No. _____

In The
Supreme Court of the United States

MALLARDS COVE, LLP for itself
and all others similarly situated,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, and JED PITTMAN, CLERK OF THE CIRCUIT COURT OF PASCO COUNTY,

Respondents.

**On Petition For Writ Of Certiorari
To The District Court Of Appeal Of Florida,
Second District**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Florida's eminent domain statutes provide a true "quick-take" mechanism that permits the government to forcibly take immediate title and possession of private property the moment it deposits an amount specified in an order of taking into the court registry. A Florida statute gave clerks of the court the discretion to invest quick-take deposits and mandated that 90% of the interest earned on the deposits be paid to the condemning authority. Here, the Pasco County Clerk of Court elected to invest the money deposited by the State of Florida, Department of Transportation to immediately take title to Petitioner Mallards Cove's land and paid 90% of the interest actually earned on the deposit to the State, all of which occurred without Mallards' knowledge. A Florida trial court ruled that Mallards, as ultimate owner of the funds, was vested with a property interest in the money immediately upon deposit. Applying the "interest follows principal" rule, the trial court concluded that Mallards also owned the interest earned when the Clerk invested the deposit. On appeal from an interlocutory class certification order, the Florida appellate court reversed. It held that eminent domain deposits are not private property until the money leaves the registry, and so the government could take the interest earned on such funds. The Supreme Court of Florida declined review. Mallards seeks to invoke the discretionary jurisdiction of the Supreme Court to review the appellate court's decision.

QUESTION PRESENTED – Continued

The question presented is:

Whether an unconstitutional taking of a protected property interest occurs when the government seizes 90% of the interest earned on eminent domain registry funds that the government was required to deposit to take immediate possession and title to private land.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that all parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Mallards Cove LLP, is a Limited Liability Partnership organized under the laws of Florida and is not a publicly traded corporation.

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PETITION FOR WRIT OF CERTIORARI

Mallards Cove LLP, (hereinafter, "Mallards"), respectfully petitions for a writ of certiorari to review the decision of the Florida Second District Court of Appeal.

OPINIONS BELOW

The opinion of the Florida Second District Court of Appeal reversing the trial court's class certification order is reported at *Florida Dep't of Transp. v. Mallards Cove, LLP*, 159 So. 3d 927 (Fla. 2d DCA 2015), and is reproduced in Petitioner's Appendix ("Pet. App.") at A. The opinion of the trial court, the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida, granting Mallards' motion for class certification is reproduced in Pet. App. at B. The opinion of the trial court granting Mallards' motion for summary judgment finding the challenged statute unconstitutional is reproduced in Pet. App. at C. The Florida Supreme Court's decision declining to review *Florida Dep't of Transp. v. Mallards Cove, LLP*, 159 So. 3d 927 (Fla. 2d DCA 2015), is reported at No. SC15-474, 2015 WL 5683074 (Fla. Sept. 28, 2015), and is reproduced at D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Mallards filed a lawsuit for inverse condemnation and declaratory and injunctive relief in the Florida state court challenging both the government's appropriation of the interest that accrued on Mallards' quick-take deposit and the statute authorizing that appropriation as violating the Fifth Amendment of the United States Constitution. The Florida trial court granted Mallards' Motion for Class Certification, and the Florida Second District Court of Appeal reversed that decision in an opinion dated March 6, 2015. The Florida Supreme Court denied discretionary review of the Second District's decision in an opinion dated September 28, 2015. On December 3, 2015, Justice Clarence Thomas granted Petitioner's application to extend the time within which to file the petition to January 27, 2016. *Mallards Cove, LLP*, No. 15A580.

CONSTITUTIONAL PROVISION AND STATUTES AT ISSUE

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use without just compensation."

* * *

Florida Statutes section 74.051(4) (2008) provides:[1]

> The court may fix the time within which and the terms upon which the defendants shall be required to surrender possession to the petitioner, which time of possession shall be upon deposit for those defendants failing to file a request for hearing as provided herein. The order of taking shall not become effective unless the deposit of the required sum is made in the registry of the court. If the deposit is not made within 20 days from the date of the order of taking, the order shall be void and of no further effect. The clerk is authorized to invest such deposits so as to earn the highest interest obtainable under the circumstances in state or national financial institutions in Florida insured by the Federal Government. Ninety percent of the interest earned shall be paid to the petitioner.

* * *

[1] Petitioner sued under section 74.051(3) (2007). In 2008, without changing the content of the statute, the Legislature renumbered the statutory provision to section 74.051(4). Consistent with the numbering used in the opinion, Petitioner will refer to the statute as subsection (4). The last sentence of section 74.051(4) was amended effective July 1, 2013, to provide: "Ninety percent of the interest earned shall be allocated in accordance with the ultimate ownership in the deposit." *See* ch. 13-23, §§ 1, 2, at 220-21, Laws of Fla.

Florida Statutes section 74.061 (2007) provides as follows:

> Immediately upon the making of the deposit, the title or interest specified in the petition shall vest in the petitioner, and the said lands shall be deemed to be condemned and taken for the use of the petitioner, and the right to compensation for the same shall vest in the persons entitled thereto. Compensation shall be determined in accordance with the provisions of chapter 73, except that interest shall be allowed at the same rate as provided in all circuit court judgments from the date of surrender of possession to the date of payment on the amount that the verdict exceeds the estimate of value set forth in the declaration of taking.

STATEMENT OF THE CASE

I. In 1985, Florida's Legislature enacted section 74.051(4) to generate revenue for the State Department of Transportation and other condemnors, and the Department began to actively solicit clerks to invest eminent domain deposits without notice to property owners.

The Florida Legislature enacted the provisions of 74.051(4) to generate revenue for the state's Department of Transportation ("Department") and other condemnors, projecting that the statute would generate revenue of $1.2 million annually for the Department

alone. Pet. App. I. The statute authorized clerks of court "to invest [eminent domain registry] deposits so as to earn the highest interest obtainable" in a federally insured account. If a clerk elected to invest an eminent domain deposit, the statute required that ninety percent of the interest earned "shall be paid" to the condemning authority.

The Legislature's enactment of section 74.051(4) occurred in spite of this Court's decision five years earlier in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), which held that investment interest generated on registry deposits is private property belonging to the ultimate owner of the deposited funds that cannot be taken by the government without compensation. The Florida statute at issue in *Webb's* authorized clerks of court to invest registry deposits and, if invested, to keep the interest earned on them. *Webb's* at 156, n.1. The Court found this exaction of interest violated the Fifth Amendment guarantee that Governments are barred "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 163 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Once the Florida Legislature enacted section 74.051(4), the Department actively pursued this new revenue source. It solicited clerks to invest these deposits without notice to property owners. The Department adopted a written policy that required its personnel to send a form letter to the clerk of the court in every eminent domain case asking the clerk

to invest the eminent domain deposit and pay the interest earned on the deposit to the Department. Pet. App. E. The Department's form letter advised clerks it was to the Department's and the clerks' "mutual advantage" for the deposits to be invested. Pet. App. E:3. The Department was successful in convincing 14 of Florida's 68 clerks of court to invest eminent domain deposits pursuant to the statute. Pet. App. B:25. One of these clerks was the clerk of court in Pasco County, where Mallards owned property. The Department's letters were not placed in court files or dockets, and property owners were never notified by the Department or otherwise that the money deposited to take their land had been invested and earned interest. Pet. App. B:4-5; F:2.

The Department assigned a revenue code specifically to any investment interest it received on eminent domain deposits and treated the interest so received as income to the Department. Pet. App. G:6-10, 14-15. Under the new revenue source provided by the statute, the Department obtained revenue of approximately $8 million in investment interest pursuant to the statute from 1985 through 2011. Pet. App. G:18.

II. The Department took immediate title and possession of Mallards' land by depositing funds into the court registry in a quick-take proceeding.

In 2007, Mallards was the owner of a parcel of real property the Department wanted for a road

project. Pet. App. B:4. The Department filed an eminent domain action and, in order to take immediate title to Mallards' property prior to final judgment, the Department pursued a quick-take under Chapter 74 of the Florida Statutes. Pet. App. B:4.

Under Florida's statutory framework, the Department was required to appraise Mallards' property to establish a good-faith estimate of its value and disclose that amount in its quick-take Petition. Fla. Stat. § 74.031 (2008). Pet. App. B:4. The court then entered an Order of Taking authorizing the Department to immediately take title to Mallards' real property by depositing the amount of the good-faith estimate into the court registry. Pet. App. B:4. The Department deposited the amount specified in the order of taking to consummate the taking. Under section 74.061, upon the deposit title to Mallards' property immediately vested in the Department and the right to compensation immediately vested in Mallards. Pet. App. B:4; C:2.

III. Unbeknownst to Mallards, the Clerk invested the registry deposit and paid the Department ninety percent of the interest earned on it.

After the Department took title to Mallards' private property, the Clerk chose to invest the deposit. Pet. App. B:4. The Clerk later paid the Department 90% of the interest earned on the deposit. Pet. App. B:4; C:2-3. All of this was done without notice to

Mallards and outside of the judicial record. Pet. App. B:3-4, 18-19; C:6. Mallards did not know these governmental transactions occurred as no notice was provided to Mallards. Pet. App. B:3-4, 18-19; C:5-7.

IV. After the quick-take proceedings were concluded, Mallards learned the interest on the eminent domain deposit had been taken and sued to recover it.

As noted, Mallards had no notice and did not know that the Clerk had earned interest on Mallards' deposit and paid 90% of that interest to the Department until after final judgment was entered in the quick-take of Mallards' land. B:3-4, 18-19; C:5-7. When Mallards discovered the taking of the interest, Mallards filed this lawsuit individually and on behalf of all others similarly situated against the Department and the Clerk. Mallards' suit included a claim for inverse condemnation that sought to recover the interest taken from him, as well as a claim for declaratory relief that the statute's requirement that clerks pay condemning authorities 90% of interest earned on quick-take deposits was unconstitutional under the Fifth Amendment.

A. The trial court ruled an unconstitutional taking had occurred and granted class certification.

Before any class was certified, the parties each filed motions for summary judgment to obtain legal

rulings on ownership of the quick-take deposit, ownership of the investment interest, and the constitutionality of section 74.051(4). Pet. App. B:3-7. The trial court ruled that the "registry deposit and the investment interest earned on the deposit belonged to Mallards." Pet. App. B:5-6; C:2-4. The court also ruled that the investment interest earned by the Clerk was "property entitled to constitutional protection entirely separate and apart from the land that was taken by the Department." Pet. App. B:6. Relying on *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), and its progeny, the court also ruled that the "challenged provision of section 74.051(4) is unconstitutional" in requiring "investment interest to be paid to someone other than the rightful owner of the deposited principal." Pet. App. C:3-4; 9-10; 13.

Following the trial court's summary judgment rulings, Mallards filed a motion for class certification. Pet. App. B:1. The Department and the Clerk's arguments in opposition included the assertion that Mallards lacked standing because the registry funds were public funds rather than property of Mallards. Therefore, the government argued there was no taking and that any claim to the taking of the interest was barred by the prior judgment in the quick-take proceedings. Pet. App. B:30-31. The trial court rejected these arguments as it had in earlier rulings:

> The investment interest earned on Mallards registry deposit was not an element of the full compensation due to Mallards for the taking [of its land], and resolution of the

> underlying quick taking action did not preclude this action to recover Mallards' investment interest under the doctrines of res judicata, collateral estoppel or waiver.

Pet. App. B:6. The trial court granted class certification. Pet. App. B.

B. The Florida appellate court reversed the trial court and held the quick-take registry funds "were not the property of Mallards Cove."

On appeal, Florida's Second District Court of Appeals reversed the class certification order. Pet. App. A. The appellate court held that the quick-take "funds were not the property of Mallards Cove while on deposit . . . [and, therefore] no taking could have resulted, either from the actions of the Clerk or the [State], when ninety percent of the interest earned on those funds was distributed to the [State]." *Mallards Cove*, 159 So. 3d at 934. The appellate court did not consider this Court's decision in *Webb's Fabulous Pharmacies*, nor did the court apply the reasoning or purpose of the "ultimate owner" test set forth in *Webb's* as it would relate to quick-take deposits – i.e., that registry deposits are private property protected by the Fifth Amendment when they are made for the ultimate benefit of private citizens and "not for the benefit of the court" and "not for the benefit of the [government]." *Webb's* at 161. Nor did the appellate court consider the unique constitutional significance

of quick-take deposits: That they are paid to consummate an immediate taking of private property.

In holding that there was no taking of separate private property when the Clerk paid the investment interest to the Department, the Florida appellate court also concluded that the investment interest was an element of the full compensation due to Mallards for its land under the quick-take procedure. *Mallards* at 932. Under that theory, the appellate court reasoned Mallards' claim for the investment interest would be barred by *res judicata*. *Mallards* at 932. But that theory runs counter to the statute, under which a property owner's entitlement to full compensation is set forth. The statutory framework does *not* include any interest on the amount of the registry deposit – either earned or statutory. *See* § 74.061 (" . . . interest shall be allowed at the same rate as provided in all circuit court judgments from the date of surrender of possession to the date of payment *on the amount that the verdict exceeds the estimate of value set forth in the declaration of taking*."). The Florida Supreme Court declined to review *Florida Dep't of Transp. v. Mallards Cove, LLP*, 159 So. 3d 927 (Fla. 2d DCA 2015). Pet. App. D, reported at No. SC15-474, 2015 WL 5683074 (Fla. Sept. 28, 2015).

The Florida appellate court's decision relied on a prior opinion it had issued, *Livingston v. Frank*, 150 So. 2d 239 (Fla. 2d DCA 2014). In *Livingston*, the appellate court applied the doctrine of *res judicata* to uphold summary judgment against a property owner that brought suit to recover investment interest the

Clerk of Hillsborough County had earned by investing a quick-take registry deposit. The court held that "because [the] deposit funds did not become Mr. Livingston's property until the Clerk transferred them to [him] . . . there was no second taking, and his right to any interest as a portion of the settlement of the eminent domain cases simply needed to be resolved in those proceedings." *Id*. at 241.

This Court recently denied Livingston's petition for writ of certiorari in *Livingston v. Pat Frank, Clerk of the Circuit Court of Hillsborough County, Florida* No. 15-470. That ruling should not be dispositive of the petition in this case because the extensive record and opinion in this case makes clear that the Mallards' decision hinges on the courts' flawed constitutional takings analysis which is inextricably intermingled with its alternative *res judicata* holding. And, unlike Livingston, which was decided on summary judgment solely on the ownership issue and without a developed factual record, the record in this case is fulsome. Through depositions, admissions, discovery responses and thousands of documents, the record here establishes the scale and scope of the Department's takings and the extent to which the Department and clerks, in secret, conducted the business of creating and distributing many millions of dollars of interest rightfully owned by citizens whose property had been forcibly seized to the Department for its general revenue.

Mallards now respectfully asks this Court to issue a writ of certiorari and provide much-needed

direction on the important question of federal law decided in this case below.

REASONS FOR GRANTING THE PETITION

THE REFUSAL OF THE FLORIDA APPELLATE AND SUPREME COURT TO APPLY *WEBB'S* TO UNCONSTITUTIONAL TAKINGS OF INTEREST EARNED ON QUICK-TAKE REGISTRY DEPOSITS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD SETTLE

This Petition presents an issue of federal law that is both important and quite straightforward; and the issue can be resolved simply by clear direction from this Court that eminent domain deposits are not exempted from the protections of the Takings Clause. Absent this Court's intervention, the significant abuses caused by section 74.051(4) will go unremedied.

Like the Florida Supreme Court in *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951 (Fla. 1979), which this Court overturned in its *Webb's* decision, the appellate court in this case disregarded a clear state-created property right in registry deposits under Florida state law. The appellate court's decision permits the perpetuation of a scheme in which private property is unconstitutionally taken to fund general revenue. The appellate court's flawed constitutional analysis provides the underpinning for its alternative *res judicata* holding, which does not

constitute an independent state law ground for the decision.

As this Court demonstrated in *Webb's*, jurisdiction exists for this Court to determine whether a property interest in quick-take deposits exists under Florida state law, and because it does, to determine whether that property right has been taken in violation of the Fifth Amendment's protections. *Webb's* at 155 ("The principal sum deposited in the registry of the court plainly was private property, and was not the property of Seminole County. This is the rule in Florida. . . . Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .").

In *Webb's*, this Court held that registry deposits and the interest generated on them are private property belonging to the ultimate owner of the deposited funds that cannot be taken by the government without compensation. In this case, the Department and the Clerk regard quick-take deposits, like the deposit made to consummate the taking of Mallards' land, as public funds distinguishable from interpleader or other registry deposits. The Florida appellate court's opinion holds that quick-take registry deposits made to effect an immediate taking of private property prior to final judgment are excluded from the Fifth Amendment's protection of private property. Under the Florida court's rationale, the government – having already exacted a forcible

taking of private land – can also appropriate the interest earned on the money they were required to deposit to consummate the taking.

Quick-take deposits made to a court registry to immediately obtain title to private property implicate an even greater need for constitutional protection than the interpleader funds discussed in *Webb's*. Yet the opinion of the Florida court in *Mallards* strips property owners of *Webb's* protection and the guarantee of the Takings Clause that governments are barred "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

I. Florida's statutory quick-take scheme creates an immediate property interest in quick-take deposits.

Florida's Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and *available to the owner.*" Art. X, § 6(a) Fla. Const. (emphasis added). Florida Statutes Chapter 74 then provides the mechanism for effectuating a

taking prior to final judgment within the parameters established by the constitution.

A quick-taking is initiated when the government files a petition that identifies the property it seeks and establishes a good-faith estimate of the property's value. § 74.031. After the pleadings are closed, the court enters an order of taking specifying the amount the government must deposit in order to consummate the closing so as to "fully secure and fully compensate" the owner for the taking. § 74.051(2). The amount deposited cannot be less than the government's good-faith estimate of the value of the property. § 74.051(2). The government has 20 days from the order of taking to decide if it wants to complete the transaction by depositing the amount required by the court. § 74.051(4). "Immediately upon the making of the deposit, the title or interest specified in the petition shall vest in the petitioner, and the right to compensation shall vest in the persons entitled thereto." § 74.061.

Under *Kirby Forest Industries v. United States*, 467 U.S. 1, 10 (1984), pre-judgment interest *must* be paid on an entire eminent domain award *unless* a payment of compensation coincides with the taking. Section 74.061 provides for pre-judgment interest as part of just compensation only on the amount a verdict for full compensation *exceeds a quick-take deposit*. The Florida statutory framework excludes pre-judgment interest on the amount deposited precisely because the deposit is paid – and therefore immediately private and "available" to the owner –

thereby confirming that quick-take deposits must be considered the immediate private property of the ultimate owner. Any other interpretation, like the appellate court's interpretation below, is inconsistent with the statutory framework and *Kirby.*

II. Quick-take registry funds are deposited for the ultimate benefit of property owners and under *Webb's* and *Phipps* these deposits and any interest earned by investing them are private property protected by the Takings Clause.

The Takings Clause protects property rights established under state law. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 732 (2010). As described above, Florida state law establishes an immediate private property interest in quick-take registry deposits. *Webb's*, in turn, holds that registry deposits are private property belonging to the ultimate owner of those funds – even if the proper allocation of those funds is undetermined at the time of the deposit. *Webb's* at 163, 164.

In concluding that registry funds are protected private property under Florida law, *Webb's* relied on the Florida Supreme Court's opinion in *Phipps v. Watson*, 108 Fla. 547, 551, 147 So. 234, 235 (Fla. 1933). *Webb's* at 160. Under *Phipps*, ownership of Florida registry deposits turns "on whether or not [the deposit] was paid in under order or sanction of the court or was recognized by the court to be a fund in *custodia legis*

subject to protection and disbursement solely by order of the court." The *Phipps* court held that:

> [t]he rule is well settled that, when a party litigant, pursuant to court order, pays into the registry of the court as an unconditional tender a sum of money which he contends is due by him to his adversary litigant in a cause pending between them, the title to the sum passes irrevocably to the adversary though he does not accept it until the conclusion of the litigation or at some other time. If subsequent to payment into court or recognition by the court the sum is lost or stolen, the loss must fall on the litigant to whom title passes or for whose benefit it was tendered. The tender in other words becomes a fund in custodia legis subject to the order of the court or the pleasure of the depositee.

Phipps at 551, 552 (internal citations omitted). As noted above, quick-take deposits are made pursuant to orders of taking and are thus undeniably paid under order of the court. Once deposited, the court, rather than the government, has control of the funds.

The *Phipps* rule of immediate transfer applies with particular force here, where the Florida Constitution provides explicit protection for property owners who immediately and forcibly lose their property by virtue of the deposit. *See* Art. X, § 6(a), Fla. Const. (requiring eminent domain deposits to be "*available*" to the property owner). Quick-take deposits are undeniably private property under *Phipps* and *Webb's*. Like interpleader funds, quick-take funds are

deposited for the ultimate benefit of private property owners, not for the benefit of the government. The fact that the exact amount of a property owner's recovery may be uncertain, or that he may not receive disbursement until property taxes or some other obligation is paid, has no impact on his or her ultimate ownership of the deposited funds. *See Webb's* at 161, 162.

Webb's also makes clear that interest earned on private registry deposits "follows the deposit and is to be allocated to those who are ultimately to be owners of that principal." *Webb's* at 162 (citations omitted). Said differently, any interest earned is property separate from the principal and is independently afforded constitutional protection. As *Webb's* explains,

> [t]he earnings of a fund are incidents of ownership of the fund itself, and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

Id. at 164. As ultimate owner of the quick-take deposit, Mallards unequivocally had a constitutionally protected property interest in the investment interest earned by the Clerk pursuant to section 74.051(4). The government's appropriation of the investment interest resulted in a separate taking of this distinct property interest.

III. The Florida court's holding that quick-take funds are public property effects unconstitutional takings of millions of dollars of private property to fund state transportation revenue and renders the Florida quick-take statutory scheme unconstitutional.

This Court's precedent makes clear that when the government forcibly takes property, it must do one of two things to make the property owner whole: (1) provide for an award of pre-judgment interest on all amounts due to the property owner so that the property owner is fully compensated from the date of the taking; or (2) make payment contemporaneous with the taking, in which case no pre-judgment interest would be required. *Kirby Forest Industries v. United States*, 467 U.S. 1, 10 (1984) (internal citations omitted). Because Florida's statutory scheme provides for consummation of quick-takings immediately upon a quick-take deposit being made and provides for pre-judgment interest only on any amount ultimately awarded *in excess* of the deposit, the statutory scheme is constitutional only if the deposit constitutes *payment* to the property owner at the time of the taking.

In Florida's quick-take context, that deposits must constitute *payment* to property owners is precisely what Article X, Section 6(a) of the Florida Constitution and the statutory framework require. Quick-take deposits must be "*available*" to property

owners under Article X, Section 6(a), and are therefore considered paid contemporaneous with takings. Although section 74.061 does not provide for a landowner to receive pre-judgment interest on the deposit, the statutory scheme remains constitutionally sound under *Kirby* because the deposit is paid to the property owner upon deposit.

Additionally, quick-take deposits constitute payment contemporaneous with takings of private property under this Court's precedent. In *Kirby*, the Court determined that depositing money into the court's registry in a federal straight-taking constitutes *payment to the property owner contemporaneous with the taking* so that no pre-judgment interest is required. *Kirby*, 467 U.S. at 8-9. The legal effect of depositing compensation into a court's registry in a federal straight-take is indistinguishable from the effect of Florida quick-take deposits. In both proceedings condemning authorities effectuate and consummate takings by making a deposit of an amount established by order of the court. *Kirby* at 4; § 74.061; *see also United States v. Dunnington*, 13 S. Ct. 79 (1892) (holding that money deposited to immediately acquire title to private property in federal condemnation proceedings discharges government's duty to owners by depositing amount specified in order: "The money when deposited, becomes in law the property of the party entitled to it, and subject to the disposal of the court.").

The Florida court's holding that quick-take deposits are not private is inconsistent with the

statutory framework which, in section 74.061, provides for a simultaneous exchange of title to private property and the money deposited to compensate for it. The statutory framework also treats the funds as paid upon deposit by not allowing an award of prejudgment statutory interest of that amount consistent with *Kirby*. Under the Florida court's contrary interpretation that the deposited funds are *public* and *not* immediately paid to the property owner, *Kirby* would require statutory interest to be paid on the entire award. If the court's interpretation stands, the failure of Florida law to provide statutory interest on deposits is unconstitutional under the Fifth Amendment. *See Edmond v. U.S.*, 520 U.S. 651, 658 (1997) (acknowledging that a court may not interpret a statute in a manner that would render the statute unconstitutional).

Florida governments cannot have it both ways. Quick-take deposits either constitute payment of compensation contemporaneous with takings or they do not. Thus the Department and the Clerk should straightforwardly address two simple questions in their response to this petition: (1) Do quick-take deposits constitute payment to property owners? If so, exaction of any interest earned from investing such funds is an unconstitutional taking of private property without compensation as Mallards maintains. (2) Do quick-take deposits not constitute payment to condemnees, such that condemnors are free to withdraw these deposits at will as the appellate court concluded? If so, Florida's statutory scheme runs

afoul of *Kirby* because it does not require, and in fact prohibits, awards of statutory interest on quick-take deposits.

Clear direction from this Court that quick-take deposits are private property will prevent future and unnecessary challenges to a statutory framework that is, but for the opinion, constitutional under *Kirby*.

IV. The appellate court's *res judicata* alternative holding is inextricably intermingled with the federal constitutional question.

The Florida appellate court's failure to recognize Mallards' separate property interests in the quick-take deposit and the post-taking investment interest earned on the deposit led to its alternative, mistaken holding that the investment interest was somehow a part of full compensation determination in the quick-take and so barred by *res judicata*. In reality, the statutory scheme does not provide for any form of interest to be awarded on a quick-take deposit as part of full compensation for an original taking of land. *See* § 74.061 (" . . . interest shall be allowed . . . *on the amount that the verdict* ***exceeds the estimate of value*** *set forth in the declaration of taking*."). The alternative holding defies logic. Whereas payment of full compensation for a taking of private land is required, investment of quick-take deposits is optional, and only 14 of the state's clerks elected to make these investments. An optional investment interest, created and distributed to the *government* in secret

cannot logically be considered part of full compensation which is *required* to be paid to a *property owner* for a forced taking of private property. The *res judicata* ruling only provides further support for this Court's review because it depends upon, and is inextricably intermingled with, the Florida court's flawed constitutional takings analysis that disregarded that the interest generated on registry deposits is a separate property interest under *Webb's*. Moreover, the appellate court unequivocally held that no taking under the United States Constitution or the Florida Constitution occurred in this case. This Court has jurisdiction "in the absence of a plain statement that the decision below rested on an adequate and independent state ground." *See Michigan v. Long*, 463 U.S. 1032, 1044 (1983); *see also Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 171 (2009) (recognizing need for "plain statement" in civil context). The Florida court's opinion makes no plain statement that its *res judicata* ruling provided an adequate and independent ground for its decision. It did not.

Finally, the *Mallards'* record – unlike the record in *Livingston* – establishes the extent to which the Department and clerks, in secret, conducted the business of creating and distributing many millions of dollars of investment as revenue to the Department, which in no way related to paying compensation to Mallards. That these transactions were conducted out-of-view underscores the inadequacy and invalidity of the alternative holding.

In truth, the appellate court's opinion bears the earmarks of a taking itself. Whereas quick-take deposits were previously private property under state law and this Court's precedent, the Florida court has recharacterized these deposits as "public funds." The Constitution prohibits this result. *See Webb's* at 164 ("Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court. . . ."). *See also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection*, 560 U.S. 702, 713-14 (2010) ("The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor ('nor shall private property *be taken*')").

V. The Florida court's opinion creates a constitutional predicament with implications throughout and beyond Florida that merits this Court's review.

The opinion below also conflicts with decisions from other states that properly followed *Webb's* or otherwise concluded that deposits made to consummate quick-takings belong to property owners immediately upon deposit. *See Moldon v. County of Clark*, 188 P.3d 76, 80-81 (Nev. 2008) (holding that under a similar Nevada statutory scheme, property owners had property interest in deposited quick-take funds); *In re Town of Greenburgh v. Commissioner of Finance*,

419 N.E.2d 871 (N.Y. 1981), *affirming per curiam for the reasons stated in In re Town of Greenburgh v. Commissioner of Finance*, 421 N.Y.S.2d 239 (N.Y. App. Div. 1979) (analyzing virtually identical New York statutory framework and holding property owner owned interest earned on quick-take deposit because ownership of interest follows ownership of the principal); *Mississippi State Highway Comm'n v. Owen*, 310 So. 2d 920, 922 (Miss. 1975) (holding that when government deposited quick-take funds with clerk, it had no further control of funds and no right to withdraw them; only landowner could have obtained and used money); *State by State Highway Comm'r v. Seaway, Inc.*, 217 A.2d 313, 317-18 (N.J. 1966) (recognizing that deposit fulfills constitutional obligation of making just compensation and is private property, and that delay in payment requires interest); *Fine v. City of Minneapolis*, 391 N.W.2d 853, 856 (Minn. 1986) (holding mandates of Minnesota Constitution satisfied by deposit of approved appraisal value with court: "As a practical matter, the deposit by the city of the . . . approved appraisal value and the owners' immediate entitlement to those funds obviates an award of interest on the deposited monies."); *Morton Grove Park Dist. v. Am. Nat. Bank & Trust Co.*, 399 N.E.2d 1295, 1299-300 (Ill. 1980) (interest earned on eminent domain deposit belonged to property owner; distinguishing investment interest earned on deposit from claim for pre-judgment interest on deposit). *See also Camden I Condo., Inc. v. Dunkle*, 805 F.2d 1532, 1534-35 (11th Cir. 1986) (analyzing predecessor version of section 74.051 to

determine whether *Webb's* should be retroactively applied and stating "each clerk who elected to collect interest assumed the risk that these statutes would ultimately be found unconstitutional."). *See* Pet. App. H.

Despite this Court's precedent, Florida has demonstrated a persistence in generating revenue through investment of eminent domain registry deposits to the profit of the government and detriment of property owners. This persistence has proved profitable for Florida's state government and officers. In fact, the record shows the State of Florida, Department of Transportation actively solicited investment of private registry deposits and the seizure of the interest earned for over twenty years without notice to the rightful owners and in this manner raised over $8 million in revenue for the government.

As shown by the citations above, Florida is not the only state whose legislature has tried to generate revenue by exacting interest earned on these deposits. *See supra* at 25-26. The indifference to Constitutional protections of private property shown by the State of Florida's Department of Transportation, the Clerk and the Florida court make it clear: These protections are in jeopardy. Without review by this Court, the prospect of generating revenue by exacting the interest earned on eminent domain deposits will be too tempting for Florida and other states to resist. This Court must invalidate the exception to *Webb's* created by the *Mallards* opinion for eminent domain deposits.

The risk posed by the exception to *Webb's* is particularly ominous in quick-take proceedings where condemning authorities immediately obtain title to private land and are not prejudiced by delaying distribution of compensation to private property owners. Brazen enough to exact the interest on eminent domain registry deposits despite the holding in *Webb's*, the Florida government is surely also brazen enough to do what *Webb's* cautioned against – delay resolution of quick-take proceedings so that they can continue to earn money on the deposit while the landowner's property and funds are tied up in litigation.

In addition to this case at least three other related cases seek compensation for government appropriation of investment interest under section 74.051(4). *See Resource Conservation Holdings, LLC v. Green, et al.*, No. 11CA-2616 (Twentieth Judicial Cir., Lee County, Fla.); *Bowein v. Brock*, No. 10-4367-CA (Twentieth Judicial Cir., Collier County, Fla.); and *HCH Development, LLC v. Gardner*, No. 07-CA-12819, Div. 33 (Ninth Judicial Cir., Orange County, Fla.).

CONCLUSION

Florida's stubborn refusal to respect the private nature of registry deposits persists. The opinion is nothing short of a judicial taking. It creates confusion and the false belief that these eminent domain deposits are beyond the reach of Fifth Amendment protection

and this Court's decision in *Webb's*. In the absence of clear guidance from the United States Supreme Court, Florida's courts appear unwilling to appreciate or properly apply the protections provided by this Court's precedents and the Takings Clause of the United States Constitution. If the Florida court's decision is allowed to stand, thousands of property owners will be denied millions of dollars in compensation for the uncompensated takings of their investment interest. It is critical for this Court to address and remedy the Florida appellate court's deviation from this Court's precedent and established principles of federal constitutional takings law.

Respectfully submitted,

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APPENDIX A

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

FLORIDA DEPARTMENT OF TRANSPORTATION, Appellant, v. MALLARDS COVE, LLP, for itself and all others similarly situated, Appellee.	Case No. 2D13-181
PAULA S. O'NEIL, Clerk of the Court of Pasco County, Appellant, v. MALLARDS COVE, LLP, for itself and all others similarly situated, Appellee.	Case No. 2D13-336 CONSOLIDATED

Opinion filed March 6, 2015.

Appeals pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Pasco County; Linda Babb, Judge.

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David P. Ackerman and Lanelle K. Meidan of Ackerman, Link & Sartory, P.A., West Palm Beach; and Anthony P. Pires, Jr., of Woodward, Pires & Lombardo, P.A., Naples, for Amicus Curiae, Dwight E. Brock, Clerk of the Circuit Court of Collier County.

CASANUEVA, Judge.

In this consolidated appeal, the Florida Department of Transportation (the DOT) and the Clerk of the Court of Pasco County (the Clerk), Appellants, seek review of a nonfinal order granting class certification and appointing Mallards Cove, LLP, as class representative. Mallards Cove filed a class action complaint asserting that Appellants had unlawfully

taken private property of Mallards Cove[1] by transferring investment interest earned on deposit funds to the DOT rather than Mallards Cove. These deposit funds were being held in the court registry pursuant to a quick-take eminent domain proceeding.[2]

Because we conclude that a constitutional violation did not occur in this case and Mallards Cove has failed to allege a justiciable case or controversy, we reverse the class certification. Based on this holding, we decline to reach the additional arguments raised by Appellants challenging various other elements of class certification.

I. FACTS AND PROCEDURAL HISTORY

Mallards Cove was a defendant in a 2007 quick-take eminent domain proceeding initiated by the DOT to take a tract of land owned by Mallards Cove. Pursuant to chapter 74, Florida Statutes (2007), which sets forth Florida's quick-take eminent domain procedure,

> specified public bodies are entitled to take possession and title to property in advance of a final judgment by filing a condemnation petition and declaration of taking and depositing a good faith estimate of the value of the land into the registry of the court.

[1] We refer to Mallards Cove throughout as the purported class representative.

[2] Chapter 74, Florida Statutes (2007).

> § 74.031. . . . [T]he trial court enters an order allowing the taking and directing the petitioner "to deposit in the registry of the court such sum of money as will fully secure and fully compensate the persons entitled to compensation as ultimately determined by the final judgment." § 74.051(2). Upon making the deposit, the petitioner is vested with title and takes possession of the property and, in exchange, the right to full compensation for the property vests in the property owner. § 74.061. The matter of full compensation is then determined in accordance with the provisions of chapter 73, Florida Statutes (2007), which provides for the empanelling of a jury to make a final determination of value. §§ 74.061, 73.071.

Livingston v. Frank, 150 So. 3d 239, 241 (Fla. 2d DCA 2014).

In the Mallards Cove quick-take proceeding, the circuit court entered an order of taking on August 15, 2007, pursuant to stipulation of the parties. The DOT was required to deposit a good faith estimate of value in the amount of $2,004,320 into the registry of the court. The funds were deposited on August 30, 2007, and released to Mallards Cove, net of property taxes, on September 13, 2007.

While the funds were on deposit in the court registry, the Clerk elected to invest the funds as

permitted by section 74.051(4),[3] which stated in pertinent part: "The clerk is authorized to invest such deposits so as to earn the highest interest obtainable under the circumstances in state or national financial institutions in Florida insured by the Federal Government. Ninety percent of the interest earned shall be paid to the petitioner."[4] The Clerk earned investment interest on the deposit in the amount of $4396.49, and subsequently transferred ninety percent of that sum to the Department and retained ten percent, as provided by section 74.051(4). The eminent domain case was concluded pursuant to a stipulated final judgment entered on December 13, 2007, by which Mallards Cove and the DOT stipulated to an amount of "full, just and reasonable compensation" for the property.[5] No appeal was taken in that case, and Mallards Cove does not challenge that taking here.

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[3] At the time the funds were invested the statute at issue was section 74.051(3). The statute was renumbered in 2008, but the operative language is identical. Throughout this opinion, the statutory reference will be to section 74.051(4).

[4] The last sentence of section 74.051(4) has since been amended, effective July 1, 2013, to provide: "Ninety percent of the interest earned shall be allocated in accordance with the ultimate ownership in the deposit." *See* ch. 13-23, §§ 1, 2, at 220-21, Laws of Fla.

[5] The stipulated final judgment provides in part that Mallards Cove recovered from the DOT the sum of $2,450,000 "in full payment for the property . . . and for statutory interest, subject to apportionment, and subject to the satisfaction of all liens, mortgages and encumbrances, and subject to payment to the tax collector."

In 2009, Mallards Cove initiated the case now on appeal, seeking a declaration that section 74.051(4) of the quick-take eminent domain statute is unconstitutional in that it directs clerks to pay ninety percent of interest earned on the quick-take deposit funds to the condemning authority and asserting a claim of inverse condemnation against the Clerk and the DOT, resulting from the disbursement of ninety percent of the accumulated interest to the DOT rather than to Mallards Cove.

The circuit court ruled that, as a matter of law, Mallards Cove owned the deposit funds from the moment the DOT deposited the funds into the registry. The circuit court further ruled that Mallards Cove owned the interest that was earned when the Clerk invested the deposit funds and that this investment interest "was property entitled to constitutional protection entirely separate and apart from the real property that was taken by the [DOT] in the underlying quick taking procedure." The circuit court extensively analyzed the requirements of class certification under Florida Rule of Civil Procedure 1.220 and ultimately granted class certification.

Appellants argue that the order on class certification must be reversed because, inter alia, Mallards Cove lacks the requisite standing to serve as a class representative since it did not own the deposit funds at the time interest was earned, the action is barred by res judicata due to the stipulated final judgment in the eminent domain case, and the requirements for class certification were not met. This appeal was

stayed pending the appeal of *Livingston*, 150 So. 3d 239, which involved similar questions of law regarding the inverse condemnation claim.

While the procedural posture of this case is different from that of *Livingston* because we now review an order granting class certification, *Livingston* is nonetheless determinative, as we discuss below. First, we find it useful to examine the operative constitutional provisions in eminent domain proceedings.

II. CONSTITUTIONAL ANALYSIS

The first operative constitutional provision is found in the Fifth Amendment to the United States Constitution and the second is found in our state constitution. The provisions are nearly identical.

A. Fifth Amendment

Recognizing the importance of property to our founding fathers, as well as their intention to limit the powers granted to the national government, James Madison led the first Congress to pass those amendments, including the Fifth, which we commonly refer to as our Bill of Rights. Meeting those philosophical pillars, the Fifth Amendment's Takings Clause, made applicable to the states through the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897), provides:

"[N]or shall private property be taken for public use, without just compensation," U.S. Const. amend. V.

As the text makes plain, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). Just compensation, in this context, "means the full and perfect equivalent in money of the property taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). The value of a permanent taking is fair market value. *Id.* at 374. The owner

> is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. . . . Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined.

Olson v. United States, 292 U.S. 246, 255 (1934); *see also Brown v. Legal Found. of Wash.*, 538 U.S. 216, 236 (2003). Further, just compensation "is measured by the property owner's loss rather than the government's gain." *Brown*, 538 U.S. at 235-36.

B. Florida's Constitution

The second operative provision is found in the Takings Clause of Florida's constitution, which provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the

registry of the court and available to the owner." Art. X, § 6(a), Fla. Const. Similar to its federal counterpart, "'[t]he theory and purpose of that guaranty is that the owner shall be made whole so far as possible and practicable.'" *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289, 292 (Fla. 1958) (quoting *Dade Cnty. v. Brigham*, 47 So. 2d 602, 604 (Fla. 1950)). The Supreme Court of Florida has further stated: "[O]ur constitutional provision for full compensation requires that the courts determine the value of the property by taking into account all facts and circumstances which bear a reasonable relationship to the loss occasioned the owner by virtue of the taking of his property under the right of eminent domain." *Id.* at 291.

C. Interest as a Component of Just Compensation

The United States Supreme Court has held that interest is a component of just compensation in federal eminent domain proceedings. *Behm v. Dep't of Transp.*, 383 So. 2d 216, 217-18 (Fla. 1980); *see also Albrecht v. United States*, 329 U.S. 599, 602 (1947) ("'[J]ust compensation' in the constitutional sense, has been held, absent a settlement between the parties, to be fair market value at the time of taking plus 'interest' from that date to the date of payment."); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923). Florida's quick-take statutory scheme includes an interest provision, § 74.061, and Florida's legislature has thus "provided that

interest is a part of the 'full compensation' required by article X, section 6, Florida Constitution, to be paid in eminent domain proceedings" in accordance with section 74.061.[6] *Behm*, 383 So. 2d at 217-18 (stating that "the question of interest on condemnation awards . . . is controlled by statute").

III. CASE ON APPEAL

Reviewing the textual language left us by the founding fathers, two operational principles require application in this case. First, there must be a taking of property. All concede Mallards Cove's real property was taken by the government pursuant to the quick-take eminent domain proceeding. This act triggers the second operational principle, the constitutional requirement for just compensation.

Here, the real property was taken pursuant to Florida's statutory quick-take procedures found in chapter 74. Under chapter 74 and the Fifth Amendment's mandate, Mallards Cove was entitled to full

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[6] We are not called upon in this case to determine whether section 74.061 is constitutionally infirm by reason of its limiting language, which provides for interest to the property owner "from the date of surrender of possession to the date of payment *on the amount that the verdict exceeds the estimate of value set forth in the declaration of taking.*" (Emphasis added.) As discussed herein, Mallards Cove resolved the takings case by stipulation, not jury verdict, and the final judgment is dispositive as to the matter of full compensation, including interest as a component thereof.

compensation. Full compensation requires that Mallards Cove, as the property owner, be placed in as good a position pecuniarily as if this property had not been taken, *but no more. See Brown*, 538 U.S. at 236. Thus, while interest on the valuation of the property taken was a proper component of full compensation due to Mallards Cove, Mallards Cove and the DOT entered into a stipulated final judgment which resolved the amount of full compensation, including interest. No appeal was taken from that case. Thus, the matter of full compensation has been fully and finally resolved and Mallards Cove cannot now be heard to seek additional compensation for the taking. *See Livingston*, 150 So. 3d at 243-44.

Mallards Cove attempts to get around the finality of the eminent domain proceeding by arguing that a second taking occurred incident to that proceeding, and compensation is due for that second taking. Mallards Cove contends that, immediately upon deposit, the quick-take deposit funds became the private property of Mallards Cove and, as the owner of the principal, it is also the owner of the interest. Thus, Mallards Cove argues, a second taking resulted from the Clerk's investment of the quick-take deposit funds and payment of ninety percent of that investment interest to the DOT.[7]

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[7] We note that, on its face, this argument is incongruous at best. If the government did take its private property, Mallards Cove would be entitled to just compensation; that is, to "be made whole." *Olson*, 292 U.S. at 255. However, Mallards Cove claims

(Continued on following page)

This argument was addressed and rejected in *Livingston.*

> Under Florida's quick-take statutory scheme, once the condemning authority makes the deposit, two acts occur simultaneously. First, the condemning authority acquires title to the condemned property, and, second, the property owner's entitlement to full compensation under the respective constitutional provisions vests. § 74.061. It is the right to full compensation that vests, *not a right to the specific funds*. . . .

Livingston, 150 So. 3d at 244-45 (emphasis added).

Although it could have, the legislature did not expressly state that upon deposit those funds immediately became the private property of the property owner. Rather, the legislature recognized that in a quick-take scenario, that which vested upon the making of the deposit was the entitlement to constitutional compensation. Additionally, the legislature used permissive language by providing that "the court *may* direct that the sum of money set forth in the declaration of taking be paid forthwith to such defendants from the money deposited in the registry of the court." § 74.071 (emphasis added). Finally, the legislature placed the property owner on notice of the risk that, should the final compensation award be

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it is entitled to ninety percent of the earned interest. As a matter of mathematics, the amount claimed by Mallards Cove is ten percent *less* than whole.

less than the amount deposited, the condemnor would be entitled to reimbursement of the overage by way of a monetary judgment. *Id.*

Thus, pursuant to the plain language of chapter 74, when the DOT deposited quick-take funds into the registry, the right that vested in Mallards Cove was the entitlement to be paid full compensation for that property, not entitlement to those specific funds placed on deposit. *See Livingston*, 150 So. 3d at 245. "'[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" *Greenfield v. Daniels*, 51 So. 3d 421, 425 (Fla. 2010) (alteration in original) (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

Therefore, the circuit court erred in determining that the deposit funds in this case were the personal property of Mallards Cove while those funds remained on deposit. *See Livingston*, 150 So. 3d at 245. As the funds were not the property of Mallards Cove while on deposit, no taking could have resulted, either from the actions of the Clerk or the DOT, when ninety percent of the interest earned on those funds was distributed to the DOT.

Mallards Cove has failed to allege a justiciable case or controversy and thus lacks legal standing to represent the putative class. *See Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 116 (Fla. 2011). This

lack of standing requires reversal of the order granting class certification. *See id.*; *United Auto. Ins. Co. v. Diagnostics of S. Fla., Inc.*, 921 So. 2d 23, 25 (Fla. 3d DCA 2006).

IV. CONCLUSION

As the condemnee in a quick-take proceeding, Mallards Cove was entitled to be paid full compensation for the real property taken by the DOT. No further taking occurred. Full compensation was determined pursuant to a stipulated final judgment from which no appeal was taken, and an interest award on the monies used to make Mallards Cove whole would be a "double dip." Mallards Cove has failed to establish that a justiciable case or controversy exists between it and the DOT or the Clerk. Accordingly, we reverse the order granting class certification and remand for further proceedings consistent with this opinion.

Reversed and remanded.

KELLY and BLACK, JJ., Concur.

APPENDIX B

IN THE CIRCUIT COURT OF
THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY FLORIDA

MALLARDS COVE LLP, a Florida Limited Liability Partnership, for itself and all others similarly situated,

Plaintiffs,

v.

JED PITTMAN, CLERK OF THE CIRCUIT COURT OF PASCO COUNTY, individually and as representative of all other Clerks of the Florida Circuit Courts similarly situated, and the STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION individually and as representative of all other condemning authorities similarly situated,

Defendants.
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Case No.
51-2008-CA-7689
DIVISION: ES-JI

CLASS REPRESENTATION

TRUE COPY
Original Signed

DEC 04 2012

LINDA H. BABB
CIRCUIT JUDGE

ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

This cause came on for evidentiary hearing on October 25, 2012, on Plaintiff's Motion for Class Certification. Pursuant to the provisions of Florida Rule

of Civil Procedure 1.220, Plaintiff, Mallards Cove LLP ("Mallards"), sought certification of a Class comprised of the following individuals:

> All property owners who were originally defendants in eminent domain cases brought pursuant to Chapters 73 and 74 of the Florida Statutes by the State of Florida, by the Florida Department of Transportation ("Department") from September 11, 2004 to the present, where the Department made registry deposits pursuant to Florida Statutes section 74.051(4); and a Florida Clerk of the Circuit Court elected to invest the eminent domain deposits so as to earn investment interest; and the property owners have not received at least ninety percent (90%) of the interest that was earned by any such investment.

On August 24, 2012, well before the class certification hearing, Plaintiff submitted a Class Certification Hearing Brief containing extensive factual and legal arguments along with documentary evidence and affidavits that were admitted at the hearing without objection from the Defendants. Plaintiffs supplemented this submission with several more documents that were provided to opposing counsel and the Court on October 19, 2012, and were admitted into evidence without objection at the hearing. In addition, the Class Representative testified in person at the hearing, and class counsel answered a number of questions tendered by the Florida Department of Transportation ("Department"). Neither the Department

nor the Clerk of Circuit Court for Pasco County ("Clerk") submitted written briefs or any other paper in opposition to class certification. Each Defendant called one witness at the hearing.

The Court has conducted a rigorous analysis to determine whether the elements of the Rule 1.220 are satisfied. *Sosa v. Safeway Premium Finance Company*, 73 So. 3d 91, 105, 118 (Fla. 2011); *City of Tampa v. Addison*, 979 So. 2d 246, 251 (Fla. 2d DCA 2007). The Court finds that this case is uniquely well situated for class action treatment. Arguably, the pleadings alone in this case make obvious that the case is appropriate for certification as a class action. However, Plaintiff has also submitted overwhelming evidence establishing that each element of the Rule is satisfied and that certifying this case as a class action is appropriate. *See Fla. Health Sciences Ctr., Inc. v. Elsenheimer*, 952 So. 2d 575, 581 (Fla. 2d DCA 2007); *Ernie Haire Ford, Inc. v. Gilley*, 903 So. 2d 956, 959 (Fla. 2d DCA 2005).

I. Procedural Background

A. Undisputed Facts Established Prior to Class Certification

Prior to Plaintiff filing its Motion for Class Certification, the parties, by agreement and pursuant to a number of Agreed Case Management Orders, engaged in dispositive motion practice which placed a number

of discreet legal issues before the Court on an undisputed factual record.[1] Defendants do not dispute that prior to August 30, 2007, Plaintiff owned a tract of land referred to as Parcel 109 that became the object of a "Quick Taking" action initiated by the Department pursuant to Chapter 74 of the Florida Statutes. In connection with the Quick Taking of Parcel 109, on August 30, 2007, the Department deposited a sum of money into the court registry as a good faith estimate of the value of Parcel 109. During the time Mallards' good faith estimate of value was on deposit in the court's registry, the Clerk of the Circuit Court in and for Pasco County elected to invest the funds, as the Clerk had the discretion to do pursuant to section 74.051(4) of the Florida Statutes.[2] The Clerk earned investment interest on the registry deposit, subsequently transferred 90 percent of the investment interest to the Department, and retained 10% of the interest as income to the Clerk.[3] Prior to the investment of Mallards' registry deposit by the Clerk, it was the Department's long-standing policy to pursue

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[1] This motion practice included Plaintiff's Motion for Partial Summary Judgment, and cross motions for summary judgment filed by Plaintiff and the Defendants.

[2] At the time the funds were invested the statute at issue was 74.051(3). The statute was renumbered in 2008, but the language at issue is identical. Throughout this order, the statutory reference will be section 74.051(4) Fla. Stat.

[3] As stated in the Amended Complaint, Plaintiff does not challenge the Clerk's retention of the ten percent investment management fee.

investment interest on eminent domain registry deposits throughout the State of Florida. The Department routinely corresponded with various Clerks of the Court asking them to invest registry deposits in the "mutual best interest" of the Department and the Clerks. It was the Department's policy to not inform property owners that it was pursuing investment of registry deposits, and the Department can identify no case in which the Department ever advised a property owner that a registry deposit was invested, that interest was earned on the investment, or that the Department had received any of the interest earned from a Clerk of the Court. Likewise the Clerk did not inform Mallards that the Clerk had elected to invest eminent domain registry deposits, that interest had been earned on the Mallard's deposit or that 90 percent of the interest earned had been transmitted to the Department.

B. Prior Legal Rulings Relevant to Class Certification

Several of the Court's rulings on Plaintiff's Motion for Partial Summary Judgment and the parties' cross motions for summary judgment are relevant to the class certification determination. First, as a matter of law, Mallards Cove owned the eminent domain registry deposit made by the Department to compensate Mallards for the taking of Parcel 109 in the quick taking action. (Order on Plaintiff's Motion for Partial Summary Judgment). Mallards also owned the interest that was earned when the Clerk invested

Mallards' deposit. (*Id.*). The investment interest earned as a result of the Clerk's discretionary investment was property entitled to constitutional protection entirely separate and apart from the real property that was taken by the Department in the underlying quick taking procedure. (*Id.*). Florida Statute section 74.051(4) is unconstitutional in that it mandates the payment of investment interest belonging to individual citizens to be paid to condemnors rather than to the lawful owner of the interest. (Order on Plaintiff's Motion for Summary Judgment) The investment interest earned on Mallards' registry deposit was not an element of the full compensation due to Mallards for the taking of Parcel 109,[4] and resolution of the underlying quick taking action did not preclude this action to recover Mallards' investment interest under the doctrines of res judicata, collateral estoppel or waiver. (*See* Orders on Department's Motion to Dismiss; Department's Amended

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[4] Investment interest earned by Clerk's pursuant to 74.051(4) cannot logically or legally be a component of full compensation. It is only generated when any particular Clerk ***makes the decision*** to invest a registry deposit. Because payment of full compensation is a constitutional mandate, Clerks would be ***required*** to invest deposits, if payment on investment interest were necessary to fully compensate a property owner for the loss of their condemned property. In reality, the evidence admitted at the hearing shows that only a minority of Florida's clerks have opted to invest eminent domain registry deposits. Likewise, by definition the investment interest generated by 74.051(4) cannot be considered as compensation to the property owner as the statute directs the interest to be paid to the ***condemnor***, rather than the property owner.

Motion for Summary Judgment; and Clerk's Motion for Summary Judgment).

II. Facts Established at the Evidentiary Class Certification Hearing

A. Facts Established by the Department's Stipulations and Records

Plaintiff submitted two Stipulations that were entered into evidence as Exhibits 8 and 9. These stipulations demonstrate that all of the information necessary to identify and notify the Class and to calculate each Class Member's recovery is readily ascertainable by reference to objective information contained in public records maintained by the Department and Florida's Clerks of the Court. Specifically, the Department stipulated that its records reveal the identity of each Class Member. The Department's records also capture the circuit civil case number assigned to each quick taking action in which the Department made a deposit, the date of each deposit and the amount of each deposit, the parcel number of the real property taken, the amount of each deposit and the date it was deposited, and an address for each property owner. Screen shots from one of the Department's computer systems were entered into evidence without objection. These documents confirm that the Department's systems capture information critical to the identification and notification of Class Members as well as objective calculation of their monetary claims. Next, the Department stipulated that Florida's Clerks of Court are also

required by law to maintain in perpetuity the amount of each eminent domain registry deposit made by the Department, the date each deposit was made, the date each deposited amount was disbursed, and the amount of interest earned by the clerk from investing each deposit.

The Department also produced an extensive number of financial records in discovery which were entered into evidence. These documents establish that fourteen Clerks of the Court elected to invest eminent domain registry deposits made by the Department during the Class Period, and transmitted the interest earned to the Department in accordance with section 74.051(4) Fla. Stat. These documents reveal that in Hillsborough County alone, interest belonging to at least 77 individuals was paid to the Department, and that with respect to many of these Class Members, the amount of interest taken from them totaled less than $50 – amounts too small to justify individual court actions.

B. Facts Established by the Clerk's Witness and the Clerk's Records

The testimony of the Clerk's designated deposition witness was admitted into evidence without objection along with documents produced by the Pasco County Clerk of the Court. The Clerk called this same witness, Delores Lupo, to testify in person at the hearing. All of this evidence corroborated the Department's stipulations concerning the kind and quality of

information maintained by Clerks of the Court related to Class Members and the calculation of their claims.

Additionally, the Clerk's documents reveal that, like other Clerks who have elected to invest registry deposits made by the Department, the Pasco County Clerk maintains public records in perpetuity that establish the date each good faith deposit was made by the Department, the amount of each deposit, the case number in which each deposit was made, the date each deposit was disbursed, the interest rate(s) earned by the Clerk by investing each deposit, and confirmation that the interest earned on each deposit was transmitted to the Department. In addition, the Clerk's records also demonstrate that many Class Member claims are not large enough to justify each class member filing a separate action.

C. Testimony of Plaintiff's Notice and Administration Expert, Entered by Agreement

Jeff Dahl is President of Dahl Administration, and is a nationally recognized expert with extensive experience in class action notice and administration that has been retained as Notice Administrator for this class action. Mr. Dahl's unopposed affidavit, which was admitted into evidence without objection, establishes that each Defendant has directly communicated with Class Members and maintains robust and meaningful information related to these contacts.

Dahl Administration will provide direct mail notice to the class by reviewing the Defendants' documents, court records and other public records maintained by the Clerks of the Court and the State of Florida. These files will reveal the identity of all Class Members. Dahl will obtain the most current mailing address for Class Members by making use of the National Change of Address database and will, if necessary, follow up with attorneys who represented class members in the underlying eminent domain cases. The proposed Notice to the Class accurately and meaningfully informs Class Members of the information they need concerning this case and their rights as Class Members. Dahl Administration will determine the amount of damages for each Class Member by making simple mathematical calculations on objective information contained in readily available public records. Dahl will calculate each Class Member's recovery by simply multiplying 90% of each Class Member's deposit, times the applicable interest rate(s) earned by the Clerk while the deposit was in the registry.

The notice and administration program will include a case-specific website that will provide meaningful information to Class Members. The website will be modeled after the Federal Judicial Center's "Illustrative" Forms of Class Action Notices and will include a Home page, a Frequently Asked Questions Page, an Important Dates page, a Court Documents Page and a Contact Us page. The Toll-Free Helpline will be set up prior to issuing the notice and will

inform Class Members how to access additional information 24 hours a day, 7 days a week. The help line will also provide answers to relevant frequently asked questions. The Notice and Administration program represents the best notice that is practicable under the circumstances and includes direct individual notice to all Class Members.

D. Uncontroverted Facts Established by Class Counsel and the Class Representative

Michael Firminger, an owner of Mallards Cove, testified in person at the hearing. Mr. Firminger has taken a very active role as Class Representative, has advocated on behalf of all Class Members and is committed to continuing to do so. Mr. Firminger testified that he understands his responsibility to act on behalf of the Class in its best interest and has endeavored to do so. He testified that his interests are not antagonistic to those of the rest of the Class. Rather, his interests and the interests of Mallards Cove parallel the interests of the Class members, as he and the Class Members have sought redress from the same unconstitutional statute and the unconstitutional taking of their investment interest pursuant to the statute. Mr. Firminger testified that he is financially capable of funding this litigation if he were called upon to do so. He also testified that he has satisfied that Class Counsel are capable of funding this litigation without asking him to do so.

Christa L. Collins and Jackson H. Bowman submitted affidavits detailing their legal background and experience, which demonstrate their adequacy as Class Counsel and were entered into evidence without objection. The Court has also observed these lawyers over the course of this litigation and is satisfied that they are well qualified to serve as Class Counsel.

III. Certification of this Case as a Class Action is Appropriate

In conducting the rigorous analysis of class certification in this case, this Court has been guided by the analytical framework set forth by the Florida Supreme Court in *Sosa v. Safeway Premium Finance Company*, 73 So. 3d 91 (Fla. 2011). The Court recognizes that in order for a certification of a class to take place under Rule 1.220, Plaintiff, as the party seeking certification, is required to carry the burden of pleading and demonstrating the presence of the elements required under the Rule. *Id.* at 106 (citing *InPhyNet Contracting Servs. v. Soria*, 33 So. 3d 766, 771 (Fla. 4th DCA 2010)).

In order to satisfy the Rule, Plaintiff must have satisfied the four elements found in subsection (a) of Rule 1.220, which are commonly referred to as the numerosity, commonality, typicality and adequacy requirements. Specifically, the Rule requires the following:

> (1) the members of the class are so ***numerous*** that separate joinder of each member is impracticable (numerosity),
>
> (2) the claim or defense of the representative party raises questions of law or fact ***common*** to the questions of law or fact raised by the claim or defense of each member of the class (commonality),
>
> (3) the claim or defense of the representative party is ***typical*** of the claim or defense of each member of the class (typicality), and
>
> (4) the representative party can fairly and ***adequately protect*** and represent the interests of each member of the class (adequacy).

Fla. R. Civ. P. 1.220(a) (emphasis added).

Once a court determines that the four requirements of subsection (a) are met, a moving party must also satisfy one of the three subdivisions of subsection (b) of the Rule which allows certification of a class if:

> (1) the prosecution of separate claims or defenses by or against individual members of the class would create a risk of either:
>
> > (A) inconsistent or varying adjudications concerning individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications concerning individual members of the class which would, as a

practical matter, be dispositive of the interests of other members of the class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class who are not parties to the adjudications to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate; or

(3) the claim or defense is not maintainable under either subdivision (b) (1) or (b)(2), but the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class ***predominate*** over any question of law or fact affecting only individual members of the class, and class representation is ***superior*** to other available methods for the fair and efficient adjudication of the controversy.

Fla. R. Civ. P. 1.220(b).

In order to evaluate the predominance and superiority requirements of subsection (b)(3) outlined above, a court must consider all relevant facts and circumstances, including (A) the respective interests of each member of the class in individually controlling the prosecution of separate claims or defenses, (B) the nature and extent of any pending litigation to

which any member of the class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated, (C) the desirability or undesirability of concentrating the litigation in the forum where the subject action is instituted, and (D) the difficulties likely to be encountered in the management of the claim or defense on behalf of a class. *Safeway Premium* at 107.

This case satisfies the numerosity, typicality, commonality and adequacy requirements of subsection (a), and is unique in that it also satisfies each of the three subdivisions of subsection (b). As Plaintiff has requested certification pursuant to (b)(1), (b)(2) and (b)(3), and consistent with certification under subsection (b)(3), Plaintiff is prepared to ensure that full notice to the Class as required by subsection (d)(2) is provided.[5] Following the Supreme Court's example in *Safeway Premium*, the Court begins its analysis of the elements of Rule 1.220 with the commonality requirement.

A. Commonality

A plaintiff seeking class certification satisfies the commonality requirement when the claims of class members and the plaintiff arise from the same course

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[5] Plaintiff has requested that the cost of providing notice to the Class be funded by Defendants. This request has not been set for hearing, and no decision by the Court as to this issue has been made.

of conduct and routine practice and are based on the same legal theory. *Safeway Premium* at 1415 (citing *Morgan v.* Coats, 33 So. 3d 59, 63-64 (Fla. 2d DCA 2010), and *Powell v. River Ranch Prop. Owners Ass'n, Inc.*, 522 So. 2d 69, 70 (Fla. 2d DCA 1988)).

In this case, the claims of Plaintiff and the Class arise from the same course of conduct; namely the systematic unconstitutional taking of investment interest earned pursuant to the provisions of the same unconstitutional statute. Likewise, the claims of Plaintiff and the Class are predicated on the same legal theory; namely that Plaintiff and the Class owned the registry deposit and any interest earned on the deposit and that the Defendants jointly and severally committed an unconstitutional taking of their investment interest.

Additionally, the commonality requirement is satisfied because there "is a need for, and benefit derived from, class treatment." *Safeway Premium* at 107 (citing *Broin v. Philip Morris Cos., Inc.*, 641 So. 2d 888, 890 (Fla. 3d DCA 1994) Expressed differently, the commonality prong "only requires that resolution of a class action affect all or a substantial number of the class members, and that the subject of the class action presents a question of *common or general interest.*" *Safeway Premium* at 107 (citing *Freedom Life Ins. C. of America v. Wallant*, 891 So. 2d at 1109, 1116 (Fla. 4th DCA 2004) (quoting *Colonial Penn Ins. Co. v. Magnetic Imaging Sys. I, Ltd.*, 694 So. 2d 852, 853 (Fla. 3d DCA 1997)). In this case, by definition, resolution of the merits of the claims

raised in the class action will affect all of the Class Members. The statute is unconstitutional as to all Class Members, and investment interest unconstitutionally taken pursuant the statute was unlawfully taken as to all.

The only factual issue separating Class Members is the amount of investment interest that was unconstitutionally taken from them. However, as demonstrated by the Affidavit of Jeff Dahl, determination of each Class Member's recovery will be formulaic in nature and will be based on simple mathematical calculations utilizing objective data that is readily available and can be easily found on public records. This calculation will closely resemble the computation of prejudgment interest, a function that is regarded as purely ministerial in nature. *See Wood v. Unknown Personal Representative of the Estate of Burnette*, 56 So. 3d 74 (Fla. 2d DCA 2011).

Even damage inquiries that are individualized in nature do not preclude class certification. *Safeway Premium* at 107 (citing *Morgan* at 64-65); *Ouellette v. Wal-Mart Stores, Inc.*, 888 So. 2d 90, 91 (Fla. 1st DCA 2004); *Broin*, 641 So. 2d at 891 (citing *Cohen v. Camino Sheridan, Inc.*, 466 So. 2d 1212, 1214 (Fla. 4th DCA 1985)). Determination of the amount each Class Member will recover is not highly individualized, however in this case. Contrary to the suggestion of the Department, no evidence of factual circumstances surrounding the taking is relevant or necessary. No testimony is required to fix each Class Member's recovery. Certification of a class under

these circumstances is appropriate. *See Safeway Premium* at 113-114.

The Department argued that the commonality requirement is not met because each Class Member's underlying quick taking action must be examined to determine whether individualized defenses such as waiver ***might*** exist. This argument is not persuasive for a number of reasons. First, the argument disregards the factual record and this Court's prior rulings that investment interest earned on registry deposit is property entirely separate and apart from the real property taken in quick taking proceedings; and is entitled to its own constitutional protection. Investment interest earned when a Clerk chooses to invest an underlying eminent domain registry deposit is not part of full compensation for original takings and is not at issue in the underlying eminent domain cases. Further, in order for a constitutionally protected right to be waived, the waiver must be knowing, voluntary, intelligent and quite clear. *Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972). *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 3d DCA 2009); *Winans v. Weber*, 979 So.2d 269, 274 (Fla. 2d DCA 2007); *See also Jean-Louis v. Forfeiture of $203,595.00*, 767 So. 2d 595, 597 (Fla. 4th DCA 2000); *Forbes v. Chapin*, 917 So. 2d 948, 951 (Fla. 4th DCA 2005).

Both Defendants have admitted that the pursuit of investment interest by the Department, as well as the investment of registry deposits and disbursement of the interest to the Department by Clerks, took place without the owners of the deposits being

informed. No evidence of any sort exists to suggest that any Class Member would have any way of knowing that his registry deposit had been invested or that his interest had been paid to the Department. This Court rejected this waiver argument in ruling on the Defendants' motions for summary judgment. In this context the Court found that the stipulated final judgment in the Mallards quick taking action did not constitute a waiver of the claim to Mallards' investment interest because the interest was property entirely distinct from Parcel 109. In addition, the judgment made no mention of investment interest whatsoever and Mallards had no knowledge of the interest claim until after the Stipulated Final Judgment pertaining to Parcel 109 was entered.

Applying these standards to Class Members' claims demonstrates that the Defendants' waiver argument does not defeat commonality. Any final judgment sufficient to waive a claim to investment interest would, at a minimum at least have to clearly identify the nature of the claim being waived. Neither Defendant has provided evidence of the existence of any final judgment meeting this constitutional standard. The judgments entered into evidence by the Department do not satisfy the heightened standard for waiver of constitutional claims, although the submission of these judgments by the Department does demonstrate that these judgments can be readily obtained from Clerks of the Court for any purpose. At this point, the existence of any judgments satisfying the heightened standard is speculative.

Even if such a [sic] final judgments do exist, however, the exercise of examining court files to evaluate the content and existence of a waiver, would not defeat commonality. As noted above, given the heightened standard required for waiver of constitutional rights, any such waiver, if one even exists, would have to be clear on the face of the document. No testimony or evidentiary basis would be necessary. Such determination would be made simply by looking at objective public records and would "not negate the common, general interest shared by the putative class members." *Safeway Premium* at 107 (citing *Freedom Life Ins. C. of America v. Wallant*, 891 So. 2d at 1109, 1116 (Fla. 4th DCA 2004) (quoting *Colonial Penn Ins. Co.* at 853)).

Finally, commonality is also present in this case because "the common or general interest of the class members is in the *object* of the action, the *result sought*, or the general *question* implicated in the action." *Safeway Premium* at 107-108 (citing *Imperial Towers Condo., Inc. v. Brown*, 338 So. 2d 1081, 1084 (Fla. 4th DCA 1976), which in turn cited to *Port Royal, Inc. v. Conboy*, 154 So. 2d 734, 737 (Fla. 2d DCA 1963)). In this regard, commonality is actually supported by the Defendants' common, if not identical, defenses to the Class Members' claims, because the class action will avoid duplicitous litigation of the common issues and promotes judicial efficiency. As the *Safeway Premium* Court made plain:

> It would be a perversion of the *spirit behind rule 1.220*, and the cases interpreting the

> rule, to hold, as defendants urge, that plaintiffs' class action allegations fail because plaintiffs do not present identical claims. If class actions were dependent on class members presenting carbon copy claims, there would be few, if any, instances of class action litigation. It is virtually impossible to design a class whose members have identical claims. Even in the context of a mass disaster, each afflicted member experiences the impact differently, according to the member's relative location and proximity to the event. Defendants' proposed holding would nullify the class action rule, a course of conduct we decline to follow.

Safeway Premium at 109 (quoting *Broin* at 891) (emphasis added in *Safeway Premium*). The commonality requirement is satisfied.

B. Predominance

The Department conceded at the hearing that predominance is satisfied in this case because calculation of each Class Member's recovery will require simple mathematical computation of objective data contained in the public records. The Court agrees that cases in which Class Members' recovery is calculated formulaically are precisely what class actions are designed for. Rigorous analysis reveals other factors that also strengthen the presence of predominance in this case. *Safeway Premium* at 113-114

The determination of whether common issues predominate over individual issues is a proof-based inquiry that is satisfied if the class representative can demonstrate a "reasonable methodology for generalized proof of class-wide impact." *Id.* (citing *Soria* at 771). This is accomplished when, "by proving his or her own individual case, [the class representative] *necessarily* proves the cases of the other class members.: *Id.* (citing *Seminole Cnty. v. Tivoli Orlando Assocs. Ltd.*, 920 So. 2d 818, 824 (Fla. 5th DCA 2006)) (emphasis added in *Safeway Premium*).

Mallards has satisfied the predominance standard articulated by *Safeway Premium.* First, the evidence filed in support of class certification demonstrates that a reasonable methodology exists to present generalized proof of class-wide impact. The Department has stipulated that its own records, working in cooperation with public records maintained by the Clerks of the Court provide all of the information necessary to identify the Class, confirm the taking of their interest, and calculate the amount of their recovery. The evidentiary record also includes specific examples of the records maintained by the Department and the Clerks that provide this means of generalized proof.

Next, there is present because by proving the merits of its case, Mallards will necessarily prove the merits of Class Member's claims. As noted previously, with the procedural agreement of the Defendants. Mallards has obtained rulings on discreet issues of law that have progressed the case toward a favorable

outcome on its claims and the claims of the Class More specifically, the Court has ruled that Mallards owned the registry deposit made by the Department and the interest that accrued as a result of the Clerk's investments; and that the statute directing payment of Mallards' investment interest to the Department was therefore unconstitutional.

The Court also finds that common issues predominate because the common issues of fact and law impact more substantially the efforts of every Class Member to prove liability than the individual issues that may arise. *Safeway Premium* at 112 (citing *Soria* at 771) (relying on *Sacred Heart Health Sys., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010)). The interest belonged to Mallards and the Class. The statute that directed Clerks to pay the interest to the Department was, therefore, unconstitutional as to Mallards and the Class. Similarly, that the investment interest was not paid to each of them as a lawful owner resulted in an unconstitutional taking of private property owned by Mallards and the Class. The right of Mallards and the Class to declaratory and injunctive relief is purely a question of law. Likewise, the determination of whether the failure to pay the interest to Plaintiff and the Class constitutes an unconstitutional taking of private property is purely a legal question common to all.

Even assuming the Department can identify a final judgment satisfying the standard for waiver of constitutional right, this exercise would not defeat the pervasive and overwhelming common issues in

this case because the waiver defense does not go to the issue of liability. It does not relate to whether issue of whether the statute is unconstitutional. It also does not go to the question of whether failure to pay the investment interest to the Class as lawful owners constitutes a taking as a matter law. Its effect is to avoid liability, which in this instance would require no evidentiary development or testimony because to be effective, a waiver of a constitutional right must be knowing, voluntary and abundantly clear. See *Safeway Premium* at 113. (predominance existed because the common issues did not require individual inquiries or mini-trials and individual issues did not relate to liability).

C. Numerosity

In order to satisfy this element Rule 1.220 requires that the members of the proposed class must be so numerous as to make joinder impractical. *Safeway Premium* at 114 (citing Fla. R. Civ. P. 1.220(a)). No specific number nor precise count is needed to satisfy the numerosity requirement. *Id.* (citing *Toledo v. Hillsborough Cnty. Hosp. Auth.*, 747 So. 2d 958, 961 (Fla. 2d DCA 1999); *Pottinger v. City of Miami*, 720 F. Supp. 955, 958 (S.D.Fla.1989)). Class certification is proper if the class-size number is not based on mere speculation. *Safeway Premium* at 114 (citing *Toledo*, 747 So. 2d at 961). The numerosity requirement is generally thought to impose a floor on class membership at 20-40 individuals. *See Cox v. American Cast Iron Pipe Co.*, 784 F. 2d 1546, 1553 (11th Cir.

1986). Similarly, the United States Supreme Court imposed a limit of 15 class members in *General Telephone Co. v. EEOC*, 446 U.S. 318, 330 (1980).

In discovery prior to class certification the Department produced extensive documents to demonstrate the total amount of interest it received during the class period. The entire production was entered into evidence. The Department's documents included summary charts organized by year along with back up detailing information concerning payments made by Clerks of the Court to the Department from 2004 through 2010. These documents show that the Department has received investment interest belonging to Class Members from 14 Clerks of Court during the more than eight-year class period; and that the Hillsborough County Clerk disbursed investment interest belonging to at least 77 Class Members during the class period. The Department's records also demonstrate the existence of many more Class Members. Thus, Mallards has demonstrated the required evidentiary basis, and numerosity is satisfied in this case.

D. Typicality

"The test for typicality is not demanding. . . ." *Safeway Premium* at 114. The key inquiry on typicality is "whether the class representative possesses the same legal interest and has endured the same legal injury as the class members." *Id.* (citing *Morgan*, 33 So.3d at 65, who relied upon *Clausnitzer v. Fed.*

Express Corp., 248 F.R.D. 647, 656 (S.D.Fla.2008)). The typicality requirement is satisfied "when there is a strong similarity in the legal theories upon which those claims are based and when the claims of the class representative and class members are not antagonistic to one another." *Safeway Premium* at 114 (citing *Morgan*, 33 So.3d at 65). Even if factual differences exist between the claims of the class representative and the claims of class members, typicality is not defeated. *Id.* (citing *Morgan*) (citing *Smith v. Glen Cove Apartments* at 1111)). Additionally, typicality is satisfied "despite substantial factual differences . . . when there is a strong similarity of legal theories." *Morgan* at 65 (quoting *Clausnitzer*, at 656)).

In this case, the claims of Mallards and Class Members are based on the same legal theories; namely the unconstitutionality of section 74.051(4) and the takings of Plaintiff and Class Member's property that resulted from the provisions of the statute. The same course of conduct is at issue and Plaintiff and the Class experienced the same type of injury. The only variation between Plaintiff and the Class is the extent of the damages, which is easily calculated and will not defeat the typicality test. *Safeway Premium* at 115 (citing *Morgan* at 65). Moreover, typicality is also supported here because the Class Representative's interests are not antagonistic to those of the Class. As the *Safeway Premium* Court noted at page 115, the fact that the damage recoveries might differ in amount is of no consequence to the typicality

requirement. The existence of typicality has been established.

E. Adequacy

The adequacy requirement found in subsection (a) of Rule 1.220 consists of two elements. First, the class representative must demonstrate he will adequately and fairly "protect and represent the interests of each member of the class." Fla. R. Civ. P. 1.220(a)(4). In addition, class counsel must demonstrate the competence and experience necessary to advocate effectively on behalf of the Plaintiff and the class. *Safeway Premium* at 115 (citing *City of Tampa v. Addison*, 979 So. 2d 246, 255 (Fla. 2d DCA 2007)).

The adequacy inquiry concerning a class representative serves to uncover the existence of conflicts of interest between the class representative and the putative class. *Safeway Premium* at 115 (citing *Terry L. Braun, P.A. v. Campbell*, 827 So. 2d 261, 268 (Fla. 5th DCA 2002)). When a class representative's interests run parallel to, and are not antagonistic to, the interest of the class; and the representative demonstrates the willingness to take an active role and to advocate on behalf of all class members, his adequacy is established. *Id.*

Michael Firminger has taken a very active role as Class Representative, has advocated on behalf of all Class Members and will continue to do so. He understands that he must act on behalf of the Class in its best interest and has endeavored to do so. His

interests are not antagonistic to those of the rest of the Class, and in fact parallel the interests of the Class Members because he and the Class Members have sought redress from the same unconstitutional statute and the same unconstitutional taking of their investment interest pursuant to the statute. Finally Mr. Firminger is capable of funding this litigation if called upon to do so, and has satisfied himself regarding his counsel's ability to fund the litigation to conclusion, The Court finds that the Class Representative is adequate and this requirement of Rule 1.220 is satisfied.

With respect to the adequacy of Class Counsel, the declarations filed by Christa L. Collins and Jackson H. Bowman were admitted without objection. These declarations demonstrate their competence and experience to advocate effectively on behalf of Plaintiff and the putative Class Members. The Court has also witnessed their representation of Plaintiff and the Class throughout this litigation and finds this element of the adequacy inquiry satisfied.

F. Superiority

The superiority requirement is satisfied when a class action is the "most manageable and efficient way to resolve the individual claims of each class member." *Safeway Premium* (citing Fla. R. Civ. P. 1.220(b)(3)). The court must consider three factors in deciding whether a class action is the superior method of adjudicating a controversy. First, the court

must examine whether a class action would provide the class members with the only economically viable remedy. Second, the court must consider whether there [sic] it is likely that the individual claims are large enough to justify the expense of separate litigation. Finally, the court must consider whether the maintaining the case as a class action would be manageable. *Safeway Premium* at 116 (citing *Morgan*, 33 So. 3d at 66) (relying on *Liggett Group. v. Engle*, 853 So. 2d 434, 445-46 (Fla. 3d DCA 2003), *approved in part and quashed in part on other grounds*, 945 So. 2d 1246 (Fla.2006)).

In this case, the superiority factors weigh heavily in favor of certifying the class. There are likely hundreds of class members and, as demonstrated by the Department's documents entered into evidence many class member's claims are not large enough to economically justify each aggrieved individual filing a separate action. The Court finds that allowing Mallards and the putative Class Members to proceed with this class action is the most economically feasible remedy given the potential individual damage recovery for each Class Member Further, and most significantly, because a large number of potential Class Members are basing claims of constitutional significance on the same common course of conduct, a class action is the most manageable and most efficient use of judicial resources to bring about justice to these aggrieved individuals. Certifying this case as a class action is also in the best interest of the People of the State of Florida whose resources are being used

to finance the Defendants' opposition to the claims raised in this case and may be required to provide full compensation to Plaintiff and the Class. The superiority requirement of Rule 1.220(b)(3) is satisfied.

G. Plaintiff has Standing to Bring the Claims Asserted

In order to satisfy the standing requirement a class representative must demonstrate that a case or controversy exists between him or her and the defendant, and that this case or controversy will continue throughout the existence of the litigation. *Safeway Premium* at 116 (citing *Olen Properties Corp. v. Moss*, 981 So. 2d 515, 517 (Fla. 4th DCA 2008) (citing *Ferreiro v. Phila. Indem. Ins. Co.*, 928 So. 2d 374, 377 (Fla. 3d DCA 2006)). A case or controversy exists if a party alleges an actual or legal injury which can be in the nature of an economic injury. *Safeway Premium* at 116 (citing *Peregood v. Cosmides*, 663 So. 2d 665, 668 (Fla. 5th DCA 1995).

In this case, Mallards Cove has alleged and demonstrated a specific ascertainable economic loss. Money belonging to Mallards (in the form of the 90-percent portion of the investment interest earned by the Clerk) was disbursed by the Clerk and was received, accepted and retained by the Department. Moreover, Mallards' standing has been unsuccessfully challenged by the Defendants in their motions to dismiss and three motions for summary judgment on the theories of res judicata, collateral estoppel and

waiver. These arguments and legal issues have been raised once again in opposition to class certification. The Court again finds that Mallards Cove's claims are not precluded by these doctrines, and Mallards has standing to serve as Class Representative.

H. Venue is Proper in Pasco County.

At the hearing the Department raised a venue challenge in opposition to class certification. Although the Department had not raised the issue by motion or other filing, the Court entertained extensive argument on this issue and reviewed significant portions of the court file. Having considered the arguments of counsel, discovery responses, deposition testimony, the court file and the applicable case law, the Court finds that venue is proper in Pasco County, and that opposition to certification of the class on this basis is without merit.

The Amended Class Action Complaint was filed against the Department on August 6, 2009. The definition of the class contained in the Amended Class Action Complaint is identical to the class Plaintiffs seek to certify. Thereafter the Department filed a motion to dismiss which, among other legal issues, asserted that the Department was entitled to home rule venue and that venue did not properly lie in Pasco County. At the hearing on the motion to dismiss the Department explicitly abandoned its venue argument and consented to venue in Pasco County. The Court memorialized the Department's abandonment

of its venue challenge in its Order on the Defendant's Motions to Dismiss. Thereafter, for more than three years, the parties have engaged in hard fought, extensive litigation consisting of dispositive motion practice and significant discovery that involved numerous discovery disputes. Following the Department's abandonment of its venue challenge, at no time before the morning of the hearing on class certification, did the Department raise, renew or complain that the venue it voluntarily consented to was improper.

At times during the venue argument the Department suggested that separate class actions must be filed in each of the 14 counties from which Clerks disbursed interest to the Department. At other times the Department argued that, because the putative class included Class Members outside of Pasco County (a reality present when the Department waived home rule venue) that the Department was entitled to a second bite at the venue apple.

The Court rejects both of these contentions. In making the argument that 14 separate class actions must maintained, the Department conflates the investment interest (the subject matter of the class action) with the real property (the subject matter of underlying quick taking actions). The property at issue here is money, not physical property situated in a particular location. Throughout this litigation, the Department has consistently taken the position that its role in the unconstitutional taking of investment interest was a passive one. In Requests for

Admissions and deposition testimony the Department and its representatives has [sic] maintained, and this Court finds, that the Department never had possession or control of the interest funds until the funds were received and taken as revenue of the Department in its Tallahassee central office. Unlike inverse condemnation cases that involve the taking of real property, the property taken by the Department in this case was money belonging to private citizens. There is no property physically located in various counties around the state that would justify requiring suit to be brought in each county. Unlike real property which must be subjected to the valuation process, these claims require no valuation exercise whatsoever. These claims require no jury views *(See, e.g.*, section 73.071(6) Fla. Stat.), or any other inquiry or function that turns on the location of physical property.

The Court also rejects the Department's home rule venue argument. The inverse condemnation claims asserted by Mallards and the Class are derived directly and organically from the Florida Constitution's protections against takings without full compensation. *See* Art. X, § 6(a), Fla. Const.; *State Road Dep't v. Tharp*, 1 So. 2d 868 (Fla. 1941); *City of Jacksonville v Schumann*, 167 So. 2d 95 (Fla. 1964). The Supreme Court has recognized four exceptions to the home venue privilege, three of which render venue in Pasco County proper in this class action. *See Department of Agriculture v. Middleton*, 24 So. 3d 624, 627 (Fla. 2d DCA 2009) (citing to *Fla. Dep't of*

Children & Families v. Sun-Sentinel, Inc., 865 So.2d 1278, 1288 (Fla.2004). The first exception to home venue that applies is waiver. Governmental defendants may waive the home venue submitting to the jurisdiction of the court in which the plaintiff has filed suit, *Middleton*, at 627 (citing *Smith v. Williams*, 35 So. 2d 844, 848 (Fla. 1948)). Waiver applies in this case because the Department unequivocally abandoned its venue challenge and consented to venue at the motion to dismiss stage.

The next exception that renders venue in Pasco County appropriate is the "sword wielder" exception. *See Middleton*; *Barr v. Florida Board of Regents*, 644 So. 2d 333, 335 (Fla. 1st DCA 1994). This exception allows a claim to be brought where a constitutional infringement by the state or its agency is threatened or has occurred. This exception applies here in that Mallards has been, and continues to be deprived of its interest funds which was constitutionally-protected private property created in Pasco County.

Finally, venue is proper in Pasco County because the alleged combined actions of the Department and the Clerk resulted in the unconstitutional taking of Plaintiffs and Class Member's [sic] interest funds. A trial court has the discretion to refuse to apply the home venue privilege when a party sues a governmental agency as a joint tortfeasor. *Board of County Comm'rs v. Grice*, 438 So. 2d 392, 395 (Fla.1983). In this context the Court must consider "justice, fairness, and convenience under the circumstances of the case," giving the home venue privilege substantial

consideration. *Id.* In this instance the Court finds that justice, fairness and convenience compel the determination that venue is proper in Pasco County.

The Court is mindful that the issues of proof in this case hinge on objective documentation and mathematical determinations that are unaffected or inconvenienced by the location of the Courthouse. Any constitutional claim affecting a class of persons can be the proper subject of a class action, including a refund claim seeking return of unconstitutional impact fees that are disallowed by statute. *See Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla 1994). This case is not fact intensive, and no undue burden is caused by requiring the Department to defend this action to conclusion in the location it consented to several years ago. On the other hand, refusing to certify the class certification on the Department's belated venue assertion venue would significantly waste judicial resources and unwind the significant progress made toward providing a remedy to the Class. The claims of Class Members throughout the State of Florida are at stake in this litigation, many of which are total less than the cost of filing an individual lawsuit against the Department, but all of which carry constitutional significance. Absent this class action, many Class Members will have no means by which to obtain return of their property. The Court finds venue in Pasco County to be proper for these reasons.

IV. Conclusion

Based on the foregoing the Court finds that certifying this case as a class action is proper. This case satisfies the numerosity, typicality, commonality and adequacy requirements of subsection (a) of Fla. R. Civ. P. 1.220, and it also satisfies each of the three subdivisions of subsection (b). Accordingly, Plaintiff's Motion for Class Certification be and the same hereby is **GRANTED**. The Court certifies a Class of the following individuals:

> All property owners who were originally defendants in eminent domain cases brought pursuant to Chapters 73 and 74 of the Florida Statutes by the State of Florida, by the Florida Department of Transportation ("Department") from September 11, 2004 to the present, where the Department made registry deposits pursuant to Florida Statutes section 74.051(4); and a Florida Clerk of the Circuit Court elected to invest the eminent domain deposits so as to earn investment interest; and the property owners have not received at least ninety percent (90%) of the interest that was earned by any such investment.

Additionally the Court orders the following:

1. Plaintiff, with Michael Firminger its representative, is appointed Class Representative

2. Christa L. Collins and Jackson H. Bowman are appointed as Co-Lead Class Counsel.

3. The Notice and Administration Plan described in the affidavit of Jeff Dahl is approved. The Court shall separately enter an order following a hearing on Plaintiff's motion to have Defendants pay for the Notice and Administrative Plan.

DONE AND ORDERED in Chambers in Dade City, Pasco County, Florida, this ___ day of November, 2012.

____
Honorable Linda Babb
Circuit Court Judge

Confirmed copies to:
Jackson H. Bowman, Esq.
Christa L. Collins, Esq.
Dennis J. Alfonso, Esq.
Wayne W. Lambert, Esq.
Paul J. Martin, Esq.

APPENDIX C

IN THE CIRCUIT COURT OF
THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY FLORIDA

MALLARDS COVE LLP, a Florida Limited Liability Partnership, for itself and all others similarly situated,

Plaintiff,

v.

JED PITTMAN, CLERK OF THE CIRCUIT COURT OF PASCO COUNTY, individually and as representative of all other Clerks of the Florida Circuit Courts similarly situated, and the STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION individually and as representative of all other condemning authorities similarly situated,

Defendants.
_______________________________/

CASE NO.
51-2008-CA-7689
DIVISION: ES-JI

CLASS REPRESENTATION

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT THE CHALLENGED PORTION OF FLORIDA STATUTE SECTION 74.051(4) IS UNCONSTITUTIONAL

This cause came on for hearing on March 29, 2011, on the Plaintiff's Motion for Summary Judgment Seeking a Declaration that the Challenged Portion of Section 74.051(4) is Unconstitutional. The Court having reviewed the motion, record and evidence filed in support of the motion, and having considered the oral and written arguments, and being otherwise fully advised in the premises, grants Plaintiff's motion based on the following:

Plaintiff, Mallards Cove, LLP, (Mallards) alleges in this case that it was the owner of investment interest that was unlawfully taken from Mallards by the Defendant, Clerk of the Court of Pasco County, (Clerk) and transferred to the Defendant, Florida Department of Transportation (Department), This Investment Interest accrued when the Clerk, pursuant to statutory authority, exercised his discretion and invested funds that had been deposited by the Department into the registry of the court as a good faith estimate of value in a quick taking action pertaining to acquisition of a parcel of real property referred to as Parcel 109. Judge Susan Gardner previously ruled that, as a matter of law, the registry deposit and the investment interest earned on the deposit belonged to Mallards. In spite of Mallards' ownership of the investment interest, the Clerk paid

90% of the investment interest in accordance with the requirement of section 74.051(4) Fla. Stat. (2008).[1] The particular provision of section 74.051(4) at issue in this matter is highlighted below:

> The court may fix the time within which and the terms upon which the defendants shall be required to surrender possession to the petitioner, which time of possession shall be upon deposit for those defendants failing to file a request for hearing as provided herein. The order of taking shall not become effective unless the deposit of the required sum is made in the registry of the court. If the deposit is not made within 20 days from the date of the order of taking, the order shall be void and of no further effect. The clerk is authorized to invest such deposits so as to earn the highest interest obtainable under the circumstances in state or national financial institutions in Florida insured by the Federal Government. ***Ninety percent of the interest earned shall be paid to the petitioner.***

§ 74.051(4) Fla. Stat. (2008) (emphasis added).

The Court finds that the pleadings, admissions, affidavits, and other evidentiary materials on file that would be admissible in evidence show there is no genuine issue as to any material fact and that the

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[1] Plaintiff did not challenge the constitutionality of the authority granted to clerks to invest the registry deposits or the provision for a management fee to be paid for the clerks' investment efforts.

Plaintiff is entitled to summary judgment as to the constitutionality of the challenged portion of the statute as a matter of law.

I. Mallards Did Not Waive Its Rights and has Standing

The Department argues that, as a threshold matter, before considering the constitutional question raised by Mallards, this Court must determine whether Mallards has standing to bring this action. The Clerk was not a party in the quick taking action but joined in this argument. Specifically, the Defendants argue that Mallards does not have standing because it waived its right to challenge the constitutionality of the above-referenced statute by entering into a mediated settlement agreement and the Stipulated Final Judgment in the underlying quick taking action.

A party may challenge the constitutionality of a statute after showing that the statute will injuriously affect the plaintiffs personal or property rights. *Miller v. Publicker Indus., Inc.*, 457 So. 2d 1374, 1375 (Fla. 1984). It has already been determined that the registry deposit and investment interest belonged to Mallards. Thus, the requirements of *Miller* have been satisfied.

The Department argues that language contained in the Mediated Settlement Agreement and the Stipulated Final Judgment which were entered in the quick taking action pertaining to Parcel 109 operate

to waive Mallards' right to challenge the constitutionality of section 74.051(4). The Department previously entered these documents into the record in support of its Amended Motion for Summary Judgment and its waiver position. The particular language of the Stipulated Final Judgment the Department points to states:

> [T]hat; the total amount paid by the Department to Mallards Cove, LLP,] is full and complete compensation for the taking of Parcel 109. . . . ; and shall satisfy all claims by [Mallards Cove, LLP] against the [State of Florida, Department of Transportation], including all attorney fees and costs and all expert fees and costs, and there shall be no further monetary claims arising from the eminent domain action in this case; [and] that no further award shall be made to Defendants in this matter.

With respect to the Mediated Settlement Agreement pertaining to Parcel 109 the Department points to the following language in the Agreement:

> Petitioner will pay to Defendant, Mallards Cove, LLP, the sum of $2,450,000.00 in full settlement of all claims for compensation from Petitioner whatsoever, including statutory interest, but excluding attorney's fees, experts' fees, and costs. . . .

and the following language in the Addendum to the Mediated Settlement Agreement pertaining to Parcel 109:

> Compensation amount is INCLUSIVE of ANY AND ALL real estate interests and ANY AND ALL claims of Defendant and is subject to apportionment if any.

It is well established that waiver of a constitutional right must be voluntary, knowing, and intelligent. *Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972). The doctrine of waiver operates to bar an action only when there is an intentional relinquishment of a known right. *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 3d DCA 2009); *Winans v. Weber*, 979 So. 2d 269, 274 (Fla. 2d DCA 2007). "A waiver of constitutional rights in any context must, at the very *least*, be clear." *Fuentes*, 407 U.S. at 94 (emphasis added); *Forbes v. Chapin*, 917 So. 2d 948, 951 (Fla. 4th DCA 2005) (confirming the presumption against waiver of constitutional rights and resolving any doubt in favor of non-waiver).

The language of the Mediated Settlement Agreement and the Stipulated Final Judgment does not provide the requisite clarity that Mallards voluntarily, knowingly, and intelligently waived its right to challenge the constitutionality of the statute. The Stipulated Final Judgment, the Mediated Settlement Agreement and for that matter none of the documents filed in the record on this issue, make no mention of investment interest. No mention is made in these documents that the clerk had elected to invest the registry deposit; that interest had been earned as a result of the Clerk's investments; that any investment interest would be paid to the Department or

that any investment interest even existed. Further, these documents which the Department contends constitute a waiver of Mallards' right to challenge the constitutionality of the statute, do not mention the constitutional claim at all.

The fact that Mallards' principal testified that he was aware he was not able to invest and earn interest on his money while it was on deposit in the court's registry is of no significance on this issue, In contrast, his testimony that he was not aware that the Clerk had invested his money for the benefit of the Department by the time the Stipulated Final Judgment was entered is entirely consistent with the fact that the Stipulated Final Judgment was completely silent on these claims.

As a matter of law, Mallards has standing to bring this action to challenge the constitutionality of Florida Statute section 74.051(4). Under the rigorous standard which must be met for a waiver of constitutional rights to occur, Mallards did not waive its right to challenge the constitutionality of the above-referenced statute by virtue of the Mediated Settlement Agreement or the Stipulated Final Judgment, and accordingly there are no genuine issues of material fact. As a result, Mallards' Motion for Summary Judgment Seeking a Declaration that the Challenged Portion of Section 74.051(4) is Unconstitutional is appropriate for determination.

II. The Challenged Portion of Section 74.051(4) Fla. Stat. (2008) is Unconstitutional

Mallards relies upon *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980); *Camden I Condominium Inc. v. Dunkle*, 805 F.2d 1532 (11th Cir. 1986); *Camden I Condominium Association, Inc. v. John B. Dunkle*, et al., Case No. 83-8265-Civ-Paine, United States District Court, Southern District of Florida; *Camden I Condominium Association, Inc., v. John B. Dunkle*, Case No. 81-124 CA, Fifteenth Judicial Circuit of Florida, in and for Palm Beach County; and several jurisdictions from other states to support its constitutional challenge of the last sentence of section 74.051(4) Fla. Stat. (2008). The Department and Clerk argue that the cases relied upon by Mallards are not on point. This Court finds that the cases cited and relied upon by Mallards are on point, and that the challenged portion of section 74.051(4) Fla. Stat. 2008, that "ninety percent of the interest earned shall be paid to the petitioner" is unconstitutional.

A. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980).

In *Webb's*, the Supreme Court declared unconstitutional a statute nearly identical to section 74.051(4) on the finding that registry deposits are constitutionally protected property, immune from taking without full compensation. The relevant provisions of the statute at issue in Webb's provided:

> Money deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk. . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk. . . .

§ 28.33 Fla. Stat. (1977).

The *Webb's* Court found that the principal deposited into the registry of the court was plainly private property, and not the property of Seminole County, acknowledging that this "is the rule in Florida, *Phipps v. Watson*, 147 So. 234, 235 (1933), as well as elsewhere. . . ." *Webb's* at 160-61. The Court stated:

> [A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.

Webb's at 164.

Because the statute at issue in *Webb's* allowed clerks to retain interest on registry deposits rather than paying the interest to the owner of the deposit itself, the Supreme Court found that the statute effectuated an unconstitutional taking without full compensation. The similarities between section 28.33 Fla. Stat., the statute found to be unconstitutional in *Webb's*, and the current section 74.051(4), challenged herein, are materially similar in that both statutes provide for investment interest to be paid to someone

other than the rightful owner of the deposited principal. [2]

B. The *Camden* Cases

Following the Supreme Court's decision in *Webb's*, the constitutionality of Florida Statute section 74.051 was challenged in a series of cases referred to as the *Camden* cases. In the first of these cases, a class action filed in Palm Beach County state court in 1981, the Honorable Edward Rodgers denied a motion to dismiss filed by the Clerk of Palm Beach County and Palm Beach County, and later certified the case as a class action. *Camden I Condominium Association, Inc., v. John B. Dunkle*, Case No. 81-124 CA, Fifteenth Judicial Circuit of Florida, in and for Palm Beach County.

In his July 1, 1981 Order denying the motion to dismiss, Judge Rodgers observed:

> Obviously, the party has lost its land to the condemning authority and the land has been replaced with an offered amount of money. . . . It appears to follow as the day the

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[2] After the *Webb's* decision, the legislature amended section 28.33 Fla. Stat. (1977), to provide that: "The clerk may invest moneys deposited in the registry of the court and shall retain as income of the office of the clerk and as a reasonable investment management fee 10 percent of the interest accruing on those funds with the balance of **such interest being allocated in accordance with the interest of the depositors**." (emphasis added).

night, that if the property is gone and the money is left behind, then the money is left in the place of the property. . . .

. . .

This statute* [*section 74.051(3)*[3]] *appears to suffer the same infirmity as F.S. 28.33. The Defendants herein again urged upon the court that in condemnation actions, the monies deposited are public funds, not private funds. To allow the state to have both the land and the funds would indeed be a taking without due process.

. . .

It certainly appears to this court that if the property owners whose land has been taken and money has been placed into the Registry of the Court has to contribute interest earned from his principal to the burden of road building in Palm Beach County, his rights under ***the Fifth and Fourteenth Amendments of the United States Constitution have been violated.*** . . . (emphasis added).

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[3] At the time of the Camden cases, section 74.051(3) required Clerks to pay investment interest earned on eminent domain registry deposits to the secondary road fund of the County. In 1985 the subsection was revised to require payment of investment interest to the petitioners in eminent domain proceedings. In 2008, subsection (3) was renumbered to subsection (4). In all material respects the statute challenged herein is the same statute declared unconstitutional in the Camden cases.

For reasons unrelated to the issue at hand, the *Camden I* plaintiffs dismissed the state court action and re-filed in the United States District Court of Appeals, Southern District of Florida. (*Camden I Condominium Association, Inc., v. John B. Dunkle*, et al., Case No. 83-8265-Civ-Paine, United States District Court, Southern District of Florida). On the strength of the *Webb's* decision, the Southern District also found Florida Statutes section 74.051(3) unconstitutional and entered a permanent injunction against it. Earlier in the pendency of that case, on appeal of an order dismissing the class action complaint, the Eleventh Circuit Court of Appeals, in reversing the lower court order, also recognized the unconstitutionality of section 74.051(3). *See Camden I Condominium Inc. v. Dunkle*, 805 F. 2d 1532, 1534 (11th Cir. 1986).

C. Other Jurisdictions

The highest courts of several states with statutes similar to section 74.051 have found these statutes to violate the federal Constitution, relying on the *Webb's* decision. These states include North Carolina (*McMillan v. Robeson County*, 37 S.E. 2d 105 (N.C. 1964)); Texas (*Sellers v. Harris County*, 483 S.W. 2d 242 (Tex.1972)); Nevada (*Moldon v. County of Clark*, 188 P.3d 76 (Nev. 2008); and Wisconsin (*HSBC Realty Credit Corporation, v. City of Glendale*, 735 N.W.2d 77 (Wis. 2007)).

III. Conclusion

The Court finds that the pleadings, admissions, affidavits, and other evidentiary materials on file that would be admissible in evidence show there is no genuine issue as to any material fact. Well-reasoned precedent established by the United States Supreme Court; the United States Court of Appeals, Eleventh Circuit; the United States District Court, Southern District of Florida along with a State of Florida Circuit Court and the highest courts of at least four other states, compels the conclusion that the challenged provision of section 74.051(4) is unconstitutional. Therefore, the Plaintiff's Motion for Summary Judgment is GRANTED.

DONE AND ORDERED in chambers in Dade City, Pasco County, Florida this ___ day of April, 2011.

____
Honorable Linda Babb
Circuit Court Judge

TRUE COPY
Original Signed

APR 26 2011

LINDA H. BABB
CIRCUIT JUDGE

Conformed Copies furnished to
Christa L. Collins, Esq.
Jackson H. Bowman, Esq.
Dennis J. Alfonso, Esq.
Erik R. Fenniman, Esq.
Adam Brand, Esq.

APPENDIX D

Supreme Court of Florida

MONDAY, SEPTEMBER 28, 2015

CASE NO.: SC15-474
Lower Tribunal No(s).:
2D13-181;
512008CA007689CAAXES

MALLARDS COVE, LLP vs.	FLORDA [sic] DEPARTMENT OF TRANSPORTATION, ET AL.
Petitioner(s)	Respondent(s)

Upon review of the responses to this Court's order to show cause dated May 21, 2015, the Court has determined that it should decline to accept jurisdiction in this case. The petition for discretionary review is, therefore, denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d)(2).

LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

A True Copy
Test:

/s/ John Tomasino [SEAL]
John A. Tomasino
Clerk, Supreme Court

cd
Served:

MARK MILLER
CHRISTINA MARIE MARTIN
JACKSON HARRISON BOWMAN, IV
CHRISTA COLLINS
DENNIS J. ALFONSO
MARC ALLEN PEOPLES
WAYNE WINSTON LAMBERT, JR.
HON. LINDA HOBE BABB, JUDGE
CLERK, SECOND DISTRICT COURT OF APPEAL
FRED W. BAGGETT
DAVID P. ACKERMAN
MARY HOPE KEATING
ANTHONY P. PIRES
KENNETH VAN WILSON
LANELLE KAY MEIDAN
HON. PAULA O'NEIL, CLERK

APPENDIX E

Topic 575-000-000
Right of Way Manual — Effective Date: April 15, 1999
Eminent Domain — Revised: June 8, 2010

7.6.11 Payment of Judgments and Orders

7.6.11.1 The assigned attorney shall provide the District Right of Way Manager certified copies or conformed copies certified by the assigned attorney of all court orders requiring payment.

7.6.11.2 Payment of court orders must be made within the time specified in the order. If no time limit is specified, payment must be made within 40 days after entry of the order except for orders of taking in which case deposit must be made within 20 days after the order is entered.

7.6.12 Closing Cases and Recovery of Excess Funds and/or Interest from the Registry of the Court

7.6.12.1 The assigned attorney shall file a final disposition with the court **(*See Attachment A*)** within 90 days after the last judgment or order has been completed for an eminent domain case. This pleading alerts the court that the Department does not intend to submit any further pleadings allowing the court to close the case.

7.6.12.2 The assigned attorney must contact the Clerk of the Circuit Court and determine if there are

funds remaining in the court registry prior to filing the final disposition. If there are funds remaining in the registry, the attorney must determine the ownership of the funds. If after reviewing the case files and court registry ledger or other appropriate records of the Clerk of the Circuit Court, the attorney determines that the funds belong to the Department, the attorney must take the necessary actions to withdraw the funds.

7.6.12.3 Funds not clearly identifiable as belonging to the Department must be left in the court registry. When funds are left in the court registry, the assigned attorney must document the case file as to the reasons funds remain in the registry.

7.6.13 Requests to the Clerk of the Circuit Court to Invest Court Deposits

When making deposits into the registry of the court pursuant to an order in eminent domain, the District shall provide the Clerk of the Circuit Court a letter **(*See Attachment B*)** requesting that the Clerk invest the deposited funds pursuant to ***Section 28.33, Florida Statutes***, and ***Section 74.051(4), Florida Statutes***.

(FDOT Letter Head)

Date:

Name of Clerk of the Circuit Court
Address of Clerk of the Circuit Court

Re: Investment of Moneys Deposited Into the Registry of the Court

Dear (Name of Clerk of the Circuit Court):

The Florida Department of, Transportation is depositing moneys into the registry of the court in your county pursuant to the enclosed court order in eminent domain. This letter is to request that you invest the deposited moneys pursuant to *Section 28.33, Florida Statutes and Section 74.051(4), Florida Statutes. Section 28.33, Florida Statutes*, allows the clerks of the circuit court to invest moneys deposited into the registry of the court and to retain ten percent of the interest accruing on the invested funds as a reasonable investment management fee. The remaining interest accrues to the depositor, in this case the Department of Transportation. It is to our mutual advantage to have the deposited moneys invested until they are withdrawn from the court registry. If you would like additional information regarding this request, please contact (District contact, phone number and e-mail address).

Sincerely,

District Right of Way Manager,
Florida Department of Transportation,
District ________________

APPENDIX F

IN THE CIRCUIT COURT OF
THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, FLORIDA

MALLARDS COVE LLP, a Florida limited liability partnership, for itself and all others similarly situated,

Plaintiffs,

vs.

JED PITTMAN, CLERK OF THE CIRCUIT COURT OF PASCO COUNTY, individually and as representative of all other Clerks of the Florida Circuit Courts similarly situated, and the STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, individually and as representative of all other condemning authorities similarly situated,

Defendants.
______________________/

CASE NO.:
51-2008-CA-7689ES
DIVISION: Y

(Filed)

DEFENDANT, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION'S SUPPLEMENTAL ANSWERS TO PLAINTIFFS' THIRD SET OF INTERROGATORIES

COMES NOW, the Defendant, State of Florida, Department of Transportation, and files its Supplemental Answers to Plaintiffs' Third Set of Interrogatories, and states as follows:

1. Identify every case in which the Department of Transportation notified a condemnee in an eminent domain proceeding that it had requested or received investment interest on a registry deposit.

The Department cannot identify any cases in which it notified a condemnee that it requested or received investment interest on a registry deposit.

* * *

APPENDIX G

IN THE CIRCUIT COURT OF
THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

MALLARDS COVE LLP, a Florida Limited Liability Partnership, for itself and all others similarly situated, Plaintiffs, vs. JED PITTMAN, CLERK OF THE CIRCUIT COURT OF PASCO COUNTY, individually and as representative of all other Clerks of the Florida Circuit Courts similarly situated, and the STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION individually and as representative of all other condemning authorities similarly situated, Defendants. /	Case No. 51-2008-CA-7689 DIVISION: ES-JI

DEPOSITION OF: JOE DISMUKE

TAKEN PURSUANT TO: Notice by Counsel for the Plaintiffs

DATE: November 8, 2011

TIME: Commenced at 2:35 p.m.

Concluded at 4:45 p.m.

LOCATION: Florida Department of Transportation
605 Suwannee Street
Tallahassee, Florida 32399

REPORTED BY: ANITA M. PEKEROL, RPR,
RMR, CRR
anitaaccurate@comcast.net
Registered Professional Reporter
Registered Merit Reporter
Certified Realtime Reporter

ACCURATE STENOTYPE REPORTERS, INC.
2894-A Remington Green Lane
Tallahassee, Florida 32308
(850) 878-2221
www.accuratestenotype.com

APPEARANCES:

REPRESENTING THE PLAINTIFFS:

JACKSON H. BOWMAN
Brigham Moore, LLP
300 West Platt Street, Suite 100
Tampa, Florida 33606
(813) 318-9000

-and-

CHRISTA L. COLLINS, ESQUIRE
Christa L. Collins, LLC
300 West Platt Street, Suite 100
Tampa, Florida 33606
(813) 254-1311

REPRESENTING THE DEFENDANT FLORIDA DEPARTMENT OF TRANSPORTATION:

MARC PEOPLES, ESQUIRE
Florida Department of Transportation
605 Suwannee Street, MS 58
Tallahassee, Florida 32399-0458
(850) 414-5265

REPRESENTING THE DEFENDANT JED PITTMAN:

(Appearing via telephone conference)
DENNIS J. ALFONSO, ESQUIRE
McClain, Alfonso, Meeker & Dunn, P.A.
Post Office Box 4
Dade City, Florida 33526-0004
(352) 567-5636

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(NO EXHIBITS WERE MARKED
IN THIS DEPOSITION.)

[4] PROCEEDINGS

– – –

The following deposition of JOE DISMUKE was taken on oral examination, pursuant to notice of taking deposition, for purposes of discovery, for use as evidence, and for such other uses and purposes as may be permitted by the applicable and governing rules. Reading and signing of the deposition transcript by the witness is not waived.

– – –

THE COURT REPORTER: Would you raise your right hand, please.

Do you swear or affirm that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

Thereupon,

JOE DISMUKE,

was called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOWMAN:

Q. Mr. Dismuke, you work for the Department of Transportation?

A. Correct.

*   *   *

[13] Q. So when I say "entire department," I mean all the districts.

A. Correct.

Q. And the turnpike office?

A. Correct. Now, the monies that flow through the actual toll booths do not go through the cashiers office, only the returned checks do.

Q. Okay. So would the coordinator for toll/turnpike accounting, your replacement, now report to you?

A. No. It is a separate section.

Q. Are there any staff that you have as coordinator for the cashiers office?

A. I have one staff.

Q. Are there also coordinators at the individual district offices?

A. They have financial service officers in the individual districts and turnpike.

Q. What are their titles?

A. That's their title.

Q. Financial services?

A. Officer.

Q. Do those folks report to you?

A. No, sir.

Q. Do they independently handle their own [14] receipts or does the Tallahassee office handle the receipts for the district offices?

A. Historically at one time they were making their own deposits, up to the year of 2001, and then we began all receipts coming through the cashiers office. But they are still handled in the district and sent to us. Not all receipts, but they receive receipts and they are sent to us. We do receive receipts here directly in the cashiers office.

Q. Was it a policy change in 2001?

A. Yes, sir. I think it was a financial change.

Q. Do you know why you are here today?

A. The eminent domain interest.

Q. What do you know about that? And when I say "that," I mean with regard to this matter. Do you know what matter –

A. The Pasco County.

Q. Right. Do you know what is at issue?

A. Which – let's see. Can you rephrase your question?

Q. Sure. I take it you understand that there is an issue with regard to the investment interest –

A. Correct.

Q. – generated on eminent domain deposits?

[15] A. Correct.

Q. What is your understanding of the issue related to that?

A. The constitutionality.

Q. Do you know if there is a way to track the amount of investment interest that has been paid to the department?

MR. PEOPLES: Objection to form.

BY MR. BOWMAN:

Q. Do you know what I mean by that?

A. Are you talking in the county or –

Q. For the department.

A. Is there a way to determine if the county is –

Q. No, let me rephrase –

A. Sorry about that.

Q. – and see if I can clarify. I understand, without really having any knowledge, so I'm going to struggle to get to where I need to get, okay? But I think we can work through it. But I think that the department codes income that comes in.

A. Correct.

Q. So I'm wondering first if there is a code that is applied to investment interest.

A. In the eminent domain interest, yes, we use [16] a specific object code.

Q. What is a specific object code?

A. A way to classify different revenues. Our accounting system uses object codes to help classify revenue. There's multiple ways to classify revenue.

Q. What do you mean by that? I mean, it – go ahead and tell me.

A. Like interest has a category, and a subcategory of that category would be the object code, which would be eminent domain interest. And there's other interests that go into that category, other interest types.

Q. When you – I guess what we need to do is break it down, okay? So, for instance, the Pasco County clerk sends a check to the department that consists of eminent domain registry deposit interest. How would that be coded?

A. With that object code.

Q. With the object code. And when – I'm confused because you said object code and then you mentioned category too. Is there a category code?

A. Correct. When you enter certain information into the accounting system, it pulls other accounting information.

Q. Like what?

[17] A. The category, the fund, the year, things like that. Other accounting information, general ledger code.

Q. So the code that one would see looking at the computer system at the end, when I'm looking at the sub-category with the object code, what would that number look like, if you know?

A. In the end when the Treasury verifies it you're going to be looking at the category fund level. So you will be looking at which fund it is and which category it is accountingwise. It wouldn't show the object code. That's a sub-breakdown of the category. So officially through central accounting you would see the category of interest.

Q. And then are there more than one sub-category –

A. Correct.

Q. – in that interest category?

A. Well, they're called object codes, so, yes, there's all kinds of different interests.

Q. Such as?

A. Travel, revolving fund interest. You have interest on agreements with counties. You have just the investment interest that we were referring to a while ago. So there is quite a bit of interest that goes into [18] that category.

Q. So if I were you and I wanted to hunt for the investment interest from Pasco County for the year 2010, how would I do that?

A. You would run a report on the Category 00500 or 000500. Actually, this is what I did to produce that report. That would give you a listing of all the information datawise that went into that object code and then you could sort by object code.

Q. So when you say "sort by object code," you mean sort for 2010?

A. Well, you do it in a date range.

Q. What would the sort do beyond what the 000500 gave you?

A. It's going to give you all the different – because that's the category level, it's going to give you everything that went into that category for that time span, which could include your interest on investments, your travel, revolving fund interest, and all these other interests. So to break it out to be able to get to the eminent domain, you'd have to sort on, or however pull out of 005040 is the object code for ED interest.

Q. 05040?

A. 005040.

[19] Q. So that would be the object code?

A. Correct.

Q. Okay. So the category code would be 000500?

A. Correct.

Q. Is there any variation to that setup that you just described with regard to investment interest?

A. To structure, no.

Q. Does that structure vary with regard to any other county that the department might receive interest from?

A. No, sir.

Q. How far back is it possible to do a search like that?

A. A search in FLAIR should be able to go back to 1985.

Q. And you called that a search in FLAIR?

A. Correct.

Q. Is that an acronym?

A. FLAIR is the Florida Accounting Information Resource System. Everybody calls it FLAIR.

Q. Florida Accounting –

A. – Information Resource System.

Q. And is that a statewide mandated system?

A. Correct.

[20] Q. And the Department of Financial Services puts out those codes?

A. Correct. We're using their system in this. We're using the State Treasury system.

Q. Is there any further breakdown that the department utilizes that is not specified for under the Department of Financial Services system?

A. We have sub-systems to capture for deposit making. The FLAIR system does not contain like your check information. Like check name, check date, check number, it doesn't have any of that information.

Q. So the sub-systems would provide that information?

A. Correct.

Q. And how is that set forth? Is it similar to the coding that we spoke of?

A. What we have is a system where you enter like the check information, like the check name, check number, check amount. And then we have a portion of that system that takes the FLAIR coding, you input the FLAIR coding into it, and then that system puts it into FLAIR.

Q. That system being the?

A. Cashier system.

Q. So that system, the Cashier system has [21] within it the sub-system that enables you to itemize the check? Am I being clear?

A. It is kind of like Quicken. You know, you put several checks in there, it is able to make a deposit, takes that FLAIR coding and puts it in FLAIR. It is like a – originally I believe it may have been called a check register was the first name of it, unofficial name of it, but you could think of it as a check register system.

Q. What do you-all refer to it as?

A. Cashier system.

Q. And the Cashier system is more comprehensive than the FLAIR system?

A. Correct.

Q. How far back can one search on the Cashier system?

A. The high 1990s. 1998, 1999 is when it began.

Q. So if I wanted to look at something with regard to any of the receipts prior to 1998 or 1999 I would have to utilize the FLAIR system?

A. Correct.

Q. Is there any other system?

A. Prior to that, no.

Q. What if I wanted to look for financial [22] information from the department before 1985?

A. That I'm not sure about. FLAIR began in the early '80s, and I'm not sure what they were using before that time.

Q. Is there an independent object code for deposit refunds from court clerks?

A. Are you talking about the deposit that was on hold at the Clerk of the Court?

Q. Yes.

A. When it is refunded, yes, it has a separate object code.

Q. And what is that object code, if you know?

A. It's 01806 and then the district. So if it was District 1, it would be 1, 2, 3, depending on the district.

MS. COLLINS: Can you say that number again? I'm sorry.

THE WITNESS: 01806, and then depending on which district it is. It is a six-digit number just like the 005040.

BY MR. BOWMAN:

Q. Currently do you know how the department utilizes the investment interest that court clerks pay to the department?

A. It is deposited into the State [23] transportation trust fund or the turnpike general reserve fund.

Q. So the department trust fund?

A. Correct.

Q. Or the turnpike?

A. General reserve fund.

Q. What are the trust fund revenues used for?

A. Maintenance of the roads, SunRail, transportation in general.

Q. And the turnpike general reserve fund, what are those funds used for?

A. For the turnpike system.

Q. And that is currently how it is done, right?

A. Correct.

Q. Has it varied from that as far as you know?

A. No, sir.

Q. I have an understanding based on documents I have reviewed that in certain districts clerks pay the investment interest to the district office.

A. Correct.

Q. Do those district offices then forward that money?

A. Correct.

A. To Tallahassee?

[24] A. Correct. At one time they did not. Back around, before 2001 they were doing their own deposits at that time, but we were, the cashiers office was doing the FLAIR entries for the accounting coding for it.

Q. And then likewise, if the districts made those deposits, did the deposit wind up in the department trust fund?

A. Correct. All of the district monies are in the department trust fund.

Q. And the turnpike, in the turnpike general reserve fund?

A. Correct.

Q. Is there ever a need when a court clerk forwards a revenue check to the department to break that amount of money down in order to determine what the amount of money comprises? I'll give you an example.

A. Thank you.

Q. I believe in Lee County, Lee County sweeps monthly interest that is derived from registry deposits and forwards that amount monthly to Tallahassee.

A. For our accounting records it – what comprises the, you know, what cases it comprises doesn't matter, it is all rolled up to a level. It is not bearing on the different cases, if I answered that correctly.

* * *

[53] A. No, sir. You can run a report in FLAIR and it will provide it, but there is not a book, so to speak.

MS. COLLINS: That would be like your file and record layout for all of those codes and how they break down and what is included in them?

THE WITNESS: The FLAIR system is very complex and has different tables and how everything feeds together. I don't have like a file setup or that kind of layout. There are principles in accounting so that you know which object codes go with revenue, which one goes with expenditures, that type of data layout.

BY MR. BOWMAN:

Q. But there is nothing that tells you how to input in the FLAIR system the information that the fields require?

A. Yes, the FLAIR manual will have that. But like if you are being specific about a certain type of revenue, it will not tell you how to code a certain type of revenue. It will tell you how to code a revenue, but it doesn't get into the certain types of revenue.

Q. So is that accomplished through training?

A. Correct.

Q. And what type of training does the [54] department offer?

A. It is just on-the-job training on this.

Q. Is there somebody at the department that administrates the FLAIR system, the administrator of the FLAIR system?

A. A liaison-type role?

Q. Just an overseer of it.

A. Not like an overseer.

Q. Here is me talking in a very colloquial fashion, which I tend to do. Who is the guru of the FLAIR system at the department?

A. That would be James Hicks.

Q. Have you calculated the investment interest earned – excuse me. Have you calculated the investment interest paid to the department since 1985?

A. Yes.

Q. And when did you do that?

A. In the last month.

Q. Do you know the number?

A. Approximately $8 million. And that's unaudited.

Q. Does that also include the turnpike folks?

A. Yes. That was based just solely on the object code, running a report just on the 005040 object code.

[55] Q. And one would be able to check that, though, if they went back through, at least through the documents to 2000, right?

A. Correct.

Q. Do you know how one would check it prior to 2000?

A. You would have to go back to the Clerk of the Court prior to that.

Q. But if one had a final judgment and an order of taking, could you?

A. We don't have any way to audit it. All I could do is provide this is what was on the object code.

Q. But that, that – I mean, if there were no other means to check it, would the department rely upon that?

A. I'm not sure.

Q. Do you know who we would talk to about that?

A. Probably the comptroller.

Q. Who is that?

A. Robin Naitove.

Q, Robin?

A. Naitove.

Q. I've heard that name before. N-A-T-O?

A. N-A-I-T-O-V-E.

[56] Q. Naitove?

A. Naitove.

Q. Do you feel confident now that the answers that you provided in the request for production are correct?

A. Yes, sir.

MS. COLLINS: Can I ask one question?

MR. PEOPLES: You have been asking questions.

MS. COLLINS: Just kind of spontaneously. This is a little different than spontaneously.

DIRECT EXAMINATION

BY MS. COLLINS:

Q. I just want to make sure I understand. Going back to August of 2000, you can track each investment interest payment received and you can obtain the checks or transmittals associated with each of those payments?

A. Well –

MR. PEOPLES: Hang on.

THE WITNESS: I'm sorry.

BY MS. COLLINS:

Q. Is that right?

A. Until November of 2001.

Q. Okay.

APPENDIX H

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

To all to whom these presents shall come. Greeting:

By virtue of the authority vested in me by the Archivist of the United States, I certify on his behalf, under the seal of the National Archives and Records Administration, that the attached reproduction(s) is a true and correct copy of documents in his custody.

[SEAL]

SIGNATURE	
[Illegible]	
NAME [for] JAMES J. MCSWEENEY	DATE 11/12/10
TITLE Regional Administrator	
NAME AND ADDRESS OF DEPOSITORY National Archives and Records Administration Southeast Region Federal Records Center 4712 Southpark Boulevard Ellenwood, GA 30294	

NA FORM 13040 (10-86)

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA. WEST PALM BEACH DIVISION

CLASS REPRESENTATION

CASE NO. 83-8265-CIV-JCP

CAMDEN I CONDOMINIUM ASSOCIATION, INC.; CAMDEN L CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE A CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE I CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE F CONDOMINIUM ASSOCIATION, INC.; CHATHAM A CONDOMINIUM ASSOCIATION, INC.; CHATHAM M CONDOMINIUM ASSOCIATION, INC.; COVENTRY A CONDOMINIUM ASSOCIATION, INC.; COVENTRY J CONDOMINIUM ASSOCIATION, INC.; DORCHESTER E CONDOMINIUM ASSOCIATION, INC.; KENT D CONDOMINIUM ASSOCIATION, INC.; KENT J CONDOMINIUM ASSOCIATION, INC.; SALISBURY D CONDOMINIUM ASSOCIATION, INC.; SALISBURY E CONDOMINIUM ASSOCIATION, INC.; SOMERSET A CONDOMINIUM

FILED BY AM DT

'83 MAY 16

ASSOCIATION, INC.;
SOMERSET C CONDOMINIUM
ASSOCIATION, INC.;
SOMERSET H CONDOMINIUM
ASSOCIATION, INC.;
SOMERSET I CONDOMINIUM
ASSOCIATION, INC.; WALTHAM
E CONDOMINIUM ASSOCIA-
TION, INC.; WALTHAM H CON-
DOMINIUM ASSOCIATION,
INC.; and WINDSOR N CONDO-
MINIUM ASSOCIATION, INC.,
Florida Corporations not for profit,

Plaintiffs,

vs

JOHN B. DUNKLE, Clerk of the
Circuit Court, 15th Judicial
Circuit of Florida, and PALM
BEACH COUNTY,

Defendants. /

COMPLAINT – CLASS ACTION

COMES NOW the Plaintiffs, CAMDEN I CONDOMINIUM ASSOCIATION, INC.; CAMDEN L CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE A CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE I CONDOMINIUM ASSOCIATION, INC.; CAMBRIDGE F CONDOMINIUM ASSOCIATION, INC.; CHATHAM A CONDOMINIUM ASSOCIATION, INC.; CHATHAM M CONDOMINIUM ASSOCIATION, INC.; COVENTRY A CONDOMINIUM ASSOCIATION, INC.;

COVENTRY J CONDOMINIUM ASSOCIATION, INC.; DORCHESTER E CONDOMINIUM ASSOCIATION, INC.; KENT D CONDOMINIUM ASSOCIATION, INC.; KENT J CONDOMINIUM ASSOCIATION, INC.; SALISBURY D CONDOMINIUM ASSOCIATION, INC.; SALISBURY E CONDOMINIUM ASSOCIATION, INC.; SOMERSET A CONDOMINIUM ASSOCIATION, INC.; SOMERSET C CONDOMINIUM ASSOCIATION, INC.; SOMERSET H CONDOMINIUM ASSOCIATION, INC.; SOMERSET I CONDOMINIUM ASSOCIATION, INC.; WALTHAM E CONDOMINIUM ASSOCIATION, INC.; WALTHAM H CONDOMINIUM ASSOCIATION, INC.; and WINDSOR N CONDOMINIUM ASSOCIATION, INC., Florida Corporations not for profit, by and through their undersigned counsel, and hereby sues the Defendants, JOHN B. DUNKLE, Clerk of the Circuit Court, 15th Judicial Circuit of Florida, and PALM BEACH COUNTY, and allege the following:

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1343(3)(4) providing for jurisdiction without regard to the amount in controversy in cases seeking redress from alleged infringement of civil rights; upon 28 U.S.C. 1331 providing for jurisdiction in cases arising under the constitution and laws of the United States; and upon 28 U.S.C. 2201 and 2202 providing for declaratory and injunctive relief. This case arises under the Fifth and Fourteenth Amendments to the United States Constitution and 42

U.S.C. 1985, 1983 creates a federal cause of action for violations of these rights.

CLASS REPRESENTATION ALLEGATIONS

2. That the Plaintiffs are Florida Corporations not for profit who bring this action as a class action under Rule 23, and allege as follows:

(a) Count I of this class action is brought under Rule 23(b)(2) in that the Defendants have refused to act on grounds generally applicable to all members of the class, as further alleged herein, thereby making final injunctive and declaratory relief concerning the class as a whole appropriate.

(b) The questions of law or fact are common to the claim of the Plaintiffs and the claim of each member of the class as further alledged [sic] herein.

(c) Plaintiffs deposited recreation rentals and cash bonds with the Clerk of the Circuit Court, 15th Judicial Circuit, in an amount in excess of $3,500.00 per Plaintiff in the case of *Wellington Condominium Associations, et al. v. Century Village, Inc.*, Case No. 75-951 CA (L) 01 A, et al., Circuit Court Palm Beach County. Said rentals and cash bonds were deposited under the same procedures as any funds are deposited with the Clerk of the Circuit Court, in that the Clerk of the Circuit Court used said funds and funds similarly deposited by Class Members, or on behalf of Class Members, or funds which were ultimately disbursed to Class Members, to

invest in savings accounts, time certificates and other investments which earned interest, pursuant to Sections 28.33, 74.051 and 74.061, Fla.Stat. (1973).

(d) The total number of class members who also deposited cash, or cash was deposited on their behalf, with the Clerk of the Circuit Court is not known to the Plaintiffs but is believed to be so numerous as to make it impractical to bring them all before the Court. All Class Members are persons who, like the Plaintiffs, deposited cash, or cash was deposited on their behalf, with the Clerk of the Circuit Court, 15th Judicial Circuit, and whose funds were also invested by the Clerk of the Circuit Court, 15th Judicial Circuit, pursuant to Sections 28.33, 74.051 and 74.061, Fla.Stat. (1973). A complete listing of each Class Member is available from the Clerk of the Circuit Court's records. The Plaintiffs are the proper representatives of the Class Members in that they are residents of Palm Beach County who have extensively litigated class action issues in the 15th Judicial Circuit and who have themselves a monetary claim in this cause exceeding $10,000.00 in lost interest. Plaintiffs will vigorously protect the rights and claims of all Class Members.

(e) The Clerk of the Circuit Court collected interest earned from deposited monies owned by the Plaintiffs and Class Members and used said interest earned to partially fund the operations of the Clerk's Office. A substantial portion of the interest earned was also turned over to Palm Beach County for County operations. Both the Clerk of the Circuit

Court and Palm Beach County have publically and officially stated that interest monies earned from the Court Registry deposits would not be refunded to the Plaintiffs or Class Members even though the Supreme Court of the United States has declared this practice of retaining interest monies earned to be violative of the Fifth and Fourteenth Amendments to the United States Constitution. *Webb's Fabulous Pharmacies, Inc. et al. v. Beckwith*, 49 LW 4033, No. 79-1033, December 9, 1980.

COUNT I

3. That this is an action for declaratory and other supplemental relief brought by the Plaintiffs and Class Members.

4. That the Plaintiffs and Class Members from 1973 to date have deposited funds, or funds were deposited on their behalf, with the Clerk of the Circuit Court, 15th Judicial Circuit. The Clerk of the Circuit Court has invested said funds and earned in excess of $1,000,000.00 in interest which he used for his own office operation and/or which he turned over to Palm Beach County.

5. That the Clerk's and County's policy of retaining interest in this manner violates the Fifth and Fourteenth Amendments to the United States Constitution in that it deprives the Plaintiffs and Class Members of their property (interest earned on monies deposited) without due process of law.

6. That the Defendants have publically and officially stated that they will not refund the interest monies earned to the Plaintiffs or Class Members.

7. In order to gain refunds of interest monies earned, the Plaintiffs have had to retain the undersigned law firm and have agreed to pay them reasonable attorneys fees.

8. Plaintiffs and Class Members are uncertain as to their rights for a refund of interest monies and seek a declaration thereof.

WHEREFORE, Plaintiffs and Class Members pray that this Court declare their rights and create a special fund of all interest monies earned in the 15th Judicial Circuit to date, and to order the return of said monies to the Plaintiffs and Class Members less reasonable attoneys fees.

COUNT II

9. That paragraphs 1 through 7 herein are realleged.

10. That Count II of this class action is also brought under Rule 23(b)(3) in that the Plaintiffs and Class Members seek a claim for damages in excess of $2,500.00 per named Plaintiff and in excess of $1,000,000.00 for all Class Members against the Defendants, and further state:

(a) The right of Plaintiffs and Class Members to the interest earned concerns questions of

constitutional law and fact common to all the parties and the claims of class members differ only as to the amount of damages to each class member;

(b) A class action is superior to individual lawsuits which would involve numerous actions on small accounts making such actions economically inefficient and impractical;

(c) If individuals (class members) were required to bring individual actions, the expense of the court proceedings and defense of the Defendants would be much greater than a class action;

(d) A class action consisting of the alleged Class Members is a manageable class action with membership consisting of primarily Palm Beach County residents. All Defendants reside and perform their official duties in Palm Beach County. The monies and records of all Court deposits are all located in Palm Beach County.

(e) Any difficulties in managing this class action can be resolved, after the determination of liability, by creating a special fund with a special master to award claims from such a special fund.

11. That the refusal of the Defendants to return interest earned on funds deposited by or on behalf of the Plaintiffs and Class Members without due process of law has damaged the Plaintiffs and Class Members in excess of $1,000,000.00.

WHEREFORE, Plaintiffs and Class Members pray that this Court enter judgment in excess of $1,000,000.00 against the Defendants.

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APPENDIX I

Prepared 5/22/85
by the Committee on
Appropriations

STATE OF FLORIDA
HOUSE OF REPRESENTATIVES
1985
FISCAL NOTE

HB 1392
Bill Number

II. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

A. Non-Recurring or First Year Start-up Effects

	1985-86	1986-87	1987-88
Department of Highway Safety and Motor Vehicles			
Operating Capital Outlay	$128,602		
Department of Transportation			
Operating Capital Outlay	$366,750		

B. Recurring or Annualized Continuation Effects

Department of Transportation

	1985-86	1986-87	1987-88
Estimated Revenue:			
Interest Earnings on Eminent Domain Deposits	$1,200,000	$1,200,000	$1,200,000
Increased Enforcement of Truck Weight and Registration Regulations	4,000,000	4,000,000	4,000,000
Motor Fuel Tax Floor	5,700,000	12,200,000	7,100,000
Increased Enforcement of Auto Registration Regulations	1,000,000	1,000,000	1,000,000
Total Estimated Revenue	$11,900,000	$18,400,000	$13,300,000
Estimated Expenditures:			
Increased Enforcement of Truck Weight and Registration Regulations			
Salaries and Benefits (15 FTE)	199,510	209,485	219,960
Expenses	16,945	16,945	16,945
Other	46,800	46,800	46,800
Total Estimated Expenditures	$ 263,255	$ 273,230	$ 283,705

It is anticipated that the Department would incur expenditures totaling approximately $50,000 per year for cost associated with commission travel expenses.

Department of Highway Safety and Motor Vehicles

Estimated Requirements to Implement the International Registration Plan Program

Salaries and Benefits (36 FTE)	$ 449,053	$ 471,506	$ 495,081
Other Personal Services	20,904	20,904	20,904
Expenses	176,895	176,895	176,895
Data Processing Services	471,190	450,000	450,000
Total	$1,118,042	$1,119,305	$1,142,880

The International Registration Plan Program will generate additional funds through the apportioned revenue concept. However, since the I.R.P. is a new program, the amount of additional funds is indeterminate.

C. Long Run Effects other than Normal Growth

Increased revenues from the motor fuel tax floor will essentially disappear in F.Y. 1988-89 as the tax rate is expected to increase to 5.7 cents per gallon under current law.