SUPREME COURT OF FLORIDA

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SUPREME COURT CASE NO. SC10-

DISTRICT COURT CASE NO. 3D10-1331

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MIA CONSULTING GROUP, INC.

Petitioner,

vs.

HACIENDA VILLAS, INC.

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

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# PETITIONER'S BRIEF ON JURISDICTION

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Brian J. Stack, Esq.
Sammy Epelbaum, Esq.
**STACK FERNANDEZ ANDERSON & HARRIS, P. A.**
1200 Brickell Avenue
Suite 950
Miami, Florida 33131
Tel: 305.371.0001
Fax: 305.371.0002

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This Court has jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution because the Third District's decision in this case expressly and directly conflicts with two decisions of this Court and multiple decisions of other District Courts of Appeal.[1]

Where there are multiple venues to bring a lawsuit, the election of venue rests with the plaintiff. *Eclectic Source Network, Inc. v. Value Rent-A-Car, Inc.*, 611 So. 2d 585 (Fla. 3d DCA 1993). The Third District's failure to adhere to established precedent has deprived the Plaintiff below of its fundamental choice of venue guaranteed by Section 47.011 of the Florida Statutes.

## II. STATEMENT OF THE CASE AND FACTS

The appeal before the Third District arose from an order denying a Motion to Dismiss for Improper Venue filed by Defendant/Appellant/Respondent, HACIENDA VILLAS, INC. (hereinafter, "Hacienda"). The salient facts are set forth in the Third District's Opinion dated October 6, 2010 (hereinafter, the "Opinion"), which is attached in the Appendix:

> In its complaint, [Plaintiff/Appellee/Petitioner, MIA CONSULTING GROUP, INC. (hereinafter, "MIA")] alleged that it entered into an agreement with Hacienda Villas, Inc. to submit an application to the United States Department of Housing & Urban

[1] 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."

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

Opinion at 2-3.

The Third District reversed the trial court 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," (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." 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." 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)).

## III. SUMMARY OF ARGUMENT

The Third District's decision conflicts with numerous decisions of other courts which authorize a plaintiff to bring suit for anticipatory breach of contract in the county where the defendant was required to pay the plaintiff, irrespective of whether the amount claimed is unliquidated.

The Third District's decision also conflicts with numerous decisions of other courts holding that a claim 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 Decision Expressly and Directly Conflicts with 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

MIA respectfully submits that the Third District overlooked and failed to apply the correct venue rule for breach of contract actions, which rule focuses on

*where* the defendant has failed to tender its 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.

The venue rule for breach of contract claims was explained by the Florida Supreme Court in *Croker v. Powell*, 115 Fla. 733, 156 So. 146, 150-51 (1934). In *Croker*, the plaintiff, a Duval County attorney, was retained to provide legal services to the defendant in Palm Beach County. *Id.,* 156 So. at 150. After the legal services were rendered, the defendant refused to pay the plaintiff's fee, 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.,* 156 So. at 149. *Importantly, the amount alleged to be owed to the plaintiff was disputed and unliquidated*. *Id.,* 156 So. at 150, 153. The defendant objected to venue, but the objection was overruled by the Supreme Court, which held that a venue inquiry concerning a contract claim must focus on where contract payments are to be made:

> Where a contact 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 *were 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.

*Id.*, 156 So. 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*; . . .

*Id.*, 156 So. at 151 (emphasis supplied).

The Florida Supreme Court in *Saf-T-Clean, Inc. v. Martin-Marietta Corp.*, 197 So. 2d 8 (Fla. 1967) reaffirmed its venue holding in *Croker*. 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, where it maintained its principal place of business. There is no suggestion in the *Saf-T-Clean* opinion that the amount claimed by the plaintiff was liquidated. The defendant objected to venue in Broward County, and the trial court dismissed the action in favor of Orange County. On appeal, the Supreme Court reversed, holding that the trial court's venue decision conflicted irreconcilably with *Croker*:

> We therefore hold that under F.S. Section 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* and *Saf-T-Clean* is not dependent on whether the amount being claimed by the plaintiff is liquidated or unliquidated, but whether performance of the payment obligation is to occur where the plaintiff resides. The Fifth District put that issue to rest in its decision in *Sundor Brands, Inc. v. Groves Co., Inc.*, 604 So. 2d 901 (Fla. 5th DCA 1992). In *Sundor*, the plaintiff sued the defendant for damages of an unliquidated nature arising out of a breach of representations and warranties under 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. The Fifth District held that venue was properly laid where the plaintiff maintained it offices in Lake County and where the indemnity payments were due:

> We agree with Sundor that its claims are for contractual indemnification and that this case falls within the rule that where the breach alleged is the failure to pay money due under a contract, the cause of action "accrues", for venue purposes, where payment was to have been made. *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 whether the cause of action accrues*.

*Id.* at 903 (emphasis supplied). The defendant argued on appeal in *Sundor* that the general venue rule for breach of contract claims did not apply because the amount claimed as damages by the plaintiff was unliquidated. 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); *accord Duggan v. Tomlinson*, 167 So. 2d 2, 4 (Fla. 1st DCA 1964) (claim to recover an unliquidated sum for the "reasonable value of plaintiff's services" rendered to defendant in Okaloosa County may be brought in Duval County where plaintiff resides).

*Croker*, *Saf-T-Clean,* and *Sundor* thus make clear that MIA may bring suit for anticipatory breach of contract in the county where Hacienda was required to pay MIA, irrespective of whether the amount claimed is unliquidated. By failing to apply the aforementioned general venue rules, the Third District erred. The Court should invoke its discretionary jurisdiction to correct the Third District's

error of law.

### 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 not for a liquidated 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 the county where the services were to be performed." 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). 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. Opinion at 2. There is no claim alleged for non-performance of 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 and where performance of the 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 were the plaintiff has its principal place of business.

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

The same result was reached in the following "service contract" 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 were 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.").

● *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 -- and not on 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

MIA respectfully requests the Court to invoke its jurisdiction for the purpose of reversing the Third District's decision and affirming the trial court's order denying Hacienda's Motion to Dismiss for Improper Venue.

Respectfully submitted,

**STACK FERNANDEZ ANDERSON**
**& HARRIS, P.A.**
Attorneys for Plaintiff/Appellee/Petitioner, MIA Consulting Group, Inc.
1200 Brickell Avenue
Suite 950
Miami, Florida 33131-3255
Tel. (305) 371-0001
Fax. (305) 371-0002

By: _____
Brian J. Stack, Esq.
Fla. Bar No. 0476234
Sammy Epelbaum
Fla. Bar No. 0031524

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of December 2010 to:

DAVID T. WEISBROD, ESQ.
Attorney for Defendant/Appellant/Respondent, Hacienda Villas, Inc.
412 East Madison Street, Suite 1111
Tampa, Florida 33602
Tel: 813-223-2792
Fax: 813-223-3124
Email: dweislaw@yahoo.com

By: _____
Brian J. Stack, Esq.
Fla. Bar No. 0476234
Sammy Epelbaum, Esq.
Fla. Bar No. 0031524

## CERTIFICATE OF COMPLIANCE

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

Brian J. Stack, Esq.
Sammy Epelbaum, Esq.
**STACK FERNANDEZ ANDERSON & HARRIS, P. A.**
1200 Brickell Avenue
Suite 950
Miami, Florida 33131
Tel: 305.371.0001
Fax: 305.371.0002

By: _____
Brian J. Stack, Esq.
Fla. Bar No. 0476234
Sammy Epelbaum, Esq.
Fla. Bar No. 0031524

# APPENDIX

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| 1. | Third District Court of Appeal Opinion reversing and remanding the matter | 10-6-10 |
| 2. | Third District Court of Appeal Order denying motion for rehearing | 11-12-10 |