**IN THE SUPREME COURT OF FLORIDA**

Case No. SC-____

**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.

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

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# PETITIONERS' BRIEF ON JURISDICTION

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## STATEMENT OF THE CASE AND FACTS

The Third District's holding—that a corporate officer who knowingly engages in criminal conduct, and pleads guilty to a federal felony charge arising out of that conduct, can nonetheless force a corporation to pay her defense costs as a matter of law on the theory that she negotiated a plea deal to fewer than all of the charges against her—directly conflicts and is fundamentally incompatible with Alternative Dev., Inc. v. St. Lucie Club & Apt. Homes Condo. Ass'n, 608 So. 2d 822, 828 (Fla. 4th DCA 1992). The Third District's holding adopts Delaware's indemnification law, in direct conflict with the Fourth District's ruling and contrary to Florida's indemnification law. Petitioners Banco Industrial de Venezuela, C.A., Miami Agency ("BIV-Miami Agency") and BIV Investments and Management, Inc. (collectively "BIV") thus seek certiorari review.

Esperanza de Saad was vice-president and general manager of BIV-Miami Agency when, through an undercover sting operation involving a U.S. Customs confidential informant, she allegedly facilitated the deposit of approximately $4 million in drug proceeds into BIV accounts. She was charged with ten counts of money laundering and one count of conspiracy to launder money.[1] She was found guilty by the jury on all counts. After the trial judge granted de Saad's motion for judgment of acquittal, the United States appealed. While the appeal was pending,

[1] Respondent Joseph Beeler is one of the many counsel she retained in the criminal proceeding. She assigned her right to seek indemnification to him.

de Saad pled guilty to one count of money structuring on the condition that the government drop its appeal.[2] De Saad then sued BIV seeking indemnification for her defense fees in the criminal proceedings and also asserting a claim for breach of her employment contract.

The Third District affirmed the trial court's award of over $4.5 million to Beeler and de Saad on the indemnification claim and more than $1 million to de Saad on her breach of contract claim. It found that subsection (7) of Florida's statutory indemnification law did not apply, and instead looked to Delaware law to interpret Florida's indemnification statute—despite a critical difference in the two statutes: the strict prohibition in subsection (7)[3] of Florida's law does not exist in Delaware, as the Fourth District recognized in Alternative Development, 608 So. 2d at 828. The Third District also affirmed the trial court's finding that BIV breached the employment contract as a matter of law by suspending de Saad

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[2] As part of her plea agreement, de Saad paid a fine of $50,000, was sentenced to a one-year probationary period, and agreed never to seek or accept employment with any financial institution in the United States without the prior express written consent of the U.S. Attorneys' Office.

[3] Subsection (7) states in relevant part that "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; [or] (b) A transaction from which the director, officer, employee, or agent derived an improper personal benefit . . ." Section 607.0850(7), Fla. Stat. (emphases added).

pending clarification of the charges against her and for not reinstating her before the contract expired—even though the contract expired long before her guilty plea ended the criminal proceeding and even though she was wholly unavailable to perform her job duties while in jail and on trial in California for money laundering.

This case presents a critically important question with statewide impact for all corporations doing business in Florida: Does Florida require mandatory indemnification for a corporate officer who knowingly breaks the law for personal gain and then pleads guilty to felony charges arising from that conduct? In addition, this case presents important and recurring questions of contract interpretation: Can a court decide which of two reasonable contract interpretations it likes better, resolve ambiguities, disregard the doctrine of mitigation, and ignore well-pled affirmative defenses? The answer to both questions is no, and the Third District's opinion has created direct and express conflicts on each of these points.

## SUMMARY OF ARGUMENT

The Third District misapprehended the significant differences between Delaware's and Florida's indemnification statutes. Florida's Legislature, as a matter of public policy, enacted an indemnification statute that prohibits a corporate officer from seeking indemnification if the officer knowingly violated the law or entered into a transaction for an improper personal benefit. Section 607.0850(7), Fla. Stat. There is no such similar prohibition in Delaware law. To

the contrary, Delaware's statute mandates indemnification even in cases where the Florida Legislature (as evidenced by its specific adoption of subsection (7)) has determined such an indemnification obligation would be offensive both to the public interest and the legitimate business community. The Third District disregarded Florida law, and instead imposed Delaware's indemnification law on BIV-Miami, a foreign corporation merely doing business in Florida. Ignoring Florida law to blindly follow Delaware law is not reasoned judicial decision-making. See Stuart R. Cohn, Dover Judicata: How Much Should Florida Courts Be Influenced By Delaware Corporate Law Decisions?, 83 Fla. Bar J. 20, 21 (Apr. 2009) ("The prominence of Delaware courts should not . . . lead to an overly submissive attitude or one that gives undue influence to Delaware decisions . . . [T]here are considerable differences between Florida and Delaware that ought to provide caution to Florida courts.").

This issue is one of critical public importance for all corporations doing business in Florida. Corporations should be able to depend on the Legislature's considered judgment that no corporation doing business in Florida should be forced to indemnify and pay for the criminal acts of a wayward corporate officer.

The Third District also created a direct and express conflict by allowing the trial court to resolve the quintessential jury question of which reasonable interpretation of de Saad's employment contract was more reasonable, simply

rejecting BIV's understanding that it could suspend her until there was clarification as to whether she engaged in wrongdoing. The Third District created additional direct and express conflicts with Florida law governing whether factual disputes (such as to who breached first) can be resolved on summary judgment, whether the doctrine of mitigation exists in Florida contract law, and whether summary judgment can be granted when a party has well-pled unresolved affirmative defenses. These issues are of great importance to all parties who contract for goods or services in Florida.

## ARGUMENT

### I. THE COURT SHOULD EXERCISE DISCRETIONARY JURISDICTION TO REVIEW THE THIRD DISTRICT'S INTERPRETATION OF FLORIDA'S INDEMNIFICATION STATUTE, WHICH IS IN DIRECT AND EXPRESS CONFLICT WITH ALTERNATIVE DEVELOPMENT, INC. V. ST. LUCIE CLUB & APT. HOMES CONDO. ASS'N, 608 So. 2d 822 (Fla. 4th DCA 1992).

### A. CONFLICT JURISDICTION

The conflict between the Third and Fourth District's positions is clear. The Third District "reject[ed]" the contention that subsection 7 applies to a mandatory indemnification request. Slip Op. at 7. In sharp contrast, the Fourth District, in addressing a claim for mandatory indemnification, held that "if the trial court finds under Section 607.0850(7) that the Dehons did not meet the requisite standard of conduct as it gave rise to the action, then they are not entitled to indemnification." Alternative Dev., 608 So. 2d at 828. This conflict is direct and express.

## B. REASONS TO EXERCISE DISCRETIONARY REVIEW

Florida's indemnification statute precludes indemnification where a cause of action is adjudicated in which the officer's actions material to that cause of action violated criminal law or amounted to a transaction providing an improper personal benefit to the officer or was outside the scope of that officer's employment. See § 607.0850(7), Fla. Stat. The Third District turned that provision on its head by "follow[ing]" the interpretation of Delaware's statutory indemnification statute that has been adopted by Delaware trial courts—which does not include the same language as the Florida statute. Slip Op. at 7. That error created a direct conflict with the Fourth District. The proper interpretation of Florida's statute is not governed by the Delaware courts' interpretation of Delaware law. Florida's indemnification statute was adopted after Delaware's. Florida did not simply adopt Delaware law. Instead, the Legislature enacted a very specific limitation on indemnification, set forth in subsection (7), that is not a part of Delaware's statute—demonstrating that Florida reached a different policy conclusion as to when indemnification should occur. As a matter of Florida law, indemnification cannot be awarded if an officer's acts material to a judgment or final adjudication violated criminal law or provided an improper personal benefit.

Florida is unique in precluding indemnification under these circumstances. The Fourth District—unlike the Third District—has embraced Florida's legislative

choice on the circumstances in which indemnification is prohibited. In Alternative Development, the Fourth District directly held that mandatory indemnification is specifically limited by the preclusive language in Section 607.0850(7). 608 So. 2d at 828. See also Colonial Guild Ltd. v. Pruitt, No. 03CA008319, 2004 WL 627921, at *2 (Ohio Ct. App. 9 Dist. Mar. 31, 2004) (same). BIV consistently cited this case as legal authority, and no one—not the Third District, not de Saad, and not Beeler—offered any meaningful distinction.

De Saad could not overcome the express prohibition of Section 607.0850(7), Fla. Stat. Indeed, as part of her plea deal, she admitted she violated federal law by illegally accepting $20,000 in checks—a clear improper personal benefit. Thus, the trial court's grant of summary judgment to her, and the Third District's affirmance, was in error. Given the conflict the Third District has created by holding such a wayward corporate officer must be indemnified, review is warranted.

The Third District also ignored disputed facts as to whether de Saad even met the threshold requirements for mandatory statutory indemnification of being "successful on the merits or otherwise" in the criminal proceeding and being charged "by reason of the fact" she was a corporate officer. §§ 607.0850(1), (3), Fla. Stat. The criminal proceeding against her ended with a guilty plea. Expert Marcos Jiménez, former U.S. Attorney for the S.D. Fla. and prominent white collar

criminal defense attorney, opined that de Saad was *not* "successful on the merits," because in his expert opinion, "the United States prevailed in its case against de Saad." App. 30 at ¶¶ 5, 11.[4] The Third District ignored that expert testimony, just as it ignored similar expert testimony of Robert Serino, a 29-year veteran of the Office of the Comptroller of the Currency. App. 38 at ¶¶ 2-4, 7.

The Third District's opinion is wrong on the law and fundamentally unfair to corporations in Florida, which now must indemnify corporate officers who knowingly break the law for personal benefit—so long as they accept a plea deal.

## II. THE COURT SHOULD EXERCISE DISCRETIONARY JURISDICTION TO REVIEW THE THIRD DISTRICT'S BREACH OF CONTRACT RULING, WHICH IS IN DIRECT AND EXPRESS 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); HOSPITAL CORRESPONDENCE CORP. v. MCRAE, 682 So. 2d 1177 (Fla. 5th DCA 1996) and FASANO v. HICKS, 667 So. 2d 1033 (Fla. 2d DCA 1996).

### A. CONFLICT JURISDICTION

The numerous direct and express conflicts in the Third District's breach of contract ruling are set forth in detail below.

### B. REASONS TO EXERCISE DISCRETIONARY REVIEW

The Third District affirmed the trial court's decision resolving—on summary

[4] "App." refers to the appendix filed with BIV's initial Third District brief.

judgment—a clear issue of factual dispute over the competing reasonable interpretations of de Saad's employment contract and the BIV personnel manual incorporated therein: Did BIV's contractual right to suspend de Saad pending clarification of the charges mean that it could suspend her until the charges against her were resolved? The Third District said no. Slip Op. at 8. But as the Fourth District recognizes, "[w]hen there are two reasonable [contractual] interpretations, summary judgment is inappropriate because there is a genuine issue of material fact." Fecteau v. S.E. Bank, N.A., 585 So. 2d 1005, 1007 (Fla. 4th DCA 1991).[5]

At a minimum, ambiguity existed as to when the "clarification" occurred, creating a further fact issue as to the starting point for assessing damages. By permitting resolution of these issues on summary judgment, the Third District created a direct and express conflict with Langford v. Paravant, Inc., 912 So. 2d 359, 360-361 (Fla. 5th DCA 2005) ("[W]hen the content of an agreement is ambiguous and the parties present different interpretations, the issue of proper interpretation becomes one of fact, precluding summary judgment.").

The Third District's decision also directly and expressly conflicts with Fabel v. Masterson, 951 So. 2d 934, 936 (Fla. 4th DCA 2007) and Marshall Const., Ltd.

[5] The reasonableness of BIV's interpretation is confirmed by the personnel manual, incorporated into the employment contract, which refers to "conclusive evidence of dishonesty or involvement in a misdemeanor or felony." App. 27 at 32 (emphasis added). Here, the final, conclusive evidence was not available to BIV until de Saad's guilty plea—which was long after the contract had expired.

v. Coastal Sheet Metal & Roofing, Inc., 569 So. 2d 845, 848 (Fla. 1st DCA 1990), because it permits summary judgment to be awarded without determining whether de Saad breached the contract first—because she could not perform her job obligations from jail and while defending herself in the criminal action in California, and because of her contractual obligation to abide by bank policies and federal law. As Fabel and Marshall make plain, if de Saad breached first, BIV had no duty to perform under the contract. The Third District's opinion is in direct and express conflict with these decisions of other district courts, and warrants review.[6]

## CONCLUSION

The Florida Legislature made a policy choice that corporate officers who knowingly break the law and act for personal gain are not entitled to indemnification. The Third District has undermined that legislative policy choice in conflict with the Fourth District. This Court should grant review, resolve the conflict, and quash the decision below. It should also restore black-letter contract principles to the Third District's breach of contract jurisprudence.

[6] The Third District also failed to require de Saad to mitigate her damages, creating yet another conflict with the Second District by gutting the doctrine of mitigation. See Thomas v. Western World Ins. Co., 343 So. 2d 1298, 1303 (Fla. 2d DCA 1977) ("[I]t is black-letter contract law that a party suffering a breach is obligated to take all reasonable means to protect himself and mitigate his damages."). And it left standing the trial court's legal error in granting summary judgment while affirmative defenses were pending—in direct and express conflict with Hospital Correspondence Corp. v. McRae, 682 So. 2d 1177, 1182 (Fla. 5th DCA 1996) and Fasano v. Hicks, 667 So. 2d 1033, 1034 (Fla. 2d DCA 1996).

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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