by an association and its shareholders. 608 So. 2d at 827. When an officer is sued by the corporation, it is especially important to scrutinize the indemnification request because the corporation faces the possibility of having to pay the legal fees of the very individuals it has sued. *See Turkey Creek Masters Owners Ass'n v. Hope*, 766 So. 2d 1245, 1247 (Fla. 1st DCA 2000). Here, however, the underlying action was not between BIV and de Saad. Rather, it was between de Saad and the Federal Government. Thus, for this reason alone, no conflict is presented here.

Also, the Fourth District has now issued a new decision involving Florida's indemnification statute – *Wendt v. La Costa Beach Resort Condominium Ass'n*, 14 So. 3d 1179 (Fla. 4th DCA 2009) (juris. review pending Case No. SC09-1914). In

Wendt (which BIV fails to cite), the Fourth District holds that neither Florida's indemnification statute, nor the corporation's bylaws, permits indemnification where the underlying action was between an officer and her corporation. *See id.* at 1181-82. Thus, the decision in *Wendt* shows that the Fourth District treats differently indemnification claims where the underlying action was between the officer and her corporation (as in *Alternative Development, Inc.*) and indemnification claims where, as here, the underlying action was between the officer (de Saad) and a third party (the Federal Government). Indeed, the decision in *Wendt* eliminates any arguable conflict between the instant case and the Fourth District's decision in *Alternative Development, Inc.*

Second, it is BIV, and not the Third District, that turns subsection (7) on its head, defying legislative intent and public policy. The plain language of subsection (7) – which BIV fails to quote – shows that it only applies to voluntary indemnification outside of the statute, and not to mandatory indemnification under subsection (3). Thus, by seeking to engraft the requirements for voluntary indemnification under subsection (7) to mandatory indemnification under subsection (3), BIV turns the statute on its head, defies legislative intent, and circumvents public policy. In fact, the Third District's decision follows the Legislature's intent and public policy, holding simply and correctly that BIV must indemnify its officer on all counts for which she was acquitted.

Finally, the Third District's decision correctly finds Delaware law persuasive. *See In re Banco Latino Int'l*, No. 94-10202-BKC-AJC, 2003 Bankr. LEXIS 2139, at *17 (S.D. Fla. Jan. 23, 2003) (stating Delaware's indemnification statute "is ***virtually identical*** to Fla. Stat. § 607.0850") (emphasis supplied). Indeed, contrary to BIV's claims, the Third District did ***not*** "misapprehend[ ] the significant difference" between the Delaware and Florida statutes, *see* BIV Br. at 3, because no such difference exists in this case. Subsection (7) of the Florida statute finds its equivalent in subsection (f) of the Delaware statute, which provides that:

> The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section ***shall not be deemed exclusive of any other rights*** to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office. . . .

8 Del. C. § 145(f) (emphasis supplied). Thus, subsection (f) of the Delaware statute is nearly identical to the first sentence of subsection (7), showing that both subsections only apply to voluntary indemnification by a corporation, not mandatory indemnification. As for the second sentence of subsection (7), it begins with the transition word "***However***," showing that the limitations contained therein merely modify the first sentence, thus only applying to voluntary indemnification.

CONCLUSION

For all the foregoing reasons, the Court should deny review in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered via U.S. Mail to counsel for Esperanza de Saad, William L. Petros, Esq., Petros & Elegant, 4090 Laguna Street, 2nd Floor, Coral Gables, Florida 33146 and Dinah S. Stein, Esq./Shannon Kain, Esq., Hicks & Kneale, P.A., 799 Brickell Plaza, Suite 900, Miami, Florida 33131; counsel for BIV, Carol A. Licko, Esq., Hogan & Hartson, L.L.P., 1111 Brickell Avenue, Suite 1900, Miami, Florida 33131, and Jessica L. Ellsworth, Esq., Hogan & Hartson L.L.P., Columbia Square, 555 13th Street, N.W. Washington, DC 20004-1109 this ____ day of January, 2010.

By:_____
H. Eugene Lindsey

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

By: _____
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