IN THE SUPREME COURT OF FLORIDA

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CASE NO.: SC10-2408

Lower Tribunal No(s).: 3D10-1331
10-16264

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**MIA CONSULTING GROUP, INC.**

Petitioner,

vs.

**HACIENDA VILLAS, INC.**

Respondent.

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ON REVIEW FROM AN OPINION OF THE
THIRD DISTRICT COURT OF APPEAL

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# PETITIONER'S INITIAL BRIEF

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## II. STATEMENT OF THE CASE AND FACTS

This case involves a one-count complaint for breach of contract by Plaintiff/Petitioner, MIA CONSULTING GROUP, INC. (hereinafter, "MIA") against Defendant/Respondent, HACIENDA VILLAS, INC. (hereinafter, "Hacienda"). *See generally* Complaint, App. Ex. 1.[1] This appeal arises from the Circuit Court's order dated May 5, 2010, App. Ex. 3, denying Hacienda's Motion to Dismiss for Improper Venue. App. Ex. 2. The salient facts are set forth in the Third District's Opinion dated October 6, 2010, *Hacienda Villas, Inc. v. MIA Consulting Group, Inc.*, 47 So. 3d 848 (Fla. 3d DCA 2010) (hereinafter, the "3d DCA Opinion"), App. Ex. 4:

> In its complaint, MIA alleged that it entered into an agreement with Hacienda Villas, Inc. to submit an application to the United States Department of Housing & Urban Development ("HUD") for a grant to convert the Hillsborough County Hacienda Villas housing project to an assisted living facility. The parties agreed that MIA would not charge any fees for preparing and submitting the grant application. In exchange for this, Hacienda Villas agreed to retain MIA as the implementation consultant and managing agent of the Hillsborough County Hacienda Villas facility. MIA alleges that all payments to MIA for its services would be made at MIA's principal office in Miami-Dade County.
>
> The complaint goes on to allege that MIA submitted the application to HUD as agreed and that HUD awarded a multi-million dollar grant. MIA alleged that Hacienda Villas refused to retain MIA as the consultant and manager of the Hillsborough County Hacienda Villas facility. MIA alleged breach of contract and requested damages.

[1] An Appendix is attached hereto pursuant to Rule 9.220, Fla. R. App. P.

> Hacienda Villas moved to dismiss the action for improper venue. The trial court denied the motion and Hacienda Villas has appealed.

3d DCA Opinion, at 2-3.

The Third District reversed the Circuit Court's order for two stated reasons:

*First*, although the Third District noted that "an action on a default of an agreement for monetary payment accrued in the county where payment was agreed to be made," *see* 3d DCA Opinion, at 3 (quoting *Rayman v. Langdon Asset Mgmt., Inc.*, 745 So. 2d 426, 428 (Fla. 3d DCA 1999), it held that "the present case does not involve an agreement to pay a liquidated sum in Miami-Dade County. This is a suit for damages which are unliquidated. Accordingly the debtor-creditor rule does not apply." 3d DCA Opinion, at 4.

*Second*, the Third District then determined that the "alleged agreement here was for MIA to manage a living facility located in Hillsborough County. Failure to perform services is a breach that accrues in the county where the services were to be performed." 3d DCA Opinion, at 4 (citing *Kumar v. Embassy Kosher Tours, Inc.*, 696 So. 2d 393 (Fla. 3d DCA 1997) and *Weiner v. Prudential Mortgage Investors, Inc.*, 557 So. 2d 912, 913 (Fla. 3d DCA 1990)). The Third District ordered MIA's lawsuit to be transferred to Hillsborough County.

After the Third District denied rehearing on November 12, 2010, App.

Ex. 5, MIA sought discretionary review by this Court pursuant to article V, section 3(b)(3) of the Florida Constitution because the Third District's Opinion expressly and directly conflicted with a number of decisions of this Court and of other District Courts of Appeal.[2] The Third District's failure to adhere to the established precedent of this Court has deprived MIA of its fundamental choice of venue guaranteed by § 47.011, Fla. Stat. By order dated February 24, 2011, this Court accepted jurisdiction of this case.

## III. SUMMARY OF ARGUMENT

The principal issue on appeal is whether MIA's cause of action for breach of contract accrued in Miami-Dade County, where the parties agreed that payment under the contract would be made and where MIA's principal office is located.

The Third District's Opinion failed to properly apply the venue rules of this Court and other District Courts which authorize a plaintiff to bring suit for breach of contract in the county where the defendant was required to pay the plaintiff or, if no place of payment was stipulated, in the county where plaintiff resides, irrespective of whether the amount claimed is "unliquidated." This Court's decisions does not permit a plaintiff to be deprived of its choice of venue because

[2] Article V, section 3(b)(3) of the Florida Constitution provides that the "supreme court . . . [m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

the damages it seeks are unliquidated. Similarly, § 47.011 does not authorize such a limitation.

The Third District's Opinion also conflicts with numerous decisions of other courts which hold that a cause of action for failure to pay for services rendered under a contract accrues where the *payment* for services should have been made, *not* where the underlying services were to be rendered.

## IV. ARGUMENT

### A. The Third District's Opinion Expressly and Directly Conflicts with Multiple Decisions of this Court and of Other District Courts that Permit a Plaintiff to Bring Suit for Payments Due Under a Repudiated Contract in the County where Plaintiff Resides

The Third District failed to apply the correct venue rule for breach of contract actions. As firmly established by this Court's decisions, the applicable venue rule focuses on *where* the defendant has failed to tender its monetary performance under a contract, *not* on whether the amount owed by the defendant under a repudiated contract is "liquidated" or "unliquidated." Indeed, whether the amount claimed is liquidated or unliquidated is completely irrelevant.[3]

[3] A trial court's legal conclusions on a motion to transfer venue are reviewed *de novo*. A trial court's determination of venue-related factual disputes is reviewed to determine whether it is supported by competent, substantial evidence or is clearly erroneous. *PricewaterhouseCoopers LLP v. Cedar Res., Inc.*, 761 So. 2d 1131, 1133 (Fla. 2d DCA 1999); *accord Tobin v. A & F Eng'g*, 979 So. 2d 967, 968 (Fla. 3d DCA 2008).

The venue provisions implicated by this case are set forth in §§ 47.011 and 47.051, Fla. Stat. Both permit a plaintiff to sue in the county "where the cause of action accrued." Section 47.011 states: "Actions shall be brought only in the county where the defendant resides, *where the cause of action accrued*, or where the property in litigation is located." (emphasis supplied). Section 47.051 states a similar rule: "Actions against domestic corporations shall be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, *where the cause of action accrued*, or where the property in litigation is located." (emphasis supplied). This Court has uniformly and repeatedly held that under these venue statutes, a cause of action for breach of contract accrues in the county where the plaintiff is owed money under a contract, express or implied.[4]

The leading -- and dispositive -- case on venue in contract actions was decided by this Court in *Croker v. Powell*, 115 Fla. 733, 156 So. 146 (Fla. 1934). In *Croker*, the Court was asked to construe the predecessor to § 47.011, which provided that "[s]uits shall be begun only in the county (or if the suit is in the

[4] The statutory predecessors to §§ 47.011 and 47.051, Fla. Stat. are substantively identical. *See Croker v. Powell*, 115 Fla. 733, 156 So. 146, 150-51 (Fla. 1934) (construing § 46.01, Fla. Stat., the predecessor to § 47.011) and *Saf-T-Clean, Inc. v. Martin-Marietta Corp.*, 197 So. 2d 8 (Fla. 1967) (construing § 46.04, Fla. Stat., the predecessor to § 47.051).

justice of the peace court in the justice's court) where the defendant resides, or where the cause of action accrued, or where the property in litigation is." *Croker*, 156 So. at 150 (quoting Section 4219(2519), C.G.L., *codified at* § 46.01, Fla. Stat.).

The facts in *Croker* mirror those of the instant case. In *Croker*, the plaintiff, a Duval County attorney, was retained to provide legal services to the defendant in Palm Beach County. *Id.* After the legal services were rendered, the defendant refused to pay the plaintiff's fees, and the plaintiff brought suit in Duval County for the "reasonable value of the services rendered and performed by said plaintiff under, and in pursuance of, said contract and agreement." *Id.* at 149. *Importantly, the amount owed the plaintiff was disputed and unliquidated*. *Id.* at 150, 153. The defendant objected to venue and contended that he must be sued in Palm Beach County where the legal services were rendered. The objection was overruled by this Court, which held that venue lies in the county where contract payments are to be made:

> Where a contract involving the payment of money is made in one county and payments under the contract are to be made in another county, an action for a breach of the promise to pay may be maintained in the county *where the payment was agreed to be made, for there the breach occurred and the cause of action accrued. And if no place of payment is expressly agreed on, it may be implied that payment is to be made where the payee resides or has an established place of business,* and where payment under the contract may be made. Where there is an

> express promise to pay, and no place of payment is stipulated, the debtor should seek the creditor unless otherwise provided or agreed.

*Id.* at 150-151 (emphasis supplied). Applying the foregoing rule to the plaintiff's unliquidated damage claim, the Supreme Court held that venue was properly laid in Duval County where the plaintiff resided:

> The plaintiff having first elected to rescind or treat the contract as at an end because of the alleged anticipatory breach by the defendant, there is then a cause of action to sue upon. *The plaintiff then had a right to maintain an action in the county of his residence for the alleged anticipatory breach of the contract by the defendant*; and may recover for the value of services rendered, if it be duly shown that the contract was violated and repudiated by the defendant.

*Id.* at 151 (emphasis supplied).

Two years later the Court reaffirmed its holding in *Croker*. In *Baruch v. W. B. Haggerty, Inc.*, 137 Fla. 799, 188 So. 797 (1939), the Court addressed whether a claim for damages and specific performance under a contract for the sale of corporate stock could be brought where the plaintiff was located, not where the contract was entered into or where the defendant resided. "The contract [for the sale of plaintiff's stock] was executed in Dade County; the only defendant served, Sailing W. Baruch, resides in Dade County; and plaintiff corporation is domiciled in Hillsborough County. The contract did not state where it was to be performed. The suit was instituted in Hillsborough County." *Id.* at 802. The Court held that under the venue rule enunciated in *Croker*, "it is entirely proper, under the

circumstances existing in this case, for the cause of action to be instituted in Hillsborough County, the domicile of the corporation and of W. B. Haggerty individually;" *Id.* at 803.

Three years later in *Producers Supply, Inc. v. Harz*, 149 Fla. 594, 6 So. 2d 375 (1942), the Court again reaffirmed its holding in *Croker*. In *Producers Supply*, the plaintiff sued the defendant for goods sold under a consignment contract in the plaintiff's county of residence. The Court held "[i]t is settled law in this state that the parties to an agreement may provide therein where suit may be brought to enforce it if such should become necessary, *but in the absence of such a specification, a cause of action accrues where the breach of contract accrues or where the payee resides* and a suit base[d] on failure to pay may be brought where such failure accrues." *Id.*, 6 So. 2d at 376 (emphasis supplied).

Twenty-three years later in *Duggan v. E. D. Tomlinson*, 174 So. 2d 393 (Fla. 1965), the Court reaffirmed head-on that the venue rule enunciated in *Croker* and *Producers Supply* applied to a plaintiff's claim for breach of an implied contract for brokerage services where there was no express promise to pay and the damages sought were unliquidated. The facts of *Duggan* revealed that "the plaintiff's action was in general assumpsit[5] on an implied contract *for the reasonable value*

[5] "General assumpsit" is an action based on an implied contract to pay. "[I]n *general assumpsit* the cause of action is *never* based upon an express contract no

*of his services* rendered defendant at the latter's request -- and from which defendant benefited -- even though defendant resided in a different county than did plaintiff." *Id.* at 394-95 (emphasis supplied). The defendant challenged the plaintiff's right to sue in the county where plaintiff resided, but that challenge was rejected by the First District, which applied the venue rule articulated in *Croker*, *Producers Supply*, and their progeny, *i.e.*, that "in the absence of [a contrary] specification, a cause of action accrues where the breach of contract accrues or where the payee resides and a suit base[d] on failure to pay may be brought where such failure accrues." *Duggan v. E. D. Tomlinson*, 167 So. 2d 2, 3 (Fla. 1st DCA 1964). On further review, this Court held:

> As indicated in the [First District's] majority opinion [in *Duggan*], we are unable to distinguish the legal and factual situation respecting venue in the instant case from those situations respecting venue in *Croker v. Powell*, 115 Fla. 733, 156 So. 146; *Producers Supply, Inc., v. Harz*, 149 Fla. 594, 6 So. 2d 375; *M. A. Kite Company v. A. C. Samford, Inc.*, 130 So. 2d 99 (Fla. App. 1961); and *Edgewater Drugs, Inc. v. Jax Drugs, Inc.*, 138 So. 2d 525 (Fla. App. 1962). . . . The law appears settled that an action of this kind may be maintained in the county of plaintiff's residence.

*Duggan*, 174 So. 2d at 394-95 (ellipsis supplied). The Court further held that unless the legislature chose to amend the venue statute, the courts were duty-

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matter whether there was an express contract or not. The recovery is based upon the implied contract to pay." *Hazen v. Cobb*, 96 Fla. 151, 117 So. 853, 858 (Fla. 1928) (emphasis in original).

bound to construe it as directed by *Croker* and its progeny: "Several sessions of the Florida Legislature have elapsed since the interpretation of F.S. Section 46.01, F.S.A., in *Croker v. Powell, supra*, occurred without modification thereof by the legislative branch. No good purpose would be served to judicially change this rule of venue long established and followed in this state." *Duggan*, 174 So. 2d at 395.

Two years later in *Saf-T-Clean, Inc. v. Martin-Marietta Corp.*, 197 So. 2d 8 (Fla. 1967), this Court again ratified a plaintiff's right to file suit for money owed under a contract in the county where plaintiff resides. In *Saf-T-Clean*, the parties entered into an agreement "for the performance of janitorial services by [the plaintiff] for the [defendant] in Orange County." *Id.* at 9. When the defendant refused "to pay for certain services that had been performed under the contract," *id.* at 9, the plaintiff brought suit in Broward County for special assumpsit,[6] where it maintained its principal place of business. There is no suggestion in *Saf-T-Clean* that the amount claimed by the plaintiff was liquidated; to the contrary, the damage claim by all accounts was unliquidated. The defendant objected to venue in Broward County, and the trial court dismissed the action in

[6] "Special assumpsit" is a "remedy to recover what is due upon or for the breach of an express simple contract when the plaintiff grounds his cause of action upon the contract. This form of count differs from *general assumpsit* in this point: That *special assumpsit* lies only upon an express contract while *general assumpsit* never does." *Hazen*, 117 So. at 858 (emphasis in original).

favor of Orange County. On appeal, the Supreme Court reversed, holding that the trial court's venue decision conflicted irreconcilably with *Croker* and *Producers Supply*:

> We therefore hold that under F.S. Sec. 46.04, F.S.A. suit for money owed, brought either in special or general assumpsit in which no place of payment was agreed upon, may be brought in the county of residence of the payee *for that is where the cause of action, i.e., default in payment, accrues*.

*Saf-T-Clean*, 197 So. 2d at 11 (emphasis supplied).

The venue rule adopted by the Court in *Croker, Baruch, Producers Supply, Duggan,* and *Saf-T-Clean* is not dependent on whether the amount being sued upon by the plaintiff is liquidated or unliquidated, or even if there is an "express" promise to pay, but whether performance of the payment obligation is to occur where the plaintiff resides. In each of these cases, this Court held that where the parties had not expressly agreed on the place of payment, payment was deemed to be owed in the county where plaintiff resided. As noted by the Court in *Saf-T-Clean*, "that is where the cause of action, i.e., default in payment, accrues." *Saf-T-Clean*, 197 So. 2d at 11.

None of the Court's decisions indicate that its venue rule is inapplicable if the damages sought by the plaintiff were unliquidated. To the contrary, *Duggan* was a case involving a claim for unliquidated damages, to-wit, "the plaintiff's

action was in general assumpsit on an implied contract *for the reasonable value of his services* rendered defendant at the latter's request," *Duggan*, 174 So. 2d at 394-95 (emphasis supplied), a damage claim that by its very nature is unliquidated and subject to proof. *Croker* involved a claim for the "reasonable value of the services rendered and performed by said plaintiff under, and in pursuance of, said contract and agreement," *Croker*, 156 So. at 149, another claim that is inherently unliquidated. To suggest, as Hacienda and the Third District apparently do, that the Court's venue cases are limited to claims for *liquidated* damages would result in a gross distortion of this Court's holdings.

### 1. The Third District Failed to Apply this Court's Venue Decisions

The Third District's Opinion below did not cite to *Croker*, *Baruch*, *Producers Supply*, *Duggan*, or *Saf-T-Clean*, but instead relied on a number of District Court cases that the Third District believes sanctions an "exception" to the Court's well-established venue rule. Quoting its own opinion in *PDM Bridge Corp. v. JC Industrial Mfg.*, 851 So. 2d 289, 291 (Fla. 3d DCA 2003), a case plainly inapposite because the parties never even entered into an agreement, express or implied, for the payment of money,[7] the Third District held that "[t]he

[7] In *PDM Bridge Corp.*, 851 So. 2d 289, the plaintiff's claims were predicated on a "letter of intent," not a binding contract or agreement *Id.* at 291. The Third District found there was no debtor-creditor relationship because the defendant

special venue rules pertaining to suits to enforce payments on debts do not apply in the absence of a debtor-creditor relationship flowing from an express contractual promise to pay a certain sum of money owed." 3d DCA Opinion, at 4. The Third District then concluded that "[w]here there is no liquidated debt involved in the contract action, 'the court must look to the gravamen of the allegations in the complaint to determine where the cause of action accrued and proper venue lies.'" 3d DCA Opinion, at 4 (quoting *Magic Wok Int'l, Inc. v. Li*, 706 So. 2d 372, 374 (Fla. 5th DCA 1998). Applying this reasoning to MIA's claim, the Third District held that "the present case does not involve an agreement to pay a liquidated sum in Miami-Dade County. This is a suit for damages which are unliquidated. Accordingly the debtor-creditor rules does not apply." 3d DCA Opinion, at 4.[8]

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made "no express promise to pay" *any* amount to the plaintiff, and the amounts claimed were "unliquidated and subject to proof." *Id.* The facts in *PDM* are in marked contrast to the instant case in which MIA has alleged that the parties entered into a binding express contract and that Hacienda breached the contract by failing to appoint MIA as the implementation consultant and managing agent of the Hacienda Villas facility and by failing to pay MIA in Miami-Dade County, as agreed, for services rendered. Complaint, ¶¶ 13-14.

[8] It is not precisely known when the District Courts began to stray from *Croker* and the Court's other venue decisions, but resistance to the Court's holdings was evident in the dissent to the First District's decision in *Duggan*, 167 So. 2d at 5 (Rawls, J., dissenting). The dissent believed "that the correct [venue] rule . . . aris[es] out of violation of a *specific agreement* rather than one by implication." *Id.* at 6 (emphasis supplied). Even though Judge Rawls' view was expressly rejected by this Court in *Duggan,* and again two years later in

A careful reading of the Court's opinions in *Croker, Baruch, Producers Supply, Duggan,* and *Saf-T-Clean* does not support the result reached below by the Third District or the "exception" that the Third District found to apply. Nonetheless, it appears that the Third District concluded that the absence of a claim for "liquidated" damages somehow vitiated the debtor-creditor relationship between MIA and Hacienda. In fact, whether MIA's damages are liquidated or not is irrelevant to whether a debt is owed and a debtor-creditor relationship exists. A debt owed by one person to another is no less enforceable because it is unliquidated. Furthermore, the allegations of MIA's Complaint, which must be accepted as true on a motion to dismiss, *e.g.*, *Ralph v. City of Daytona Beach*, 471 So. 2d 1, 2 (Fla. 1983), certainly alleged the existence of a debtor-creditor relationship predicated on Hacienda's express promise to pay MIA in Miami-Dade

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*Saf-T-Clean* when the Court reiterated that claims in general and special assumpsit fell within the scope of the *Croker* venue rule, the Fourth District refused to apply *Croker* in *Mendez v. Hunt*, 191 So. 2d 480 (Fla. 4th DCA 1966), which held that *Croker's* "application is linked to instances where the default consists simply of an omission to pay a certain sum of money which is due or already earned," not where "[t]he amount of plaintiff's entitlement is unliquidated and subject to proof." *Id.* at 481. By 2003, the District Courts were incorrectly construing *Croker* to apply only where there was an "express contractual promise to pay a certain sum of money owed" and not to contract claims where damages were "unliquidated and subject to proof." *PDM Bridge Corp.*, 851 So. 2d at 291; *Magic Wok Int'l, Inc.*, 706 So. 2d at 374. The *Croker* rule has been effectively swallowed by numerous exceptions, conditions, and limitations adopted by the District Courts but not authorized by this Court, resulting in a *de facto* judicial amendment to §§ 47.011 and 47.051, Fla. Stat.

County. *See* Complaint, ¶ 8.[9]

Nor is there any indication in this Court's venue decisions that the plaintiff's choice of venue turns on whether the debt owed by the defendant is for a sum certain, is unliquidated, or is "subject to proof." Rather, the relevant venue inquiry focuses on *where* the cause of action accrued, and this Court has emphatically held that a contract cause of action accrues where the debt is to be paid. Indeed, as this Court explained in *Croker* and repeated in *Saf-T-Clean*, the rule is premised on the well-established and long-held principle that where there is a "promise to pay, and no place of payment is stipulated, *the debtor should seek the creditor* unless otherwise provided or agreed." *Croker*, 156 So. at 746-47 (emphasis supplied). The policy underlying this rule is no less vibrant because a plaintiff's damage claim is unliquidated or subject to proof.

This was precisely the reasoning of the Fifth District in *Sundor Brands, Inc.*

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[9] Notably, the Third District's Opinion did not provide an explanation as to why an unliquidated damage claim renders the *Croker* venue rule inapplicable. Instead, the Third District merely cites to a number of other District Court cases recognizing the limitation, including some of its own, but none of which provides a rationale for the so-called exception for unliquidated damage claims. Most of these cases, in turn, rely on the Second District's opinion in *James A. Knowles, Inc. v. Imperial Lumber Co.*, 238 So. 2d 487, 489 (Fla. 2d DCA 1970), which held that a materialman's "suit is not on a promise to pay monies owed, unpaid and payable; rather, it is for unliquidated damages allegedly resulting from a breach of a contract of assurance or security." *Id.* at 489. From there, the so-called exception for "unliquidated" damage claims has taken on a life of its own.

*v. Groves Co., Inc.*, 604 So. 2d 901 (Fla. 5th DCA 1992), which expressly addressed whether the unliquidated nature of the plaintiff's damages rendered the venue rule enunciated in *Croker, Producers Supply, Duggan*, and *Saf-T-Clean* inapplicable. In *Sundor*, the plaintiff sued the defendant for damages of an unliquidated nature arising out of the breach of certain representations and warranties contained in an Asset Purchase Agreement. The issue on appeal was whether the plaintiff could bring suit in Lake County where it maintained its principal office or whether the lawsuit had to be filed in Dade County, where the defendants were located.

Preliminarily, the Fifth District enunciated the applicable venue rule: "Where, as here, a contractually incurred obligation to pay money is the performance called for in the contract, the residence of the payee is the place of performance, and on default of payment, is where the cause of action accrues." *Id.* at 903 (emphasis supplied). The defendant argued, however, that because the amount claimed as contract damages by the plaintiff was unliquidated, the plaintiff could not bring suit in the plaintiff's county of residence. The Fifth District squarely rejected that argument:

> *Although there is no specific sum of money identified in the Agreement that is payable to Sundor, we do not consider this fact dispositive*. They key is that there is an express promise to pay the sums to Sundor that would indemnify it for, *inter alia*, "losses," "costs," "expenses",

> "interest and penalties", resulting from any "breach or inaccuracy" of any of the representations or warranties. Because the Agreement did not specify where payments under the indemnification provisions of the Agreement were to be made, the debtor was to seek the creditor and payment was to have been made at Sundor's headquarters in Mount Dora, Lake County, Florida. Venue was therefore proper in Lake County.

*Id.* at 904 (emphasis supplied).

The Third District's Opinion is in irreconcilable conflict with the well-reasoned opinion in *Sundor* and this Court's venue decisions, and it is problematic for a number of additional reasons:

*First*, this Court has held that a plaintiff need not allege a factual basis for venue in its complaint. "It is of the very nature of venue that the plaintiff selects it initially, *but need not plead or prove that his selection has been proper*, and the burden of pleading and proving that the venue is improper, if such is the fact, is upon the defendant." *Inverness Coca-Cola Bottling Co. v. McDaniel*, 78 So. 2d 100, 102 (Fla. 1955) (emphasis supplied). The Third District's Opinion turns this rule on its head by shifting the burden to the plaintiff to plead a factual basis for venue.

*Second*, under current Florida law, a claimant is not required to specify the nature or quality of its damages in its complaint in order to state a cause of action for breach of contract. *Hutchinson v. Tompkins*, 259 So. 2d 129, 132-133 (Fla.

1972) ("General damages, that is, those damages which naturally and necessarily flow or result from the injuries alleged need not be specifically pleaded."). Rather a plaintiff must simply allege in its complaint that damage was proximately suffered. *See* Rule 1.110(b), Fla. R. Civ. P. (a complaint need only contain "a demand for judgment for the relief to which the pleader deems himself or herself entitled. . . . Every complaint shall be considered to demand general relief."). The Third District's Opinion undermines these well-established pleading rules. Under the Third District's Opinion, a plaintiff's failure to particularize its damages in the initial pleading will subject an action to possible dismissal for improper venue.

*Third,* notwithstanding Hacienda's burden under *Inverness Coca-Cola Bottling*, Hacienda's motion challenging venue in the Circuit Court below did *not* plead that MIA's damages were unliquidated, App., Ex. 2, and it offered *no* proof at all on this point. Instead, Hacienda's motion asserted that venue lay in Hillsborough County because "[t]he services alleged to be provided by [MIA] were to be provided at the Hacienda Villas [facility] in Tampa, Hillsborough County, Florida." *See* Hacienda Motion to Dismiss for Improper Venue, at ¶ 7, App. Ex. 2. Hacienda argued for the first time on appeal to the Third District that MIA's damages were "unliquidated," *see* Hacienda's Initial Brief to the Third District, at 6, but the record below is bereft of any evidence to support the

argument. Significantly, the Circuit Court made no factual finding on this point. Instead, the Third District apparently made a *de novo* factual determination that MIA's damages were unliquidated based solely on the unsworn argument of Hacienda's counsel.[10]

*Fourth*, the Third District's Opinion will invariably open the floodgates of unnecessary interlocutory appeals over whether a plaintiff's complaint alleges a "liquidated" or "unliquidated" damage claim, particularly because venue challenges are typically raised at the inception of a case when damages are not required to be particularized in the complaint, e.g., *Hutchinson*, 259 So. 2d at 132-133, and little, if any, evidence is in the record.

*Fifth*, the Third District's Opinion improperly whittles away at a plaintiff's fundamental right to choose its forum. Sections 47.011 and 47.051, Fla. Stat., have been construed by this Court in an unbroken line of cases since 1934 to

[10] In truth, Hacienda could not make a sworn statement to the Circuit Court because it was aware that Hacienda's grant application to HUD showed that it had agreed to pay MIA the liquidated sum of $120,000.00 for "implementation fees" and additional fees for management services. If the instant venue determination actually hinges on whether any portion of the debt owed by Hacienda to MIA was liquidated (a proposition that MIA believes is inconsistent with this Court's venue holdings), then the Third District should have remanded to the Circuit Court to consider the liquidated fee provision in the HUD grant application or, alternatively, to make a factual finding on this point. The Third District respectfully should not have made a crucial factual finding on whether all or a part of the contract claim was liquidated without any evidence before it.

permit the plaintiff to sue for contract payments in the county in which the plaintiff resides. The Court's venue decisions involve a variety of contract theories, including anticipatory breach, express contract, implied contract, general assumpsit, special assumpsit, and specific performance. In some cases, plaintiff's damages were plainly unliquidated and "subject to proof." *See, e.g., Duggan,* 174 So. 2d at 394-95 (claim for "reasonable value" of brokerage services); *Croker*, 156 So. at 149 (claim for reasonable value of legal services). The Third District's "exception" for unliquidated damages plainly, but inexplicably, flies in the face of this Court's opinions. To the extent the Third District was uncomfortable with this Court's venue decisions (rather than simply misconstruing this Court's holdings), it lacked the prerogative to fashion an exception. *See, e.g., B&F of Clearwater, Inc. v. Wesley Construction Company*, 237 So. 2d 790, 792 (Fla. 2d DCA 1970) ("[The *Croker* venue] rule has met with some judicial disapproval, *See* Judge Sturgis' dissenting opinion in *M. A. Kite Co. Cf. Mendez v. Hunt*, Fla. App. 1966, 191 So. 2d 480. However, it has been recently reaffirmed by our supreme court in *Duggan v. Tomlinson, Supra*, and stare decisis requires us to adhere to it."); *see also Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) ("[I]f and when such a change is to be wrought by the judiciary, it should be at the hands of the Supreme Court rather than the District Court of Appeal. . . ."). If an exception to

the Court's venue rule is necessary, the legislature should adopt it, not the District Courts. *See Duggan*, 174 So. 2d at 394-95 ("Several sessions of the Florida Legislature have elapsed since the interpretation of F.S. Section 46.01, F.S.A., in *Croker v. Powell, supra,* occurred without modification thereof by the legislative branch. No good purpose would be served to judicially change this rule of venue long established and followed in this state.").

### 2. The *Croker* Venue Rule Permits MIA to File Its Cause of Action in Miami-Dade County

The *Croker* venue rule protects a creditor from an unscrupulous debtor. It prevents the creditor from having to do precisely what he is not required to do, *i.e.*, travel outside the county of the breach to collect the debt. This protection has been codified in Florida's general venue statute since 1887, which

> was designed to perfect the right, already possessed by the creditor, of instituting his suit for the collection of his claim in the county where the *cause of action* accrued, whether it was the residing place of the defendant or not, by extending to him the *further right* to send out the process of the court where his suit was brought into any county of the state within which the defendant might be found either permanently or temporarily located, there to be served upon him by any officer there authorized to serve it.

*Bailey v. Crum*, 120 Fla. 36, 162 So. 356, 359 (Fla. 1935) (emphasis supplied). In other words, Florida's venue statute absolves a creditor who is owed money -- either liquidated or unliquidated -- from the burden of chasing the debtor around

the state. Based on simple contract law, the debtor, unless otherwise agreed, must always pay the creditor where the creditor is located. It is designed to aid the creditor in collection, not to impose unfair hurdles on his ability to collect the debt.

Applying the principles articulated in *Croker, Baruch, Producers Supply, Duggan, Saf-T-Clean*, and *Sundor* to the instant case, it is obvious that MIA was entitled to bring suit on its claim for breach of contract in Miami-Dade County. First, the Complaint makes clear that the parties entered into an agreement under which MIA would process the HUD grant application and perform other services on behalf of Hacienda, and Hacienda would pay MIA. Complaint, ¶ 8. MIA prepared and processed the grant application, and HUD awarded a multi-million dollar grant to Hacienda. *Id.* at ¶¶ 11-12. All conditions to Hacienda's performance under the contract, and to MIA's right to be paid at MIA's principal office in Miami-Dade County, Florida," *id.* at ¶ 8, were satisfied. Thus, venue was proper in Miami-Dade County under the rule announced in *Croker* that "[w]here a contract involving the payment of money is made in one county and payments under the contract are to be made in another county, an action for a breach of the promise to pay may be maintained in the county *where the payment was agreed to be made*, for there the breach occurred and the cause of action accrued." *Croker*,

156 So. at 150-151 (emphasis supplied). However, even if the parties' agreement were silent as to the place for payment, venue was still proper in Miami-Dade County because the cause of action accrued in Miami-Dade County where Hacienda's payments were deemed, by operation of law, to be paid. *Croker*, 156 So. at 151 ("Where there is an express promise to pay, and no place of payment is stipulated, the debtor should seek the creditor unless otherwise provided or agreed."); *Producers Supply*, 6 So. 2d at 376 ("a cause of action accrues where the breach of contract accrues or where the payee resides and a suit base[d] on failure to pay may be brought where such failure accrues."); *Duggan*, 174 So. 2d at 395 ("The law appears settled that an action of this kind [for breach of an implied contract for the reasonable value of his services rendered defendant] may be maintained in the county of plaintiff's residence.").

*Croker, Producers Supply, Duggan, Saf-T-Clean,* and *Sundor* thus make clear that MIA may bring suit for breach of contract in the county where Hacienda was required to pay MIA, irrespective of whether the amount claimed is unliquidated or subject to proof. By failing to apply the aforementioned venue rule, the Third District erred. The Court should reverse the Third District's Opinion and affirm the Circuit Court's order denying Hacienda's Motion to Dismiss for Improper Venue.

### B. The Third District's Decision to Apply the "Service Contract" Venue Rule Expressly and Directly Conflicts with Decisions of this Court and of Other District Courts

After incorrectly holding that MIA's venue selection was deficient because MIA's claim was for an unliquidated sum, the Third District then compounded its error by determining that the "alleged agreement here was for MIA to manage a living facility located in Hillsborough County" and that such a claim for "failure to perform services is a breach that accrues in [Hillsborough] county where the services were to be performed." 3d DCA Opinion, at 4. The Third District purported to apply the "service contract" venue rule of *Kumar v. Embassy Kosher Tours, Inc.*, 696 So. 2d 393 (Fla. 3d DCA 1997) and *Weiner v. Prudential Mortgage Investors, Inc.*, 557 So. 2d 912, 913 (Fla. 3d DCA 1990).[11] In so doing, the Third District misapplied contrary legal principles articulated by this Court and other District Courts.

As noted in the Third District's Opinion, MIA's claim against Hacienda was for, *inter alia*, non-payment of money due to be paid under a contract in Miami-Dade County. 3d DCA Opinion, at 2. There is no claim alleged for

[11] Both *Kumar* and *Weiner* held that a breach of contract action based on the failure of the defendant to provide the agreed-upon services accrues in the county where the services were to be performed. *Kumar*, 696 So. 2d at 394 (venue for contract claim in county where defendant had agreed to provide lodging services to the plaintiff); *Weiner*, 557 So. 2d at 913 (venue for contract claim law in county where defendant had agreed to provide legal services to plaintiff).

non-performance of any services in Hillsborough County, either by MIA or Hacienda. Thus, the venue rule of the two "service contract" cases, *Kumar* and *Weiner*, is irrelevant.

Instead, the Third District should have examined the nature of the contractual duty allegedly breached by Hacienda and where performance of the repudiated contractual duty was to be tendered. That is precisely the holding in *Ryan v. Mobile Commc'n Enters., Inc.*, 594 So. 2d 845, 846 (Fla. 2d DCA 1992), where the Second District noted the important distinction between a plaintiff's performance of services under a contract in one county and a *defendant's failure to make payment to the plaintiff under the same contract in another county*:

> Although MCE is correct to characterize the underlying contract as one for services, *the important consideration for venue purposes is the behavior or events causing the breach of the contract and thus accrual of the cause of action.* MCE allegedly performed as agreed; Ryan, however, repudiated the contract and did not pay money owed. *Thus, the breach was not of MCE's covenant to perform services but of Ryan's covenant to pay for those services.* The following language from *Windsor v. Migliaccio*, 399 So. 2d 65, 66 (Fla. 5th DCA 1981), is helpful:
>
> > A cause of action for venue purposes accrues in the county where the contract is breached. *Speedling, Inc. v. Krig*, 378 So. 2d 57 (Fla. 2d DCA 1979). *If a plaintiff alleges breach of a covenant to pay money due or already earned under a contract, the cause of action accrues where performance of the act of payment was to occur.* If the action is for breach of some other covenant, venue is proper in the county were that covenant was to be performed.

> Because the complaint alleges that Ryan breached his covenant to pay *money* due, the cause of action would accrue where the act of payment was to occur. . . . [T]he rule is that when a written contract fails to specify the place where payments are to be made, a cause of action for failure to pay is properly brought in the county where the plaintiff has its principal place of business.

*Ryan*, 594 So. 2d at 846 (emphasis supplied).

The same result was reached in the following cases:

- *Croker*, 156 So. 146, 151 ("When a contract for services is made by two parties in a county where one of them resides, and it is alleged that before the contract was completed it was breached in the county where it was made by a violation of the contract by the party who resides there, upon a rescission of the contract for the breach, an action for damages for such breach may be brought either in the county where the contract was made and where it was breached, *or in the county where the other party resides if he rescinded the contract there because of the prior breach.*") (emphasis supplied).

- *Sagaz Indus. v. Martin*, 706 So. 2d 374, 376 (Fla. 5th DCA 1998) ("[T]he essence of Martin's claim is Sagaz' failure to pay for his services, and not the performance of services. *A breach in the former situation occurs where the payment for services should have been made*.") (emphasis supplied).

- *Thomas v. David Kilcoyne Real Estate Group, Inc.*, 791 So. 2d 550,

551-552 (Fla. 2d DCA 2001) ("A cause of action for venue purposes accrues in the county where the contract is breached. *If a plaintiff alleges breach of a covenant to pay money due or already earned under a contract, the cause of action accrues where performance of the act of payment was to occur*. If the action is for breach of some other covenant, venue is proper in the county where that covenant was to be performed.") (emphasis supplied).

By predicating its reversal on where MIA's consulting services were to be rendered -- as opposed to where Hacienda's payments were to be tendered -- the Third District erred. Its decision thus expressly and directly conflicts with *Ryan*, *Croker*, *Sagaz Indus.*, and *David Kilcoyne*.

## V. CONCLUSION

For the reasons stated above, MIA respectfully requests the Court to reverse the Third District's Opinion and affirm the Circuit Court's order denying Hacienda's Motion to Dismiss for Improper Venue.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and emailed this 21st day of March 2011 to:

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Petitioner hereby certifies this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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# APPENDIX

| Tab | Document | Date |
|---|---|---|
| 1 | Complaint | 3-12-10 |
| 2 | Defendant's Motion to Dismiss for Improper Venue | 4-9-10 |
| 3 | Trial Court's Order Denying Defendant's Motion to Dismiss for Improper Venue | 5-5-10 |
| 4 | Opinion of Third District Court of Appeal | 10-6-10 |
| 5 | Order of Third District Court of Appeal Denying Motion for Rehearing | 11-12-10 |