

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY, FLORIDA**

BILLMATRIX CORPORATION,  
CHECKFREE SERVICES CORPORATION,  
FISERV AUTOMOTIVE SOLUTIONS,  
INC., ITI OF NEBRASKA, INC., XP  
SYSTEMS CORPORATION, and  
CARREKER CORPORATION

Plaintiffs,

CASE NO.: 2020-CA-000435

vs.

STATE OF FLORIDA, DEPARTMENT OF  
REVENUE,

Defendant.

**DEPARTMENT'S MOTION FOR COMPULSORY JUDICIAL NOTICE  
AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION**

Defendant, State of Florida Department of Revenue ("Department"), serves this motion for compulsory judicial notice pursuant to sections 90.202(6) and 90.203, Florida Statutes, and this motion to dismiss for lack of subject matter jurisdiction pursuant to section 72.011(3) and (5), Florida Statutes.

Section 72.011, Florida Statutes, creates—and limits—subject matter jurisdiction over challenges to tax assessments for the taxes listed in section 72.011(1), Florida Statutes, including the corporate income taxes imposed by chapter 220, Florida Statutes, which are in issue in this case.

Subject matter jurisdiction is never waived and must be determined before the Court takes any other action. Plaintiffs' failure to comply with the jurisdictional requirements of section 72.011(3) and (5), Florida Statutes, conclusively bars this case.

### **Motion for Compulsory Judicial Notice**

The Department requests that the Court take judicial notice of the Court's file in this case pursuant to section 90.202(6), Florida Statutes ("A court may take judicial notice of the following matters ... (6) Records of any court of this state ..."). Judicial notice of these matters is compulsory pursuant to section 90.203, Florida Statutes, which provides:

A court shall take judicial notice of any matter in s. 90.202 when a party requests it and:

- (1) Gives each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request.
- (2) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

The particular information in the Court's file over which the Court must take judicial notice is Plaintiffs' failure to "Tender into the registry of the court with the complaint the amount of the contested assessment complained of ...," Plaintiffs' failure to "File with the complaint a cash bond or a surety bond for the amount of the contested assessment ... conditioned upon payment in full of the judgment,

including the taxes, costs, penalties, and interest ... ,” and Plaintiffs’ failure to file a motion for an alternative security arrangement with the complaint. *See* section 72.011(3)(b)1. and section 72.011(3)(b)2., Florida Statutes.

These matters are relevant and timely because the provisions of section 72.011(3), Florida Statutes, are *jurisdictional* requirements for the present case challenging the Department’s tax assessments. *See* section 72.011(5), Florida Statutes (“The requirements of subsections (1), (2), and (3) are jurisdictional.”). For the reasons stated below, this subsection is a statute of non-claim, and Plaintiffs’ failure to comply is a jurisdictional bar to this case. The Department has attached the affidavit of Mr. Thomas Butscher showing that Plaintiffs also have failed to satisfy the other requirements of section 72.011((3), Florida Statutes. (*See* Exhibit A.). These facts show that the Court lacks subject matter jurisdiction for the reasons stated below.

### **Motion To Dismiss for Lack of Subject Matter Jurisdiction**

#### **A. Subject Matter Jurisdiction Is Never Waived.**

Courts have a duty to determine whether they have subject matter jurisdiction and the lack of subject matter jurisdiction can never be waived. *See, e.g., Dep’t of Revenue v. Daystar Farms, Inc.*, 803 So. 2d 892, 895-96 (Fla. 5th DCA 2002), in which the District Court of Appeal explained:

“[I]t is well settled that lack of subject matter jurisdiction may be raised *sua sponte* by an appellate court even if neither party raises issue.” *See*

*Ruffin v. Kingswood E. Condo. Ass'n, Inc.*, 719 So. 2d 951, 952 (Fla. 4th DCA 1998) ... Thus, “[courts] are bound to take notice of the limits of their authority and if want of jurisdiction appears at any stage of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order.” *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997). As the cases above reflect, the issue of jurisdiction over the subject matter is never waived.

In *Polk County v. Sofka*, *supra*, the Supreme Court explained that “parties cannot stipulate to jurisdiction over the subject matter where none exists. ... Subject matter jurisdiction ... cannot be created by waiver, acquiescence or agreement of the parties.” 702 So. 2d at 1245. The *Sofka* court held:

This case is before us on a question certified by the district court as one of great public importance. ... However, because we conclude that the district court lacked jurisdiction to hear the appeal, we do not address the certified question. Instead, we quash the decision of the district court, and remand with directions that the district court dismiss the appeal for lack of jurisdiction.

**B. The Court May Consider Facts Outside the Complaint To Determine Whether It Has Subject Matter Jurisdiction.**

A trial court may consider evidence outside the four corners of the complaint to determine whether it has subject matter jurisdiction. *See, e.g., Seminole Tribe of Fla. v. McCor*, 903 So. 2d 353, 357 (Fla. 2d DCA 2005), which explained:

In considering a motion to dismiss challenging subject matter jurisdiction, a trial court may properly go beyond the four corners of the complaint and consider affidavits. ... We therefore conclude that it was proper for the trial court to consider the Tribe’s motion to dismiss with the accompanying affidavits and not appropriate to consider the motion for summary judgment.

*See also Steiner Transocean LTD. v. Efremova*, 109 So. 3d 871, 873 (Fla. 3rd DCA 2013) (“[A] court is permitted to consider evidence outside the four corners of the complaint when the motion to dismiss challenges subject matter jurisdiction.”)

**C. Failure To Comply with Section 72.011(3) at the Beginning of the Case Bars the Exercise of Jurisdiction.**

Plaintiffs who challenge tax assessments must “[t]ender into the registry of the court *with the complaint* the amount of the contested assessment ... [or] [f]ile *with the complaint* a cash bond or a surety bond for the amount of the contested assessment ... .” *See* § 72.011(3)(b)1. and (b)2., Fla. Stat. (Emphasis added). The Department has requested that the Court take compulsory judicial notice of the fact that none of the present Plaintiffs fulfilled these statutory prerequisites for the invocation of the Court’s jurisdiction.

The only statutory exception to the requirement that plaintiffs tender the full amount of the challenged assessment or provide a cash or surety bond for that amount *when they file the complaint* is the allowance of a written waiver of these requirements by the Department’s executive director. The Department has attached the Affidavit of Assistant General Counsel Thomas Butscher attesting to the fact that the executive director never waived these requirements for the present taxpayers. *See* Exhibit A.

In addition, courts may allow cases to proceed when taxpayers file motions for alternative security *at the same time* as they file the complaint. *See PageNet, Inc.*

*v. State of Florida Dep't of Revenue*, 896 So. 2d 824, 827 (Fla. 1st DCA 2005) (“[B]y filing a motion for alternative security arrangement *at the time it filed its complaint*, PageNet satisfied the jurisdictional requirements of section 72.011(3).”) (Emphasis added). *See also Dep't of Revenue v. Swago T-Shirts, Inc.*, 877 So. 2d 761, 762 (Fla. 4th DCA 2004) (allowing the case to proceed after noting that the taxpayer filed a motion to approve an alternative security arrangement “at the same time” that it filed the complaint.

In *Department of Revenue v. Nu-Life Health and Fitness Center*, 623 So. 2d 747, 751 (Fla. 1st DCA 1992), the First District Court of Appeal<sup>1</sup> reversed a final judgment sustaining a challenge to a tax assessment because the taxpayer failed to satisfy the requirements of section 72.011(3), Florida Statutes. The court held:

As provided in section 72.011(5), the requirements of section 72.011(3) are jurisdictional. Since Nu-Life has not satisfied any of the requirements of section 72.011(3) and did not attempt to obtain a written waiver from the director or file a motion for a court-approved security arrangement, the final judgment must be reversed and the case remanded with directions to dismiss the complaint for lack of subject matter jurisdiction.

The present Plaintiffs failed to satisfy the statutory requirements of section 72.011(3) and also failed to seek an alternative security arrangement from the Court at the time they filed the Complaint—or at any other time during the nearly three

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<sup>1</sup> The Fifth District differs from the First and Fourth Districts by allowing taxpayers to file motions for alternative security after they file the complaint. *See Don's Sod Co., Inc. v. Dep't of Revenue, State of Fla.*, 661 So. 2d 896, 901 (Fla. 5th DCA 1995).

years that this action has been pending. It now is simply too late to correct a jurisdictional defect that has existed since the inception of the case. As a result, the present tax assessment challenge is jurisdictionally barred.

**D. Plaintiffs Cannot Avoid the Jurisdictional Bar by Characterizing Their Claims as an Action for Declaratory Relief.**

The requirements of subsection 72.011(3) (that Plaintiffs tender the amount of contested taxes, obtain a cash or surety bond, or secure the executive director's waiver) are just a few of the *jurisdictional* requirements of section 72.011, Florida Statutes, for challenges to tax assessments. Section 72.011(5), Florida Statutes, declares that the additional requirements of subsections 72.011(1) and (2), Florida Statutes, also are "jurisdictional."

Subsection 72.011(2), Florida Statutes, imposes a strict 60-day deadline for challenging a tax assessment after the assessment becomes final. The taxpayers in *State of Florida Department of Revenue v. Ray Construction of Okaloosa County*, 667 So. 2d 859 (Fla. 1st DCA 1996), sought to avoid the jurisdictional bar of section 72.011, Florida Statutes, by claiming that they brought their challenge to a tax assessment as a declaratory judgment action pursuant to chapter 86, Florida Statutes. The First District rejected this argument and held:

We similarly reject, as unsupported by any legal authority which has been brought to our attention, Ray Construction's assertion that an action for declaratory relief is maintainable without regard for the 60-day jurisdictional limit found in section 72.011(2). Nothing in this or other portions of Chapter 72 indicate that the 60-day jurisdictional

period is directed to any particular form of “action” by which a taxpayer may seek to contest the legality of a tax assessment or denial of a refund.

*Id.* at 863. *See also Swago T-Shirts, supra*, 877 So. 2d at 763 (“The fact that Swago’s action is one for declaratory relief does not excuse it from complying with these jurisdictional requirements.”).

It is significant that section 72.011(3), Florida Statutes, applies to “*any action* filed in circuit court contesting the legality of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1).” (Emphasis added.) Subsection 72.011(1), Florida Statutes, specifically includes corporate income taxes under chapter 220, Florida Statutes, which are the taxes that are in dispute in this case. The broad application of section 72.011, Florida Statutes, to “any action” precludes Plaintiffs’ efforts to avoid the jurisdictional bar by the simple expedient of characterizing their assessment challenge as an action for declaratory judgment.

**E. The Legislature Emphasized the Mandatory Nature of Section 72.011(3) by Imposing a Mandatory Penalty for Failure To Comply.**

The legislature eliminated any question about whether the strict requirements of section 72.011(3) were mandatory by adding the flush language in section 72.011(3)(b)2., “Failure to pay the uncontested amount as required in paragraph (a) shall result in the dismissal of the action and imposition of an additional penalty in the amount of 25 percent of the tax assessed.” The Complaint does not identify the



portion of the assessments (if any) that is uncontested so the Department is not seeking imposition of that 25% penalty at this time. The inclusion of that language in the statute, however, shows the legislative intent to require strict compliance with the statute.

Because the requirements of section 72.011(3) are *jurisdictional* (see § 72.011(5), Fla. Stat.) and are mandatory (see the beginning language stating that “the plaintiff *must* ...”) (Emphasis added), section 72.011 operates as a statute of nonclaim, which is an absolute bar to the assessment challenge. The Fifth District has explained the nature of a non-claim statute:

Nonclaim statutes operate to bar untimely claims without any action by the opposing party and deprive a court of the power to adjudicate those claims. *See Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*, 673 So.2d 163, 166 (Fla. 4th DCA 1996). A statute is a “nonclaim statute” if there is a clearly evidenced legislative intent in the statute to not merely withhold the remedy, but to take away the right of recovery when a claimant fails to present his or her claim as provided in the statute. In other words, the language creating a nonclaim statute must indicate clearly that a failure to comply with its terms bars the claim. 51 Am. Jur.2d *Limitations of Actions* § 11 (2010).

*Adhin v. First Horizon Home Loans*, 44 So. 3d 1245, 1253 (Fla. 5<sup>th</sup> DCA 2010). The legislature’s strict jurisdictional requirements for tax assessment challenges may have resulted, at least in part, from the Florida Constitution’s requirement of a balanced budget each year. *See Fla. Const. Art. VII, §1(d)*.

## Conclusion

The Court record in this case (which is before the Court pursuant to the request for compulsory judicial notice) and the Affidavit of Thomas Butscher (which is attached as Exhibit A) show that Plaintiffs failed to “[t]ender into the registry of the court” the entire amount of the assessments *at the time they filed the complaint*, that Plaintiffs failed to “[f]ile a cash bond or a surety bond for the amount of the contested assessment” *at the time they filed the complaint*, that Plaintiffs failed to obtain a waiver of these requirements from the Department’s executive director *at the time they filed the complaint*, and that Plaintiffs failed to secure the Court’s approval of an alternative security arrangement *at the time they filed the complaint*.

It now is simply too late to correct the jurisdictional defects that have existed since the inception of the case. It is not possible to return the parties to the positions they occupied when the complaint was filed nearly three years ago and any effort to create jurisdiction retrospectively would be unfairly prejudicial to the Department.

The requirements of section 72.011(3) are *jurisdictional* (*see* § 72.011(5), Fla. Stat.) and the failure to comply with that statute deprives the Court of subject matter jurisdiction to consider Plaintiffs’ tax assessment challenge. Subject matter jurisdiction is never waived. Thus, the present action is jurisdictionally barred and must be dismissed.

**Certificate of Counsel**

The Department's undersigned counsel certifies that he conferred with Mr. James McKee, counsel for Plaintiffs, on February 17, 2023, in an unsuccessful effort to resolve the matters asserted in the foregoing motions by agreement.

Respectfully submitted,

ASHLEY MOODY  
ATTORNEY GENERAL

*/s/ J. Clifton Cox*

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Counsel for Defendant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to all counsel of record through the E-Portal on this 22nd day of February, 2023.

Respectfully submitted,

*/s/ J. Clifton Cox*

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Counsel for Defendant

# EXHIBIT A

Affidavit of Thomas Butscher

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY, FLORIDA**

**BILLMATRIX CORPORATION,  
CHECKFREE SERVICES CORPORATION,  
FISERV AUTOMOTIVE SOLUTIONS,  
INC., ITI OF NEBRASKA, INC., XP  
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CARREKER CORPORATION,**

**Plaintiffs,**

**CASE NO.: 2020-CA-000435**

**vs.**

**STATE OF FLORIDA, DEPARTMENT OF  
REVENUE,**

**Defendant.**

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**STATE OF FLORIDA  
COUNTY OF LEON**

**AFFIDAVIT OF THOMAS K. BUTSCHER IN SUPPORT OF THE  
DEPARTMENT'S MOTION TO DISMISS FOR LACK OF SUBJECT  
MATTER JURISDICTION**

Before me, the undersigned authority, personally appeared Thomas K. Butscher, who after being duly sworn, stated the following under oath:

1. I am Thomas K. Butscher. I have personal knowledge of all facts stated in this affidavit and I am competent to testify to everything stated herein. I give this affidavit for all lawful purposes.

2. I am employed by the Florida Department of Revenue (“Department”) as Assistant General Counsel and have worked in that capacity for 14 years. I have been a member in good standing of the Florida Bar since 1999, and my Florida Bar Number is 176011.

3. The facts stated in this Affidavit apply to each and every Plaintiff in this case, and this Affidavit refers to the Plaintiffs, individually and collectively, as the “Taxpayers.”

4. I am the Department’s in-house attorney who is responsible for oversight of the present case and am the person who would be responsible for receipt and processing of a request by the present Taxpayers for the executive director’s waiver of the requirements of section 72.011(3), Florida Statutes.

5. None of the Taxpayers has paid the Department any portion of the Contested Assessments.

6. I have never received a request from any of the present Taxpayers for waiver of the jurisdictional requirements of section 72.011(3), Florida Statutes, and the Department’s Executive Director has never issued a written waiver of those requirements for any of the present Taxpayers.

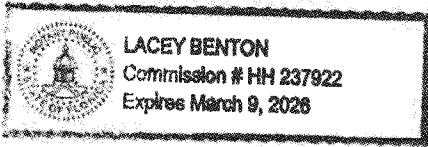
Further Affiant sayeth not.

  
\_\_\_\_\_  
Thomas K. Butscher

Sworn to and subscribed before me this 20th day of February, 2023  
by Thomas K. Butscher.

Lacey Benton  
Notary Public, State of Florida

Print Name: LACEY BENTON



March 9, 2026  
My Commission Expires:

Personally known or  
 Produced identification  
Type of identification produced:

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