IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-21

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,

vs.

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

Respondents,

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT
L.T. CASE NO. 3D08-1713
01-13868

RESPONDENT ESPERANZA DE SAAD'S BRIEF ON JURISDICTION

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This brief is filed on behalf of Respondent, Esperanza de Saad ("de Saad"). Petitioners, Banco Industrial de Venezuela, C.A., Miami Agency and BIV Investments and Management, Inc., a/k/a BIV Inversores Y Promotores, will collectively be referred to as "BIV" or the "bank."

STATEMENT OF THE CASE AND FACTS

The bank's brief includes "facts" not contained in the decision below, and grossly misstates the Third District's holding. For example, BIV misrepresents that the district court's holding will require it to indemnify de Saad for a count of money structuring to which she ultimately pled guilty. (Br., pp. 1, 3, 4, 6-7). As the Third District's decision demonstrates, this separate charge occurred seven months after de Saad's acquittal of the eleven counts that are the subject of this indemnification action. She has never sought indemnification for the unrelated subsequent charge. The Third District's decision requires only that BIV indemnify de Saad for her successful defense of the money laundering and conspiracy charges that resulted in an acquittal as a matter of law.

Although BIV characterizes this case as being one of critical importance to all corporations doing business in Florida, it actually involved a clear-cut application of Florida's corporate indemnification statute, section 607.0850, Florida Statutes, to a discrete set of facts. The decision below[1] explains the pertinent facts:

[1] The opinion below is attached as Appendix 1 ("A:1") to this brief.

> De Saad is the former vice-president and general manager of Banco's Miami agency, BIV. As part of an undercover sting operation involving a U.S. Customs confidential informant, de Saad was alleged to have facilitated the deposit of approximately $4 million in drug proceeds into BIV accounts. . . . [T]he United States charged de Saad with ten counts of money laundering and one count of conspiracy to launder money while acting in her capacity as the vice-president of BIV. . . . After a lengthy trial in which the jury found her guilty on all counts, the trial judge granted de Saad's motion for judgment of acquittal as to all counts finding that the United States had failed to prove all of the necessary elements of the alleged crimes. The United States filed an appeal of the trial court's acquittal. Seven months after her acquittal, de Saad was charged and pled guilty to one count of money structuring on the condition that the government drop the appeal of the judgment of acquittal on the money laundering and conspiracy charges. The government dropped the appeal. De Saad then sought from BIV her past wages pursuant to her contract of employment and also sought indemnification for attorney's fees incurred in her defense of the money laundering and conspiracy charges. BIV denied both claims.

(A:1 at pp. 2-3).[2] On the indemnification issue, the circuit court and Third District correctly determined that de Saad's judgment of acquittal of all eleven counts in the criminal proceeding was "success[] on the merits or otherwise" and that she was prosecuted "by reason of the fact" that she was a "director, officer, employee, or agent of the corporation" as those terms were used in subsections (1) and (3). Therefore, de Saad is entitled to mandatory indemnification for these counts.

In a footnote, the Third District rejected Petitioners' contention below that, because de Saad later pled guilty to the separate money structuring charge,

[2] All emphasis by underline herein is supplied unless otherwise noted.

subsection (7)[3] of the statute should apply to bar indemnification. (A:1, p. 7, n.4). In reaching this determination, the district court did not follow Delaware indemnification law, as Petitioners repeatedly contend.[4] To the contrary, the court interpreted the plain statutory language of section 607.0850, and determined that subsection (7) does not apply to claims for mandatory indemnification under

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[3] BIV's brief omits key language when quoting from subsection (7). The provision provides, in pertinent part:

> (7) The indemnification and advancement of expenses provided pursuant to this section <u>are not exclusive, and a corporation may make any other or further indemnification or advancement of expenses</u> 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. <u>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</u>:
>
> (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; [or]
>
> * * *
>
> (d) Willful misconduct or a conscious disregard for the best interests of the corporation in a proceeding by or in the right of the corporation to procure a judgment in its favor or in a proceeding by or in the right of a shareholder.

[4] Curiously, BIV acknowledges that there is no analog to subsection (7) in the Delaware statute, yet claims that the district court adopted Delaware law in concluding this provision did not apply. (Br., pp. 1-2, 6). A plain reading of the court's footnote demonstrates that it reached this conclusion by interpreting <u>the statutory language itself</u>, and not Delaware law. (A:1 at p. 7, n.4).

subsections (1) and (3).

On the breach of contract issue, the Third District correctly interpreted the unambiguous employment contract between de Saad and BIV and determined that BIV was the sole breaching party. (A:1 at pp. 7-9).

SUMMARY OF THE ARGUMENT

There is no express and direct conflict between the decision below or any Florida appellate decision. Accordingly, there is no basis for this Court to exercise its discretionary jurisdiction, and the petition should be dismissed.

ARGUMENT

There is no express and direct conflict between the decision below or any Florida appellate decision, and thus no basis for this Court to exercise its discretionary jurisdiction.[5] BIV grasps at straws by claiming express and direct conflict with the corporate indemnification statute and at least eight different decisions on four different points of law.[6] None of the alleged bases satisfy the

[5] A petitioner must demonstrate express and direct conflict "with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. "Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). Inherent or implied conflict cannot serve as a basis for this Court's jurisdiction. *Dep't of Health & Rehab. Servs. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986).

[6] BIV's petition demonstrates that it merely seeks another bite at the apple. In fact, the bank has reiterated almost every argument raised on appeal below under the guise of "express and direct conflict."

constitutional requirement of express and direct conflict.

A. There is No Conflict with Section 607.0850, Fla. Stat., or *Alternative Development, Inc. v. St. Lucie Club & Apt. Homes Condominium Ass'n*, 608 So. 2d 822 (Fla. 4th DCA 1992).

There is no conflict between the Third District's decision and the plain language of section 607.0850, Florida Statutes, or the Fourth District's decision in *Alternative Development*. The Third District correctly applied subsections (1) and (3), and held that de Saad's complete acquittal was "success[] on the merits or otherwise," for which she was entitled to mandatory indemnification. The district court also correctly held under the plain statutory language that "the proscription against indemnification in subsection (7) applies to voluntary indemnification by the corporation separate and apart from the mandatory indemnification required by subsections (1) and (3)." (A:1 at p. 7, n.4). The district court cited to *Alternative Development* as distinguishable authority. (A:1 at p. 7, n.4).

The plain language of the statute demonstrates that subsection (7) does not apply to claims for mandatory indemnification under subsections (1) and (3). Subsection (7) only applies where a corporation is voluntarily seeking to indemnify its officer. Subsection (7) does not apply to the case at bar, where the corporation has not provided "other or further" indemnification through "bylaw, agreement, vote of shareholders" or otherwise.[7] Thus, there is no conflict between the

[7] The purpose of subsection (7) is simple -- it allows a corporation to provide

decision below and section 607.0850, Florida Statutes.

Nor is there any conflict between the Third District's decision and the Fourth District's *Alternative Development* decision. In *Alternative Development*, officers of a condominium association were seeking indemnification as the prevailing parties on counts of breach of fiduciary duty and fraud in a suit filed by the association and its shareholders. 608 So. 2d at 827. Florida law has recognized that, when an officer is sued not by a third party but by his or her own corporation, it is especially important for the court to scrutinize the request for indemnification because the corporation faces the possibility of having to pay the legal fees of the very individuals sued. *See Turkey Creek Masters Owners Ass'n v. Hope*, 706 So. 2d 1245, 1247 (Fla. 1st DCA 2000) ("In this situation, the corporation faces the possibility of being 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.").

Unlike *Alternative Development*, the underlying action here was not between BIV and de Saad, but between the federal government and de Saad. As the Third

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indemnification to its officers in addition to that provided by the statute, but prevents the corporation (or unscrupulous corporate officers) from creating agreements that would indemnify, for example, conduct that the officer knows is in violation of the law, or conduct that amounts to willful misconduct or conscious disregard for the best interests of the corporation.

District implicitly recognized in distinguishing *Alternative Development*, that case involved policy considerations that are not present here.[8] Accordingly, the Third District correctly concluded twice[9] that the two cases were factually distinguishable, which itself renders review on the ground of conflict inapplicable. *See Wilson v. S. Bell Tel. & Tel. Co.*, 327 So. 2d 220, 220-21 (Fla. 1976) (review on the ground of conflict does not apply where the cases claimed to be in conflict are distinguishable on their facts, or on the rule of law as applied to those facts).

Additionally, a recent Fourth District decision has clarified Florida corporate indemnification law and *Alternative Development* on other grounds. In *Wendt v. La Costa Beach Resort Condominum Association, Inc.*, 14 So. 3d 1179 (Fla. 4th DCA 2009), the district court held that a claim for indemnity under section 607.0850 is unavailable in the context of a lawsuit between a corporation and its

[8] BIV also cites to *Colonial Guild Ltd. v. Pruitt*, 2004 WL 627921 (Ohio Ct. App. Mar. 31, 2004), an Ohio appellate court decision, with which there can be no conflict jurisdiction. *See* art. V, § 3(b)(3), Fla. Const. In any event, *Pruitt* involved a corporate officer who unsuccessfully defended himself in an underlying Florida action against a claim of breach of fiduciary duty, and who sought indemnification from the corporation pursuant to an indemnification agreement. *Id.* at *2. The court properly applied subsection (7) in that case, since the corporation provided for "other or further" indemnification of its corporate officers by agreement, and correctly concluded the officer could not be indemnified for his defense costs in a lawsuit in which a jury found him guilty of breaching his fiduciary duty to the corporation. *Id.* at *2-*3.

[9] On January 21, 2010, the Third District issued an opinion denying BIV's motion to stay mandate and stated that it had again reviewed the decisions that BIV claims conflict with, including *Alternative Development*, and "[u]pon review of those decisions we, again, do not find conflict." The opinion is attached as Appendix 2 to this brief.

own directors for breach of fiduciary duty. Without mentioning its prior *Alternative Development* decision, the Fourth District explained that such an action is not one for indemnity by definition because it does not involve a claim that the officer either (1) discharged a duty that should have been discharged by the corporation, or (2) has been held vicariously liable to a third party and is seeking recovery from the corporation whose action caused the damage. *See id.* at 1181-82. The Fourth District certified conflict with the First District decision in *Turkey Creek*, which held that the statute "also provides for indemnification in a case . . . where a corporation has sued its own agent." *Wendt*, 14 So. 3d at 1182.

Wendt demonstrates that *Alternative Development* is probably no longer good law, since the Fourth District has clarified that under the facts of *Alternative Development*, section 607.0850 does not apply at all. Thus, to the extent there is any conflict between the Third District's decision below and the Fourth District's decision in *Alternative Development*, that conflict is resolved by looking to *Wendt*.

Finally, while this Court ultimately may be called upon to resolve the certified conflict between *Wendt* and *Turkey Creek* as to whether section 607.0850 applies in a case where a corporation has sued its own agent, that issue has no bearing on this case, as de Saad was not sued by BIV.

Accordingly, there is no express and direct conflict and this Court should

decline to exercise its discretionary jurisdiction.[10]

B. There is No Conflict with *Fecteau v. S.E. Bank, N.A.*, 585 So. 2d 1005 (Fla. 4th DCA 1991); *Langford v. Paravant, Inc.*, 912 So. 2d 359 (Fla. 5th DCA 2005); *Fabel v. Masterson*, 951 So. 2d 934 (Fla. 4th DCA 2007); *Marshall Const., Ltd. v. Coastal Sheet Metal Roofing, Inc.*, 569 So. 2d 845 (Fla. 1st DCA 1990); *Thomas v. Western World Ins. Co.*, 343 So. 2d 1298 (Fla. 2d DCA 1977); *Hosp. Correspondence Corp. v. McRae*, 682 So. 2d 1177 (Fla. 5th DCA 1996); and *Fasano v. Hicks*, 667 So. 2d 1033 (Fla. 2d DCA 1996).

There is also no conflict between the Third District's decision and the decisions cited by the bank on the breach of contract claim. *Fecteau* and *Langford* hold that when a contract is ambiguous, and the parties present two reasonable interpretations of the contractual language, summary judgment is inappropriate. *Fecteau*, 585 So. 2d at 1007; *Langford*, 912 So. 2d at 360-61. Here, the Third District held that the contract and personnel manual unambiguously permitted the bank to suspend de Saad only pending "clarification" of the charges. (A:1, pp. 7-8). Although BIV continues to argue that the term "clarification" can equate to

[10] Petitioners inappropriately rely on affidavits filed by their expert witnesses below and claim these affidavits provided disputed factual issues as to whether de Saad was "successful on the merits or otherwise" and was charged "by reason of the fact" that she was a corporate officer. The district court did not address this meritless argument below. "Conflict between decisions . . . must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction. *Reaves v. State*, 485 So. 2d 829, 830 & n.3 (Fla. 1986). In any event, BIV does not allege that there is express and direct conflict on this ground and there is none. Florida law is clear that affidavits that are not based on personal knowledge and contain nothing more than conclusions of law are inadmissible on summary judgment. *See, e.g., Buzzi v. Quality Serv. Station, Inc.*, 921 So. 2d 14, 15 (Fla. 3d DCA 2006).

"resolution or disposition," the Third District properly analyzed the plain meaning of that term and determined that BIV's interpretation was not reasonable. (A:1, pp. 7-8). There is no conflict with *Fecteau* or *Langford*, as one party's unreasonable interpretation of an unambiguous contract will not preclude summary judgment.

BIV next claims conflict with *Fabel*, 951 So. 2d at 934**,** and *Marshall*, 569 So. 2d at 845, asserting that the Third District failed to determine whether de Saad breached the contract first. There is no conflict, as the Third District interpreted the unambiguous employment contract and clearly determined that BIV was the sole breaching party.[11] (A:1, pp. 7-9).

Accordingly, BIV has also failed to demonstrate any conflict on this basis, and the petition should be dismissed.

CONCLUSION

This Honorable Court should decline to exercise its discretionary jurisdiction, as the Petitioners have wholly failed to demonstrate express and direct conflict as required by Art. V, § 3(b)(3) of the Florida Constitution. The Petition should be dismissed.

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[11] Petitioners also inappropriately claim conflict with *Thomas*, 343 So. 2d at 1303; *McRae*, 682 So. 2d at 1182; and *Fasano*, 667 So. 2d at 1034, asserting that the court failed to address their arguments on mitigation of damages and the remaining affirmative defenses. Again, "[c]onflict . . . must appear within the four corners of the majority decision." *See Reaves*, 485 So. 2d at 830 & n.3. The Third District did not address these meritless arguments below, and thus they are not a basis for this Court to exercise conflict jurisdiction. *See id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via e-mail and U.S. Mail this **29th** day of **January, 2010**, to: Carol A. Licko, Esq., Hogan & Hartson L.L.P., *Counsel for Petitioners*, Mellon Financial Center, 1111 Brickell Avenue, Suite 1900, Miami, Florida 33131; William L. Richey, Esq., William L. Richey, P.A., *Counsel for Respondent, Joseph Beeler, P.A.* One Biscayne Tower, 34th Floor, 2 South Biscayne Boulevard, Miami, Florida 33131-1897; and H. Eugene Lindsey, Esq., Katz Barron Squitero Faust, *Counsel for Respondent, Joseph Beeler, P.A.*, 2699 South Bayshore Drive, 7th Floor, Miami, Florida 33133.

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CERTIFICATE OF COMPLIANCE

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

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