IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-2251

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Petitioner,

v.

AMERICAN EDUCATIONAL ENTERPRISES, LLC,

Respondent.

On Discretionary Review from the Third District Court Of Appeal, State of Florida, No. 3D09-3492

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Petitioner, the Board of Trustees of the Internal Improvement Trust Fund ("the Board"), is the entity responsible for the disposition of state-owned property. The Respondent, American Educational Enterprises, LLC ("American"), is the assignee of Florida National College's ("FNC") right, title and interest to and under a contract for sale and purchase of state-owned property. The Board seeks review of the decision of the District Court of Appeal of Florida, Third District, in *American Educational Enterprises, LLC v. Board of Trustees of the Internal Improvement Trust Fund*, 45 So. 3d 941 (Fla. 3d DCA 2010).

The underlying dispute between American and the Board arises from American's 2001 purchase of certain state-owned real property. In April 2001, the Board sent a bidding package to prospective buyers advising that the property was sold "as is," and that the tax assessed value was $4,462,063. The bid package also required a minimum bid of $3,750,000. FNC, the original bidder, submitted a bid of $4,025,000 and a $402,500 earnest money deposit. *American Educational Enterprises, LLC,* 45 So. 3d at 942-943.

In May 2001, the Board notified FNC that its bid and contract offer was accepted. At that time, FNC sought financing from Citibank, which obtained an appraisal for the property. The 2001 Citibank appraisal determined that the property's market value was $2,850,000. FNC also received the Board's 1999

appraisal of the property for $3,275,000. The Board had not included its 1999 appraisal in the bid package. In response to FNC's concern about the 1999 lower appraisal value, the Board declined to re-negotiate the purchase and stated that FNC would forfeit its earnest money deposit if it did not close on the property. On June 30, 2001, FNC closed on the sale of the property. *Id* at 943.

In its third amended complaint, American asserted claims against the Board for negligent misrepresentation, fraud in the inducement, unjust enrichment and reformation of the purchase contract. American alleged that the Board made false statements in its bidding package and correspondence, that the Board was unjustly enriched by American's purchase at a price that was significantly above market price, and that the contract should be reformed to reflect a proper purchase price because American mistakenly submitted its bid based on the Board's misrepresentations. The Board answered the complaint, raised numerous affirmative defenses, and asserted a counterclaim for fraud in the inducement. The Board's counterclaim asserted that FNC made misrepresentations to the Board after the Board refused to reduce the purchase price prior to closing, *i.e.*, that FNC would irrevocably purchase the property pursuant to the contract terms. *Id.*

During discovery, the Board obtained, through a third party subpoena, the financial documents that FNC had submitted to Citibank in order to obtain financing. That production included the following documents for the years 1998-

2004: FNC's independent auditor's reports, balance sheets, income statements, statements of cash flow, tax returns, and underlying information for its 2001 through 2008 budgets, and American's balance sheets, income statements, statements of cash flow, and tax returns. The parties entered into a confidentiality agreement governing production of this information, which the trial court approved. *Id.* at 943.

In March 2009, the Board propounded a Sixth Request for Production to American, requesting, in pertinent part, the following items:

1. FNC's independent auditor's reports for 2005-2007;

2. FNC's balance sheets, income statements and statements of cash flows for 2006 and 2007;

3. FNC's federal tax returns for 2005-2007;

4. Budgets prepared by FNC for 2001 through 2008;

5. American's balance sheets, income statements and statements of cash flows for 2006 and 2007;

6. American's tax returns for 2001, 2002, 2005, 2006, and 2007; and

7. All financial reports filed with the Department of Education for Title IV programs.

Id. at 943.

American objected to the production and argued that the requested items — which sought post-2001 private, financial information — were overbroad, unduly burdensome,

irrelevant to the asserted claims and not reasonably calculated to lead to admissible evidence. American further contended that because it was only seeking the difference between the amount paid for the property and the property's value, the discovery requests violated its privacy rights and was in fact prejudgment discovery in aid of execution. *Id.* at 944.

The Board sought an order compelling production, arguing that the documents are relevant and reasonably calculated to lead to the discovery of admissible evidence. In support of its motion, the Board attached the affidavit of its expert, opining that the discovery of this standard financial information was necessary to defend American's claim for economic damages. American responded, asserting, *inter alia*, that it was only seeking out-of-pocket damages and its "financial performance indicators" are irrelevant to damages. Following a hearing, the trial court denied American's objections, granted the Board's motion to compel, in part, and ordered American to produce items 1-7 in the Board's Sixth Request for Production. Thereafter, American petitioned the Third District Court of Appeal to quash the order compelling production of these documents. *Id.*

The Third District quashed the trial court's order on the basis that: (1) the order compelled the disclosure of corporate financial documents, dated from 2005 to 2007, that do not fall within the time frame of the subject matter of this case;

and (2) the order requires the disclosure of corporate financial documents without regard to the issues involved in this case. *Id.* at 944-945.

On December 8, 2010, the Board sought discretionary review from this Court.

SUMMARY OF ARGUMENT

I. The Third District Court of Appeal properly applied the standard set forth in this Court's decisions for granting *certiorari* review of a discovery order. There is no conflict with any decision of this Court.

II. The Third District Court of Appeal properly granted *certiorari* review and quashed the trial court's discovery order where the information sought was not discoverable, even in the presence of a confidentiality agreement. There is no conflict with any decision of the Second and Fourth Districts.

III. The Third District Court of Appeal properly considered the issue of irreparable harm first in determining its jurisdiction. There is no conflict with any decision of the First District.

IV. The Third District Court of Appeal properly quashed a discovery order that was overbroad in time and sought financial information not relevant to the issues. If the information was disclosed the Respondent would have no remedy on appeal – the "cat would be out of the bag." There is no conflict with any decision of the First District.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT IS NOT IN CONFLICT WITH *ALLSTATE INSURANCE COMPANY v. BOECHER*, 733 So. 2d 993 (Fla. 1999) AND *MARTIN-JOHNSON, INC. v. SAVAGE*, 509 So. 2d 1097 (Fla. 1987) ON THE SAME QUESTION OF LAW.

The Third District Court of Appeal was cognizant of the "irreparable harm" standard set forth by this Court in *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999) and *Martin-Johnson, Inc. v. Savage, 509* So. 2d 1097 (Fla. 1987) and correctly applied it here. In *Martin-Johnson*, this Court was clear in saying,

> A non-final order for which no appeal is provided by Rule 9.130 is reviewable by petition for *certiorari* only in limited circumstances. The order must depart from the essential requirements of law and thus cause material injury to the petitioner throughout the remainder of the proceedings below, effectively leaving no adequate remedy on appeal. (citations omitted).

509 So. 2d 1099. The Court refers to this standard of review for *certiorari* as an "irreparable harm" standard. *See id.*

In this case, the Third District cites to *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999) and *Martin-Johnson, Inc. v. Savage, 509* So. 2d 1097 (Fla. 1987), for the standard for *certiorari* review of a discovery order and properly applies it. *See* 45 So. 3d at 944.

In applying the standard, the Third District analogizes the case to *Redland Co. v. Atl. Civil, Inc.*, 961 So. 2d 1004, 1006-1007 (Fla. 3d DCA 2007), wherein the Third District also applied the proper standard for *certiorari* review:

> **The trial court's order departs from the essential requirements of the law by requiring overbroad discovery that will cause material injury to Redland and leave them with no adequate remedy on appeal**. First, the order requires the production of tax returns, general ledgers, and supporting documentation from 1997 through the present. This time frame request, however, is unreasonably broad given that the settlement agreement, which forms the basis of the breach of contract action was not executed by the parties until September 1999. Second, the challenged order requires the wholesale turnover of documents without regard to the issues framed by the alleged breaches of paragraphs five and six of the settlement agreement, and as such we find that the order is overbroad in that respect as well.
>
> We therefore grant the petition and quash the order below.

Emphasis added.

The Third District Court did not deviate from the correct standard of review here. Furthermore, the financial documents, dated from 2005 to 2007, do not fall within the time frame of the subject matter of this case and are not relevant to the issues involved in the case. *American Educ. Enterprises, LLC,* 45 So. 3d at 944-945. The presence of a confidentiality order does not obviate the requirement that the information sought be permissible discovery.

II. THE DECISION OF THE THIRD DISTRICT IS NOT IN CONFLICT WITH *MARTIN-JOHNSON, INC. v. SAVAGE,* 509 So. 2d 1097 (Fla. 1987), *CAPITAL ONE, N.A. v. FORBES,* 34 So. 3d 209 (Fla. 2d DCA 2010), AND *CROCKER CONSTRUCTION CO. v. HORNSBY,* 562 So. 2d 842 (Fla. 4th DCA 1990) ON THE SAME QUESTION OF LAW.

The Third District Court of Appeals did not ignore the existence of the confidentiality order that was in place with respect to the production of documents

from Citibank. The confidentiality agreement simply was not relevant to its analysis.

In *Martin- Johnson*, this Court found that discovery of litigant's finances where punitive damages was alleged was not the type of information that may reasonably cause material injury of an irreparable nature and "that our discovery rules provide sufficient means to limit the use and dissemination of **discoverable** information via protective orders." 509 So. 2d at 1100, emphasis added.

Similarly, the Second District Court of Appeal in *Capital One, N.A.,* found that a Bank's lending guidelines and practices manual was a trade secret, but there was no dispute that it was **discoverable** because of the claims in the case. The only issue in dispute was the scope of the protective order. 34 So. 3d at 212-213.

Finally, in *Crocker Constr. Co.*, the Fourth District Court of Appeal found that financial information "was relevant to the central issue in the case" (*i.e.*, that it was discoverable) and that the trial court could fashion a protective order to prevent dissemination of the information. 562 So. 2d at 843.

In contrast to these cases, here the Third District Court found that the information sought was not **discoverable**. *See* 45 So. 3d at 944-45. Therefore, the presence of a confidentiality agreement did not make the information sought discoverable. There is no conflict with this Court and the District Court decisions.

III. THE DECISION OF THE THIRD DISTRICT IS NOT IN CONFLICT WITH *WEST FLORIDA MEDICAL CENTER, INC. v. SEE*, 18 So. 3d 676 (Fla. 1st DCA 2009) ON THE SAME QUESTION.

In *West Florida Medical Center, Inc.*, the First District Court of Appeal held that the "irreparable harm inquiry" must be undertaken first. 18 So. 3d at 682. The First District explained that "irreparable harm" was "harm that cannot be remedied on appeal." *Id*. Here, the Third District Court undertook the analysis at the outset of its decision and properly concluded that there was *certiorari* jurisdiction. *See* 45 So. 3d at 944. The Third District likened the facts here to the *Redland* case where the Third District expressly had found "irreparable harm" and that *certiorari* review was proper. *Id*. There is no conflict with a decision of the First District.

IV. THE DECISION OF THE THIRD DISTRICT IS NOT IN CONFLICT WITH *GACHE v. FIRST UNION NAT'L BANK OF FLORIDA*, 626 So. 2d 86 (Fla. 4th DCA 1993) ON THE SAME QUESTION OF LAW.

In *Gache*, the Fourth District Court of Appeal stated that *certiorari* review was not proper "since wrongfully having to produce financial information is not the type of irreparable harm to justify granting *certiorari*." In so holding, the *Gache* court misstates the standard for *certiorari* review of a discovery order set forth by this Court in *Martin-Johnson, Inc*., 509 So. 2d at 1100 and overstates that decision's holding.

Moreover, the *Gache* court did not even undertake any detailed analysis, as the Third District did here, to determine whether the financial information sought was discoverable and would "effectively leave no adequate remedy on appeal." *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94-95 (Fla. 1995.) The *Gache* decision does not warrant this Court taking discretionary review of the action of the Third District Court of Appeal.

CONCLUSION

For the foregoing reasons, Respondent American Educational Enterprises, L.L.C. requests that the Court deny review of the decision of the Third District.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

This brief complies with the font requirements of Fla. R. App. P. 9.210.

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CERTIFICATE OF SERVICE

I, Elio F. Martinez, Jr., certify that on January 26, 2011, a copy of the foregoing Respondent's Brief on Jurisdiction was mailed, first-class, to Petitioner's Counsel listed below:

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