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,

vs. CASE NO.: 2020 CA 000435

STATE OF FLORIDA, DEPARTMENT OF
REVENUE,

Defendant.
_____/

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

Plaintiffs, Billmatrix Corporation ("Billmatrix"), Checkfree Services Corporation ("Checkfree"), Fiserv Automotive Solutions, Inc. ("Fiserv Auto"), ITI of Nebraska, Inc. ("ITI"), XP Systems Corporation ("XP Systems"), and Carreker Corporation ("Carreker") (collectively, the "Plaintiffs"), by and through undersigned counsel, provide the following response to the Department of Revenue's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

INTRODUCTION

Years after the Department's counsel expressly waived the requirements of section 72.011(3), after the Department admitted in its written answer to Plaintiffs' complaint that this Court has jurisdiction in this case, and after the Department actively litigated this case for more than three years and repeatedly advised Plaintiffs' counsel and the Court that the Department

needed a ruling on the merits in this case, the Department reversed course on the eve of an adverse merits ruling and asserted, for the first time, that this Court lacks jurisdiction to hear this case.

At this point, the Court has ruled on the merits and summary judgment has been issued for the Plaintiffs. There can be no dispute that the tax assessments issued by the Department to the Plaintiffs violate Florida law and are baseless. However, instead of rescinding its illegal assessments, the Department is now attempting to play "gotcha" and assert that this Court lacks jurisdiction to hear this case - in an attempt to force the Plaintiffs to pay to the Department the very tax assessments this Court has already declared are illegal and contrary to Florida law. As discussed in detail herein, the Department's Motion, and its attempt to play "gotcha" and collect on assessments which violate Florida law, should be rejected.

BACKGROUND

1. This case relates to six tax assessments issued against the various Plaintiffs.

2. Following issuance of the tax assessments, Plaintiffs' counsel contacted the Department's well-regarded and respected Deputy General Counsel, George C. Hamm, whom Plaintiffs' Counsel has known and worked with for eighteen years, initially through Plaintiffs' counsel's employment at the Florida Office of the Attorney General representing the Department in litigation. After leaving the Florida Office of the Attorney General, Plaintiffs' counsel worked with Mr. Hamm on a number of cases over the years, both aligned with the Department and adverse to the Department. Mr. Hamm and Plaintiff's counsel had a very good working relationship, and Plaintiffs' counsel has known Mr. Hamm to be a good and honorable man. *See* Exhibit A, Affidavit of James A. McKee.

3. Plaintiffs' counsel discussed with Mr. Hamm the subject of the tax assessments, (which solely related to the Department's interpretation of its service revenue apportionment

methodology and was the source of much Department discussion), and the potential for reaching an amicable resolution of the tax assessments. *Id.*

4. In the intervening time period, the COVID pandemic and related uncertainty was reaching its height. The federal government declared a public health emergency due to COVID on January 31, 2020. *See Determination That A Public Health Emergency Exists*, available at https://aspr.hhs.gov/legal/PHE/Pages/2019-nCoV.aspx

5. It became apparent that a resolution of the tax assessments could not be completed prior to the deadline for filing a circuit court complaint with respect to the tax assessments. Plaintiffs' Counsel and Mr. Hamm further discussed the status of the tax assessments, and Mr. Hamm advised Plaintiffs' Counsel to file a circuit court complaint to bring the case into the general counsel's office where it could be resolved. During that same conversation, Plaintiffs' Counsel and Mr. Hamm specifically discussed the section 72.011(3) security requirements. Mr. Hamm advised Plaintiffs' Counsel not to worry about the security requirements, and to just to get the complaint filed. The clear message was "we'll get it worked out," which was consistent with Plaintiffs' counsel's long-term working relationship and past dealings with Mr. Hamm. *See* Exhibit A.

6. But for the Plaintiffs' counsel's discussion with Mr. Hamm and reliance on such representations, Plaintiffs' counsel would have advised the Plaintiffs of other options to ensure compliance with the requirements of section 72.011(3).

7. Plaintiffs filed their complaint on March 3, 2020, just as the COVID pandemic and related uncertainty was reaching its height, and two days after Governor DeSantis issued executive order number 20-51, declaring a public health emergency in Florida due to COVID-19, on March

1, 2020. Executive Order Number 20-51, available at https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-51.pdf

8. Plaintiffs' complaint challenged the entirety of the tax assessments issued to each of the Plaintiffs, as all such assessments involved a single issue of law pertaining to the Department's interpretation of Florida Administrative Code Rule 12C-1.10155(2)(l) (the "COP Rule"), and there were no uncontested portions of the assessment. *See* Complaint.

9. After requesting an extension of time to respond to the Complaint, the Department filed its answer in this case on August 31, 2020, expressly admitting that this Court has jurisdiction in this case pursuant to sections 72.011 and 86.011, Florida Statutes. Specifically, Plaintiffs' Complaint included the following allegations regarding jurisdiction and venue:

Jurisdiction and Venue

> 8. Plaintiffs bring this action to contest certain Notices of Proposed Assessment issued by the Department against Plaintiffs for corporate income tax assessed for the periods at referenced in the respective Notices attached as exhibits to this Complaint.
>
> 9. This Court has jurisdiction in this action pursuant to section 72.011(4)(a), Florida Statutes. In addition, this Court has jurisdiction pursuant to section 86.011, Florida Statutes.
>
> 10. Venue is proper in Leon County, Florida pursuant to section 72.011(4)(a), Florida Statutes.

See Complaint at p. 2.

10. The Department's Answer contained the following responses to Plaintiffs' Complaint as to jurisdiction and venue:

Jurisdiction and Venue

> 8. Admitted.
>
> 9. Admitted.

10. Admitted.

See The Department's Answer to the Complaint at p. 2. The Department's answer was, therefore, consistent with Plaintiffs' counsel's past discussions and agreement with Mr. Hamm. The Answer further requested in its Wherefore clause that declaratory relief be entered in favor of the Department. *Id.* at p. 3. The Answer did not contain any affirmative defenses. *Id.*

11. Following the filing of Plaintiffs' Complaint, the parties continued to work for quite some time toward a potential resolution of the tax assessments. The issue that remained unresolved, and delayed a potential resolution, was the Plaintiffs' need for clarification from the Department as to how they should interpret the COP Rule prospectively, as the Department's various interpretations of the COP Rule appeared to be directly contrary to the plain language of the Rule. *See* Exhibit A. The Department's counsel were unable, or unwilling, to provide Plaintiffs clarification regarding the prospective application of the COP Rule.

12. One of the Department's current counsel, Christopher Baisden, was subsequently substituted as counsel of record for Mark Urban, the Department's first counsel of record, on March 16, 2021. *See* March 16, 2021, Notice of Substitution of Counsel and Designation of E-mail Addresses.

13. Counsel for the parties mutually agreed to the setting of trial on August 30 and 31, 2022, and the Court set trial for those days. *See* March 23, 2022, Order Scheduling Non-Jury Trial. By order entered that same day, the Court directed the parties to conduct and complete non-binding arbitration no later than July 13, 2022, and to mutually select an arbitrator by April 22, 2022. *See* Order Referring Case to Non-binding Arbitration. As detailed in "Plaintiffs' Response to Order Referring Case to Non-binding Arbitration," the Department declined to mutually agree to the

selection of an arbitrator. *See* April 22, 2022, Plaintiffs' Response to Order Referring Case to Non-binding Arbitration.

14. Several days later, the Department filed its initial and amended "Motion for Relief from Order Referring the Parties to Non-binding Arbitration." *See* April 28, 2022, Amended Motion for Relief from Order Referring the Parties to Non-binding Arbitration. The Department's motion repeatedly asserted its strong desire to obtain judicial precedent on the issues involved in this case, stating that "judicial efficiency could be best served by completing discovery and moving the case before the Court on cross motions for summary judgment," that "the parties require judicial guidance on the matters raised in the Complaint (sales factor apportionment)," that "the Department has several cases with similar legal claims, and is seeking guidance in administering the law, as opposed to a ruling issued in non-[binding] arbitration," and that "[d]ue to tax implications going forward for both the Department and Plaintiffs, the need for judicial precedent is significant and the chance of settlement are remote (as demonstrated by the party's inability to secure an agreement on a settlement)." *Id.* Finally, the Department stated in its motion:

> 7. Pursuant to Section 213.21, Florida Statutes, the Department has authority to compromise disputes relating to assessment of taxes, interest, and penalties and the denial of refunds. The Department declines to exercise that discretion in this case as it is now clear that because similar cases exist, and the Department needs a binding precedent.
>
> 8. *The Department in good faith requires a binding precedent in this case*, arbitration will not produce results, and the grounds identified by the Department are "other good cause [] shown" under Rule 1.700(b)(4), Florida Rules of Civil Procedure, from non-binding arbitration. This matter should be heard before the Court.

Department's Amended Motion for Relief from Order Referring the Parties to Non-binding Arbitration. (Emphasis added). Based on the representations made by the Department, Judge Layne Smith granted the Department's motion and dispensed with arbitration.

15. The Court subsequently rescheduled trial for November 28 and 29, 2022. *See* May 18, 2022, Amended Order Setting Non-jury Trial.

16. The Plaintiffs initiated and completed the limited discovery they needed. Plaintiffs' counsel and counsel for the Department worked cooperatively to complete such discovery, and move forward to the merits ruling the Department's counsel repeatedly indicated the Department was seeking.

17. Thereafter, the Department's counsel requested a one-month extension of time to complete the Department's discovery and Plaintiffs' counsel advised that Plaintiffs had no objection to the requested extension. However, the Department did not undertake any discovery.

18. The Department requested a continuance of the November 28 and 29, 2022, trial dates and the Plaintiffs did not oppose such continuance. *See* Department of Revenue's Motion to Continue Trial. The Court granted the continuance and rescheduled trial for March 29-30, 2023. *See* Order Granting Motion to Continue Trial.

19. Mr. Hamm, the Department's former Deputy General Counsel, retired from state service in late 2022. *See* Exhibit A.

20. In accordance with the timeline established in the Court's Amended Trial Order, Plaintiffs filed their Motion for Summary Judgment on January 5, 2023. *See* Plaintiffs' Motion for Summary Judgment. The Department did not move for summary judgment, and did not file a response to Plaintiffs' Motion for Summary Judgment.

21. On January 5, 2023, the Department filed written discovery requests, despite the fact that the discovery cut-off date had expired six months previously, on June 30, 2022. On February 3, 2023, the Department moved to compel depositions of certain plaintiff witnesses, again even though the discovery cut-off date expired on June 30, 2022.

22. Presumably because of Plaintiffs' Counsel's discussions and agreement with Mr. Hamm prior to the filing of Plaintiffs' Complaint, from the filing of the Plaintiffs' Complaint through February 16, 2023, no concerns regarding this Court's jurisdiction, or the security requirements of section 72.011(3), were raised by any of the Department's in-house, or outside counsel. *See* Exhibit A.

23. On February 15, 2023, J. Clifton Cox filed a notice of appearance as co-counsel on behalf of the Department. On February 17, 2023, Mr. Cox telephoned Plaintiffs' counsel to ask if the Plaintiffs had complied with the security provisions of section 72.011(3). *See* Exhibit A. Plaintiffs' counsel relayed to Mr. Cox the history of this case, the conversation between Plaintiffs' counsel and Mr. Hamm years ago prior to the filing of the Complaint, and the agreement reached. *Id.* Plaintiffs' counsel also relayed the Department's course of conduct in this case, including the repeated insistence by the Department and its counsel that a decision on the merits was needed. That same day Plaintiffs' counsel related the same facts to Chief Assistant Attorney General Timothy Dennis. *Id.*

24. A hearing on Plaintiffs' Motion for Summary Judgment was held on February 23, 2023. Although the Department did not file a response to Plaintiffs' Motion for Summary Judgment, on February 22, 2023, the Department filed its "Department's Motion for Compulsory Judicial Notice and Motion to Dismiss for Lack of Subject Matter Jurisdiction." The Motion asserted for the first time, almost three years after the initiation of this action, two and a half years

after admitting in writing that this Court has jurisdiction in this case, after actively litigating this case for years, and only after the retirement of Mr. Hamm, that the Plaintiffs have not complied with the requirements of section 72.011(3)(b), Florida Statutes, and that this Court therefore lacks jurisdiction over this case.

25. On February 23, 2023, prior to the hearing on Plaintiffs' Motion for Summary Judgment, Plaintiffs filed their Motion for Alternative Security Arrangement in an abundance of caution given the Department's apparent change of position on the bond requirement in this case, and its apparent reversal of its previous representation and admission that this Court has jurisdiction in this case.

26. On February 28, 2023, this Court entered its order granting Plaintiffs' Motion for Summary Judgment, determining that the tax assessments issued to the Plaintiffs are invalid and abated in full. The Order recognized that final judgment will be entered via a separate order, subject to this Court's ruling on Plaintiffs' Motion to Dismiss.

ARGUMENT

The Department's Motion to Dismiss, and assertion that this Court lacks subject matter jurisdiction in this case, should be rejected for several reasons.[1]

First, as detailed above, the Department repeatedly waived the requirements of section 72.011(3). The Department's counsel waived the requirements of section 72.011(3) prior to the filing of the complaint in this case; thereafter, the Department did not move to dismiss the complaint, but instead filed an answer expressly *admitting* that this Court has jurisdiction in this

[1] This Court is certainly able to rely upon the record in this case and Plaintiffs do not oppose this Court taking judicial notice of the record in this proceeding, to the extent the Court deems such judicial notice necessary.

case pursuant to section 72.011. The Department's answer asserted no affirmative defenses. The Department then actively litigated this case for almost three years, repeatedly advising the Court that the Department needed a ruling on the merits, before it changed course on the eve of obtaining such a merits ruling, and took the position for the first time that it had not waived the requirements of section 72.011(3), and that this Court lacks subject matter jurisdiction in this case. Given these facts, the Department clearly waived the requirements of section 72.011(3). Additionally, the Department should be estopped from changing its position and arguing that this Court lacks jurisdiction in this case.

Second, although the Department's position is apparently that its past waivers and conduct do not matter because section 72.011(3) relates to subject matter jurisdiction, controlling precedent makes clear this is not the case, and that this Court clearly has jurisdiction over the subject matter of this proceeding.

Third, pursuant to section 72.011(3) this Court has the power to approve an alternative security arrangement. In an abundance of caution, Plaintiffs filed a Motion for Alternative Security Arrangement immediately following the filing of the Department's Motion to Dismiss. To the extent deemed necessary, Plaintiffs respectfully suggest such motion should be granted, and/or Plaintiffs should be permitted to cure any potential jurisdictional defect.

Fourth, even if this Court determines dismissal is appropriate, dismissal must be without prejudice and with leave to amend to cure any alleged jurisdictional defects, in accordance with relevant precedent.

Fifth, the Department's executive director, or designee, has a non-discretionary duty to issue a waiver of the requirements of section 72.011(3)(b) if the requirements of Florida Administrative Code Rule 12-3.007 are met, and such requirements are clearly met here.

I. The Department Waived The Requirements Of Section 72.011(3) And Is Estopped From Asserting Such Requirements.

As detailed herein, and in the accompanying affidavit, this case was filed at the height of the COVID pandemic, in reliance on agreement by counsel for the parties that the Department desired to amicably resolve the tax assessments and that no security needed to be posted. This agreement is surely the reason the Department filed a written answer years ago expressly admitting that this Court has jurisdiction over this action, and did not instead deny that the Court had jurisdiction in this case, or move to dismiss this case for lack of jurisdiction.[2] It also presumably explains why the Department raised no jurisdictional concerns at any point over the last three years, and instead actively litigated this case, repeatedly advising the Court that it needed a ruling on the merits, and expressly requesting issuance of such a ruling. It likewise explains why the Department's attempt to reverse its position on jurisdiction occurred only after departures of counsel of record and the retirement of Department counsel who were involved in this case prior to and at the time of its filing.

Indeed, only after the Department failed to contest or respond in writing in any way to Plaintiffs' summary judgment motion, and it became evident the Department would receive an

---

[2] In support of its Motion to Dismiss the Department presented the affidavit of Mr. Thomas K. Butscher. Mr. Butscher states that he is "the Department's in-house attorney who is responsible for oversight of the present case," and is also "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." Given Mr. Butscher's express representation that he is responsible for receiving and processing requests for the executive director's waiver of the requirements of section 72.011(3), and given that Mr. Butscher is responsible for oversight of the present case, Mr. Butscher's approval for the filing of the Department's written Answer to Plaintiff's Complaint, which expressly admitted that this Court has jurisdiction over this proceeding pursuant to section 72.011, can be considered a written waiver by the Department of the requirements of section 72.011(3). *See* Rule 12-3.007, Fla. Admin Code (recognizing the requirements of section 72.011(3) may be waived by the executive director's "designee").

adverse decision on the merits, did the Department assert - for the first time - that the Court lacked jurisdiction over this proceeding. The Department's conduct in this case clearly demonstrates a waiver of the requirements of section 72.011(3), and an admission that this Court has jurisdiction in this proceeding. Moreover, given the conduct of the Department it should be estopped from now asserting that the Court lacks jurisdiction in this case.

The First District Court of Appeal has aptly summarized that the essential elements of estoppel are:

> (1) a representation by the party estopped to the party claiming the estoppel as to some material fact, which representation is contrary to the condition of affairs later asserted by the estopped party; (2) a reliance upon this representation by the party claiming the estoppel; and (3) a change in the position of the party claiming the estoppel to his detriment, caused by the representation and his reliance thereon.
>
> While estoppel often results from a verbal statement of the estopped party, the representation may also be by his acts or inaction. The term 'representation' is used for convenience. It is not necessary that there should be an express statement. It is enough that a representation is implied, either from acts, silence or other conduct. From earliest cases the Florida Supreme Court has applied the doctrine of estoppel as a result of silence when common honesty and fair dealing demanded that a person estopped should have spoken.

Davis v. Evans, 132 So. 2d 476, 481–82 (Fla. 1st DCA 1961) (citations omitted). To the extent necessary, estoppel should be applied in this case. As detailed in the accompanying affidavit, the Department's counsel represented to Plaintiffs' counsel a material fact, Plaintiffs' counsel certainly relied upon this representation, and in reliance on this representation Plaintiffs did not make any payments into the Court's registry or post a surety bond. The words of *Davis* are particularly relevant here, where Plaintiffs' counsel relied upon a verbal statement from the

estopped party, but the Department's acts, silence, and other conduct also clearly demonstrate the appropriate application of estoppel here.

The Department's position, as stated in its Response to Plaintiffs' Motion for Alternative Security Arrangement, is that representations made by the Department's Deputy General Counsel with respect to waiver of the security requirements are irrelevant because the requirements of 72.011(3)(b) may only be waived *in writing by the Department's executive director*. Indeed, the Department expressly stated that agreements entered into by such counsel regarding waiver of the security requirements "would have been void because it is only the *Executive Director* who has such authority." Department's Response to Plaintiffs' Motion for Alternative Security Arrangement at 8. Likewise, the Department repeatedly states in its Motion to Dismiss that only the Department's executive director has the authority to waive the requirements of section 72.011(3)(b). However, a review of the record in the recently decided *Target Enterprise* case demonstrates Department's position here is directly contradicted by its actions in that case. Specifically, in direct contravention of the Department's assertions that only the Department's executive director has the authority to waive the provisions of section 72.011(3), the Department's general counsel, Mark S. Hamilton, issued to Target Enterprise's counsel a letter stating "*the Department* is willing to waive the requirements of s. 72.011(3)(b), F.S., with respect to an action by Target Enterprise, Inc." *See* Exhibit B, December 17, 2021, Correspondence from Mark S. Hamilton to Michael J. Bowen, attached as Exhibit B to December 22, 2022, Complaint of Target Enterprise, Inc. (emphasis added). To be sure, Mr. Hamilton is not the Department's executive director. Mr. Hamilton's letter to Mr. Bowen never mentions the Department's executive director, never states that a written waiver has been issued by the Department's executive director, and certainly does not constitute a written waiver from the Department's executive director. Rather,

the letter reflects the decision of the Department's general counsel's office to waive the requirements of section 72.011(3)(b), and makes clear that such decision was made by members of the general counsel's office.

Notwithstanding the waiver issued by the Department's general counsel, applying the principles urged upon the Court in this case to the facts at issue in *Target Enterprise,* the Department's position would presumably be that this Court also lacked subject matter jurisdiction in *Target Enterprise* because a written waiver was not issued by the Department's executive director. The Department would consider Mr. Hamilton's correspondence a nullity because *only the executive director* has the authority to waive the provisions of section 72.011(3)(b). Such an argument would be absurd, but it is nonetheless apparently the Department's position. The Department cannot pick and choose when to assert its arguments regarding subject matter jurisdiction, and certainly cannot take inconsistent positions regarding subject matter jurisdiction in cases pertaining to the same subject matter. If the Department is correct that waivers of section 72.011(3)(b) are only effective if issued by the Department's executive director, the waiver issued by the Department's general counsel's office to *Target Enterprise* must be considered invalid and this Court therefore must have lacked subject matter jurisdiction to hear that action.

While the Department relies on certain cases interpreting section 72.011(3) in its attempt to play "gotcha," none of the cases cited by the Department involve a factual scenario even remotely similar to that at issue here. Specifically, none of the cases concerned an express waiver by the Department's counsel of the security requirements, none concerned a written and affirmative admission that the Court had jurisdiction over the proceeding, none involved the Department's failure to raise any such issues for almost three years of litigation and repeated requests for a merits ruling, and none considered the applicability of estoppel in the context of

section 72.011(3). Instead, each of the cases cited by the Department appears to involve proceedings in which the Department immediately moved to dismiss a proceeding for non-compliance with the requirements of section 72.011(3).

In *Department of Revenue v. Nu-Life Health & Fitness Center.*, 623 So. 2d 747, 751 (Fla. 1st DCA 1992), the First District considered the requirements of section 72.011(3) in a case in which the Department promptly objected to jurisdiction by immediately filing a motion to dismiss. A review of the relevant Leon County Circuit Court docket demonstrates that the complaint was filed on February 13, 1989. The Department moved to dismiss for lack of jurisdiction on March 9, 1989. Here, by contrast, the Department did not move to dismiss, and instead filed an answer *admitting* that this Court has jurisdiction over this proceeding.

Additionally, the Department recognizes in its Motion that section 72.011(3)(b)2., states "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." While the Department asserts that such provision indicates the legislative intent to require strict compliance with the statute, it is striking that the cited provision applies only to a failure to pay *the uncontested amount* of tax assessments to the Department. Indeed, the Fifth District in *Don's Sod Co. v. Department of Revenue*, 661 So. 2d 896, 901 (Fla. 5th DCA 1995), relying on this exact provision of section 72.011, recognized that "[t]he statute only provides for dismissal of the taxpayer's complaint, if the taxpayer fails to pay the uncontested amount of taxes. § 72.011(3)(b)2." The Plaintiffs here challenged *the entirety* of the tax assessments issued to the Plaintiffs, and the Complaint specifically requests entry of "an order invalidating the Department's Notices of Proposed Assessment." Based on Plaintiffs' arguments, this Court declared the tax

assessments invalid and abated such tax assessments in their entirety. Accordingly, any assertion that Plaintiffs did not comply with the requirements of section 72.011(3)(b)2. clearly lacks merit.

Given the facts of this case, and in the interest of justice, estoppel should be applied, and the Department should be prevented from asserting at this point that this Court lacks jurisdiction in this case.

II. The Requirements Of Section 72.011(3) Do Not Relate To Subject Matter Jurisdiction.

Although the Department's position is apparently that its past waivers do not matter because section 72.011(3) relates to subject matter jurisdiction, this is clearly not the case for the reasons stated below. In fact, binding Florida Supreme Court and First District Court of Appeal case law, and the plain language of section 72.011 itself, make clear that the requirements of section 72.011(3) do not relate to subject matter jurisdiction.

First, as the Florida Supreme Court has long recognized, "[j]urisdiction of the subject-matter means the power of the court to adjudicate the class of cases to which the particular case belongs." *Cobb v. State ex rel. Hornickel*, 187 So. 151, 155 (Fla. 1938); *Fort v. Fort*, 951 So. 2d 1020, 1022 (Fla. 1st DCA 2007) (citing *Partridge v. Partridge*, 790 So. 2d 1280, 1284 (Fla. 4th DCA 2001)). In *Viverette v. State, Dep't of Transportation*, 227 So. 3d 1274, 1277–78 (Fla. 1st DCA 2017), 25 years after the issuance of *Nu-Life,*[3] the First District recognized the binding Florida Supreme Court precedent on the issue:

> . . . in *Cunningham v. Standard Guaranty Insurance Co.*, 630 So. 2d 179 (Fla. 1994), the Florida Supreme Court reaffirmed the

[3] Importantly, the Court in *Cunningham* two years after the issuance of *Nu-Life* considered a First District Court of Appeal decision that referred to a statutory requirement as being one of "subject matter jurisdiction." The Court in *Cunningham* clarified the meaning of subject matter jurisdiction, making clear that statutory requirements such as the one at issue *did not* relate to subject matter jurisdiction.

> principle that subject matter jurisdiction is the "'power lawfully conferred to deal with the general subject involved in the action'" and "'does not depend upon the ultimate existence of a good cause of action in the plaintiff, in the particular case before the court.'" *Id.* at 181 (quoting *Malone v. Meres*, 109 So. 677, 683 (Fla. 1926)). Stated differently, "[i]t is the power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case." *Id.* (citation and internal quotations marks omitted).

As discussed above, subject matter jurisdiction relates to the power of a court to deal with the general subject matter involved in the action, not the facts of a particular case. It is for this reason that true subject matter jurisdiction is not considered waivable.

Applying the above principles, this Court would lack subject matter jurisdiction over this proceeding only if the Court lacked subject matter jurisdiction over all challenges to tax assessments. That is definitively not the case. This Court certainly has subject matter jurisdiction over challenges to tax assessment pursuant to section 72.011, as well as the more fundamental requirements of article V, section 5 of Florida's Constitution, which state:

Circuit court jurisdiction generally:

> SECTION 5. Circuit courts.—
>
> (a) ORGANIZATION.—There shall be a circuit court serving each judicial circuit.
>
> (b) JURISDICTION.—The circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law. They shall have the power to issue writs of mandamus, quo warranto, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction. Jurisdiction of the circuit court shall be uniform throughout the state. They shall have the power of direct review of administrative action prescribed by general law.

Art. V, §. 5, Fla. Const.; *see also* Art. V, §. 20, Fla. Const. (recognizing that from the inception of the current Florida Constitution circuit courts have had jurisdiction "in all cases involving legality

of any tax assessment or toll"). It certainly cannot be said that this Court lacks the "power lawfully conferred to deal with the general subject involved" in this case. *See Cunningham v. Standard Guaranty Insurance Co.*, 630 So. 2d 179, 181 (Fla. 1994) (internal citations omitted). Accordingly, it is evident that the requirements of section 72.011(3) cannot, and do not, actually relate to "subject matter jurisdiction." Any such assertion or determination would be contrary to binding Florida Supreme Court precedent. Indeed, section 72.011(3) itself does not use the term "subject matter jurisdiction."

To the extent the term subject matter jurisdiction has nevertheless been utilized to refer to the requirements of section 72.011(3), the term is used loosely, and certainly cannot be interpreted as meaning such requirements are not waivable. While courts often reference "subject matter jurisdiction," such reference can be a misnomer, and it is important to understand whether the matter at issue actually relates to subject matter jurisdiction. *See, e.g., VL Orlando Bldg. Corp. v. AGD Hospitality Design & Purchasing, Inc.*, 762 So. 2d 956, 957 (Fla. 4th DCA 2000) ("Although the exclusive jurisdiction of a circuit court to foreclose a lien on property in that circuit has been loosely referred to as subject matter jurisdiction, that is a misnomer. Subject matter jurisdiction means 'the power of the court to adjudicate the class of cases to which the particular case belongs.'"). Again, any determination that section 72.011(3) relates to subject matter jurisdiction would be directly contrary to the Florida Supreme Court precedent recognized above.

Second, section 72.011(3) itself demonstrates that its requirements cannot relate to subject matter jurisdiction, as it expressly recognizes the Department's executive director *can* waive such requirements. The Department repeatedly recognizes in its Motion that true subject matter jurisdiction is not waivable. The Motion states in part that "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." Motion at 4 (citing *Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997)). In other words, a court which lacks jurisdiction "to adjudicate the class of cases to which the particular case belongs" lacks jurisdiction to adjudicate such cases even if the parties stipulate to the court's jurisdiction. *See Cobb*, 187 So. at 155.

The provisions of section 72.011(3) stand in direct contrast to the true subject matter jurisdictional principles cited by the Department. While subject matter jurisdiction cannot be waived, *section 72.011(3) itself indicates that its requirements are waivable,* and provides that such requirements may be waived by the Department's executive director. § 72.011(3), Fla. Stat. Moreover, Florida Administrative Code Rule 12-3.007, which implements provisions of the statute, provides in part that:

> (1) Authority to take the following action is hereby delegated by the Governor and Cabinet acting as the head of the Department of Revenue to the Executive Director of the Department *or the Executive Director's designee:*
>
> * * *
>
> (n) To waive the requirements of Section 72.011(3)(b), F.S., providing one of the following circumstances is met:
>
> 1. When the financial resources of the taxpayer are sufficient to ensure that any final judgment upholding an assessment of tax, penalty, and interest will be satisfied.
>
> 2. When payment into the registry of the court or the obtaining of a surety bond would be manifestly unjust because of the circumstances of the assessment or of the taxpayer.

Rule 12-3.007, Florida Administrative Code.[4] Accordingly, Rule 12-3.007 expressly extends the ability to waive the requirements of section 72.011(3) to the executive director's designee. In fact, nothing in the statutory section requires such waiver to occur prior to the filing of the complaint. Given that the legislature itself has expressly provided that the provisions of section 72.011(3) can be waived, the section simply cannot relate to "subject matter jurisdiction."

In addition to violating fundamental principles that "true" subject matter jurisdiction is not waivable, any assertion that the Department's executive director, or the director's designee, has the authority to convey subject matter jurisdiction upon the circuit court by edict would violate constitutional separation of powers principles enshrined in article II, section 3 of Florida's Constitution, either by permitting the executive to invade the power of the judiciary, or by improperly delegating whatever control the legislature may have over circuit court jurisdiction to the executive branch to award or deny subject matter jurisdiction on a case by case basis, without any articulated standards. *See Art. II, § 3, Fla. Const.; see also Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) ("The cornerstone of American democracy known as separation of powers recognizes three separate branches of government—the executive, the legislative, and the judicial—each with its own powers and responsibilities. In Florida, the constitutional doctrine has been expressly codified in article II, section 3 of the Florida Constitution, which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches."). If the court lacks subject matter jurisdiction, i.e., lacks the power to adjudicate the class of cases to which the particular case belongs, the lack of such subject matter jurisdiction cannot be waived by the Department's executive director or the

[4] Each of the circumstances detailed for waiver of the requirements of section 72.011(3) are certainly met in this case.

director's designee. Of course, a determination that the waiver provisions of section 72.011(3) are invalid or of no effect would likely result in the entirety of the statutory provision being found unconstitutional as an impermissible infringement on the constitutional right to access the courts, and thereby contradict the general principle that statutes be interpreted in such a manner as to preserve their constitutionality. *Dep't of State, Div. Of Elections v. Martin*, 885 So. 2d 453, 457 (Fla. 1st DCA 2004), *aff'd sub nom. Fla. Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763 (Fla. 2005) ("If at all possible, we must construe a statute in such a way as to uphold its constitutionality. *E.g., St. Mary's Hosp., Inc. v. Phillipe*, 769 So. 2d 961, 972 (Fla. 2000).").

Third, the provisions of section 72.011(3) permitting a court to approve an alternative security arrangement further demonstrate that the provisions of the statutory section cannot relate to true subject matter jurisdiction. Although it previously took the position that any such alternative security arrangement had to be agreed to prior to the filing of a circuit court complaint in order of the court to have jurisdiction over an action, the Department now asserts that if a motion for alternative security arrangement is filed at the same time the complaint is filed "courts may allow cases to proceed." Motion at 6. Such an assertion is nonsensical. The filing of a motion cannot convey subject matter jurisdiction to a court where it does not exist, and a court which lacks subject matter jurisdiction does not have jurisdiction to consider a motion which would allow the court to vest itself with subject matter jurisdiction. If the provisions of section 72.011(3) truly related to subject matter jurisdiction, courts could not, via the mere filing of a motion for alternative security arrangement, decide to award themselves subject matter jurisdiction where none existed. In other words, the filing of a motion for alternative security arrangement cannot somehow give a court the power to adjudicate a case where it lacks the power to adjudicate the class of cases to which the particular case belongs.

Even assuming the mere filing of a motion for alternative security arrangement with a complaint somehow gave a court subject matter jurisdiction over a particular case, under the Department's interpretation of section 72.011(3), if a motion for alternative security arrangement is denied the court would presumably then immediately lose jurisdiction over the proceeding, without affording the plaintiff any ability to comply with the alternative requirements of section 72.011(3). It simply cannot be the case if the requirements of section 72.011(3) truly relate to subject matter jurisdiction, that a plaintiff can give the court subject matter jurisdiction merely by filing a motion for alternative security arrangement, and that even upon the denial of such motion the court nevertheless retains subject matter jurisdiction over the proceeding (even if only for a short period to permit a plaintiff to cure a jurisdictional defect).

In contrast to true "subject matter jurisdiction," courts have readily recognized that other aspects of jurisdiction are waivable. For example, it is well-settled that personal jurisdiction is waivable, including through a failure to timely raise such a jurisdictional claim, or through the conduct of the party in litigation. *Babcock v. Whatmore*, 707 So. 2d 702, 703 (Fla. 1998) ("We agree with the above reasoning of the federal and Florida courts that adhere to its reasoning and hold that a defendant waives a challenge to personal jurisdiction by seeking affirmative relief—such requests are logically inconsistent with an initial defense of lack of jurisdiction."). Further, the First District has expressly recognized that except "where the court is completely without jurisdiction of the subject matter," a party is estopped from questioning the court's jurisdiction if the party consents to such jurisdiction, stating:

> The conduct and actions of Gladys Shurden in the instant cause are subject to the doctrines of waiver and estoppel. In 21 C.J.S. Courts § 108, p. 162, it is stated:
>
> 'What constitutes estoppel. Save where the court is completely without jurisdiction of the subject matter, a party will be estopped

> to question the court's jurisdiction if he invokes it, as by instituting on action or filing a counter claim or bringing a cross action, **or if he requests or consents that a particular court take jurisdiction, or accepts benefits resulting from the court's exercise of jurisdiction**.' (Emphasis supplied.)

Shurden v. Thomas, 134 So. 2d 876, 878 (Fla. 1st DCA 1961) (emphasis added).

In considering the type of jurisdiction at issue here, it is important to recognize the purpose of the statutory section at issue, which is to ensure parties challenging tax assessments are capable of paying such assessments if such assessments are determined to be valid. In other words, where the Department does not believe a litigant has the ability to pay such an assessment, the Department can require such payment to be secured through the posting of a bond, or payment of the amount of the assessment into the court registry, before collection on such assessments is delayed through litigation. *See, e.g.,* Rule 12-3.007, Fla. Admin. Code (providing for waiver of the requirements of section 72.011(3) "[w]hen the financial resources of the taxpayer are sufficient to ensure that any final judgment upholding an assessment of tax, penalty, and interest will be satisfied.").

The purpose of the statute is clearly not served in this case, where (1) specific representations regarding the waiver of such requirements were made by the Department, (2) the Department admitted in writing in its answer that this Court has jurisdiction over this proceeding, (3) an objection to jurisdiction was not raised for three years, until it became evident the Department would receive an adverse decision on the merits, and (4) the Court has already determined the tax assessments at issue are not valid. It must also be recognized that "[i]t is a fundamental rule of construction that tax laws are to be construed strongly in favor of the taxpayer and against the government, and that all ambiguities or doubts are to be resolved in favor of the taxpayer." *Maas Bros. v. Dickinson*, 195 So. 2d 193, 198 (Fla. 1967).; *see also Harbor Ventures, Inc. v. Hutches*, 366 So. 2d 1173, 1174 (Fla. 1979) ("We believe this interpretation is in compliance

with our duty to construe tax statutes in favor of taxpayers where an ambiguity may exist."); *Alachua Cnty. v. Expedia, Inc.*, 110 So. 3d 941, 945 (Fla. 1st DCA 2013) (explaining the principal as "well-established law in Florida"). This principle certainly applies to interpretations of section 72.011(3).[5]

For all of the foregoing reasons, the requirements of section 72.011(3) clearly do not relate to true "subject matter jurisdiction," but are instead clearly waivable, and were expressly waived by the Department.

III. The Statute Expressly Permits The Court To Approve An Alternative Security Arrangement.

Section 72.011(3) expressly contemplates alternatives to tendering into the court registry with the complaint the amount of the contested assessment or filing with the complaint a bond. Specifically, the section permits the court to approve and impose an alternative security arrangement. Section 72.011(3) provides in part that:

> (3) In 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), the plaintiff must:
>
> (a) Pay to the applicable department or county the amount of the tax, penalty, and accrued interest assessed by the department or county which is not being contested by the taxpayer; and either

[5] In recognizing the constitutional principles ensuring taxpayers access to courts to challenge tax assessments, the Florida Supreme Court stated:

> The owners of property can never forget that the power to tax is the power to destroy. Those who assess and collect taxes, like other human beings, make mistakes. The only nonviolent defense is legal action against the government.

N. Port Bank v. State Dep't of Revenue, 313 So. 2d 683, 687 (Fla. 1975).

> (b)1. Tender into the registry of the court with the complaint the amount of the contested assessment complained of, including penalties and accrued interest, unless this requirement is waived in writing by the executive director of the applicable department or by the county official designated by ordinance; or
>
> 2. File with the complaint a cash bond or a surety bond for the amount of the contested assessment endorsed by a surety company authorized to do business in this state, **or by any other security arrangement as may be approved by the court**, and conditioned upon payment in full of the judgment, including the taxes, costs, penalties, and interest, unless this requirement is waived in writing by the executive director of the applicable department or by the county official designated by ordinance.

§ 72.011(3), Fla. Stat. (emphasis added). Accordingly, section 72.011(3) expressly provides for a court to approve a security arrangement other than (1) tendering into the registry of the court with the complaint the amount of the contested assessment or (2) filing with the complaint a cash bond or surety bond for the amount of the contested assessment. While the statute references each of the above options occurring "with the complaint," the statute *does not* state that the security arrangement approved by the court must be filed with the complaint, nor could it be, as there is no mechanism for the court to approve such a security arrangement prior to the case even being filed and assigned to a judge. Nothing in the plain language of section 72.011(3) itself requires such an alternative security arrangement to be sought prior to or at the time of filing the complaint.

While *Nu-Life* did not concern the filing of any alternative security arrangement, the Fifth District in *Don's Sod Co. v. Department of Revenue*, 661 So. 2d 896, 901 (Fla. 5th DCA 1995), discussed at length the alternative security arrangement permitted by section 72.011(3), and expressly held that taxpayers:

> need not have petitioned for this alternative relief prior to filing suit or simultaneously with filing suit, as argued by the Department. The statute only provides for dismissal of the taxpayer's complaint, if the taxpayer fails to pay the uncontested amount of taxes. § 72.011(3)(b) 2. In this case there are no

> uncontested taxes. Prior to any hearing on the merits, however, such alternative security arrangements must be sought, for the contested tax amount, and if the court's orders in this regard are not complied with by the taxpayer, then the suit should be dismissed."

Don's Sod Co., 661 So. 2d at 901.

Don's Sod was cited with approval by the First District in *PageNet,* wherein the First District agreed that the power to set an alternative security arrangement is "directed to the equitable powers and discretion of the court." *PageNet, Inc. v. State Dep't of Revenue*, 896 So. 2d 824, 827 (Fla. 1st DCA 2005) (citing *Don's Sod Co.*, 661 So. 2d at 901). The First District in *PageNet* reversed a circuit court's grant of a motion to dismiss filed by the Department asserting that the circuit court lacked jurisdiction to consider an alternative security arrangement. While the appellant in *PageNet* had filed a motion for alternative security arrangement at the time it filed its circuit court complaint, nothing in the First District's ruling states that if the motion had been filed after the complaint was filed, the court would have determined that the circuit court lacked jurisdiction to hear the case.

Don's Sod was also cited with approval by the Fourth District in *Department of Revenue v. Swago T-Shirts, Inc.*, 877 So. 2d 761, 764 (Fla. 4th DCA 2004). As in *PageNet,* the Fourth District in *Swago* rejected the Department's assertion that the circuit court lacked jurisdiction because it had moved for an alternative security arrangement instead of posting a bond or tendering any funds into the court registry. While the taxpayer in *Swago* had filed its motion for alternative security arrangement when it filed its complaint, nothing in the Fourth District's ruling states that if the motion had been filed after the complaint was filed the court would have determined that the circuit court lacked jurisdiction to hear the case. Accordingly, while the Department attempts to paint *Don's Sod* as an outlier, in reality *Don's Sod* is the **only** district court decision that expressly considered the question of whether an alternative security arrangement can be sought after the

filing of the complaint. Neither *PageNet* nor *Swago* disagreed with *Don's Sod,* and *Don's Sod* continues to be cited approvingly by other district courts of appeal.

In an abundance of caution given the Department's change in position on this Court's jurisdiction, and reversal of the representations made to Plaintiffs' counsel prior to filing this case, Plaintiffs moved this court for entry of an alternative security arrangement pursuant to section 72.011(3)(b), within hours after the Department filed its Motion to Dismiss. Plaintiffs filed such motion prior to the February 23, 2023, hearing on Plaintiffs' Motion for Summary Judgment in reliance on the Fifth District Court of Appeals' decision in *Don's Sod Co.*, wherein the court held that an alternative security arrangement need not be filed with the complaint, but must be sought prior to any hearing on the merits. *See Don's Sod Co.*, 661 So. 2d at 901.

As detailed in Plaintiffs' Motion for Alternative Security Arrangement, the entirety of the assessments entered against the Plaintiffs relate to a difference in interpretation between the Department and the Plaintiffs of Rule 12C-1.0155(2)(l), Florida Administrative Code. This Court granted summary judgment to the Plaintiffs on February 28, 2023, invalidating the tax assessments issued to the Plaintiffs and abating such assessments in full. No purpose would be served by the posting of any bond, or the payment of any contested amounts into the Court registry. Moreover, the Plaintiffs are subsidiaries of Fiserv, a member of the S&P 500 Index and the Fortune 100, with a market value of more than $66 billion. Nevertheless, the Plaintiffs remain ready, willing, and able to pay such funds into the Court registry, or post such a bond, if required by the Court. Accordingly, Plaintiffs respectfully submit that their motion for alternative security arrangement was appropriately filed and within the discretion of this Court.

IV. Even If This Court Determines The Motion To Dismiss Should Be Granted, Leave To Amend Must Be Given.

It is well-settled that when an amended complaint is filed, it will relate back to the time of filing the original complaint. *Brooks v. Interlachen Lakes Ests., Inc.*, 332 So. 2d 681, 682 (Fla. 1st DCA 1976). Section 72.011(3) refers to tendering into the registry of the court "with the complaint" the amount of the contested assessment, and filing "with the complaint" a cash bond or a surety bond for the amount of the contested assessment. Nothing in the statutory section states that such filing can only be made with the initial complaint, or prohibits the filing of an amended complaint complying with such requirements.

In *Brooks,* the First District considered a trial court's ruling on a property appraiser's motion to dismiss for lack of subject matter jurisdiction based on a Plaintiff's failure to comply with the analogous requirements of section 194.171, Florida Statutes, which stated "(3) *Before a taxpayer may bring an action to contest a tax assessment, he shall pay to the collector the amount of the tax which he admits in good faith to be owing. The collector shall issue a receipt for the payment, and the taxpayer shall file the receipt with the complaint.*" *Brooks,* 332 So. 2d at 682 (emphasis added). The court was therefore presented with the same relevant statutory language at issue here, albeit in the property tax context. The day of the hearing on the property appraiser's motion to dismiss, the plaintiff paid the tax to the property appraiser and attempted to obtain a receipt for the payment. *Id.* After the trial court dismissed plaintiff's complaint with leave to amend, the property appraiser appealed, arguing that the circuit court lacked jurisdiction over the subject matter and parties, and therefore the complaint should have been dismissed without leave to amend. *Id.* The First District expressly rejected the property appraiser's argument, holding that the filing of an amended complaint relates back to the filing of the initial complaint, and the requirements of section 194.171 could therefore be satisfied with the filing of the amended

complaint. *Id.* at 682. In reaching its decision, the First District recognized and relied upon its prior ruling in *Hilltop Ranch, Inc. v. Brown,* 308 So. 2d 124 (Fla. 1st DCA 1975), wherein the court stated:

> . . . Although appellant did not originally pay the taxes prior to the filing of its complaint, it did, prior to the ruling on appellees' motion to dismiss, pay the taxes and then filed an amended complaint. It is our opinion, and we so hold, that the relation back of amendments provisions of Civil Procedure Rule 1.190(c) is applicable in this case, and that the trial court erred in not finding that the amended complaint, containing the allegation of payment and receipt therefor, related back to the date of the original complaint. *See In Re Estate of Wood*, 271 So. 2d 42 (Fla. 3d DCA, 1972), opinion affirmed and adopted by Florida Supreme Court in 278 So. 2d 614 (Fla.1973). **Thus, even if we were to hold that the payment of the taxes within the 60 days allowed for filing a complaint were a jurisdictional prerequisite, which we decline to do at this time, we find that appellant complied with the requirement when it filed its amended complaint which related back to the time of filing the original complaint**.

Brooks, 332 So. 2d at 682 (emphasis added). The court noted that the only distinction between *Hilltop* and *Brooks* was that in *Hilltop* the taxpayer paid the taxes and filed an amended complaint before the hearing on motion to dismiss his original complaint. *Id.* The court in *Brooks* further stated that the fact that "an amended complaint was not filed prior to hearing on the motion to dismiss is not a material distinction between this case and *Hilltop.* The trial court was correct in dismissing with leave to amend. When an amended complaint is filed, it will relate back to the time of filing the original complaint." *Id.* As the court expressly held in *Brooks,* this result was required *even if it were to hold that the payment of taxes was a jurisdictional prerequisite*. *Id.* at 682. The same principles must apply here.

To the extent the Department would argue that *Nu-Life* overruled *Brooks* and *Hilltop,* with respect to the relation back of amended complaints of amended complaints, even with respect to

jurisdictional issues, such an assertion is meritless. The Florida Supreme Court explained in *In re Rule 9.331*, 416 So. 2d 1127, 1128 (Fla. 1982):

> This historical discussion leads to the question raised by the chief judges of the district courts, whether one three-judge panel can expressly overrule or recede from a prior decision of a three-judge panel of the same court on the same point of law. Under our appellate structural scheme, each three-judge panel of a district court of appeal should not consider itself an independent court unto itself, with no responsibility to the district court as a whole. The view that one district court panel is independent of other panels on the same court could possibly be a proper constitutional interpretation if our constitution provided that district courts were merely intermediate courts, with this Court, as the state's highest court, having full discretionary jurisdiction to review all intermediate court decisions. This was not, however, the type of appellate structural scheme adopted by the electorate. In fact, the suggestion that each three-judge panel may rule indiscriminately without regard to previous decisions of the same court is totally inconsistent with the philosophy of a strong district court of appeal which possesses the responsibility to set the law within its district.

In re Rule 9.331, 416 So. 2d 1127, 1128 (Fla. 1982) (emphasis added). Indeed, the First District itself has held that "[e]ach panel decision is binding on future panels, absent an intervening decision of a higher court or this court sitting *en banc*." *Sims v. State*, 260 So. 3d 509, 514 (Fla. 1st DCA 2018). No such decision has been issued. Accordingly, *Brooks* and *Hilltop* remain binding precedent in the First District and to the extent the Department would assert *Nu-Life* conflicts with such decisions, *Brooks* and *Hilltop* control. Notably, while the *Nu-Life* decision cites *Brooks* approvingly, the order on rehearing appears to overlook entirely the First District's precedent in *Brooks* and *Hilltop.* Further, nothing in the order on rehearing in *Nu-Life* expressly states that amended complaints do not relate back to the time of filing of the initial complaint, and as noted above any such statement would be invalid as directly contradicting binding precedent in *Brooks* and *Hilltop*.

If the Court is inclined to grant the Department's Motion to Dismiss, it should only be granted with leave to amend, in accordance with *Brooks* and *Hilltop*, to permit Plaintiffs to expressly demonstrate compliance with the requirements of section 72.011(3) in their complaint.

V. To The Extent The Department Contends A Written Waiver Has Not Been Issued In An Appropriate Form, The Department's Executive Director, Or His Designee, Have A Non-Discretionary Duty To Issue Such A Waiver At This Time

As noted herein, section 72.011(3) expressly provides for the waiver of the requirements of section 72.011(3) by the Department's executive director. Moreover, Florida Administrative Code Rule 12-3.007, which implements provisions of the statute, provides in part that:

> (1) Authority to take the following action is hereby delegated by the Governor and Cabinet acting as the head of the Department of Revenue to the Executive Director of the Department *or the Executive Director's designee:*
>
> * * *
>
> (n) To waive the requirements of Section 72.011(3)(b), F.S., providing one of the following circumstances is met:
>
> 1. When the financial resources of the taxpayer are sufficient to ensure that any final judgment upholding an assessment of tax, penalty, and interest will be satisfied.
>
> 2. When payment into the registry of the court or the obtaining of a surety bond would be manifestly unjust because of the circumstances of the assessment or of the taxpayer.

Rule 12-3.007, Fla. Admin. Code. Nothing in section 72.011(3), or in Rule 12-3.007, specifies when such a waiver may be sought, or obtained, and nothing in the statute or Rule prohibits the request, or issuance, of such a waiver during the pendency of litigation. Moreover, Rule 12-3.007 makes clear that a waiver is warranted when either of the requirements of subsection (n) are met. Accordingly, upon determining that either:

> 1. The financial resources of the taxpayer are sufficient to ensure that any final judgment upholding an assessment of tax, penalty, and interest will be satisfied.
>
> or
>
> 2. Payment into the registry of the court or the obtaining of a surety bond would be manifestly unjust because of the circumstances of the assessment or of the taxpayer.

the Department's executive director, or his designee, have a non-discretionary duty to issue an appropriate waiver. While Plaintiffs believe both subparts are satisfied here, the first subpart is clearly satisfied given that this Court has already determined that the assessments are invalid, and therefore no final judgment upholding such tax, penalty, and interest will need to be satisfied. Moreover, each of the Plaintiffs is a subsidiary of Fiserv, a member of the S&P 500 Index and the Fortune 100, with a market value of more than $66 billion, and financial statements publicly available at https://newsroom.fiserv.com/investor-relations/. In an abundance of caution, Plaintiffs are submitting to the Department in conjunction with this Response a request for waiver of section 72.011(3), in accordance with the provisions of Rule 12-3.007. A refusal of the Department's executive director, or his designee, to consider such waiver would be contrary to section 72.011(3), in accordance with the provisions of Rule 12-3.007. Additionally, any decision by the Department's executive director, or his designee, to deny such a waiver would be meritless given the language of section 72.011(3) and Rule 12-3.007 and the facts of this case. Accordingly, even if this Court was otherwise inclined to grant the Department's Motion to Dismiss, such decision should be stayed pending a determination by the Department's executive director, or his designee, as to the requested waiver, and appropriate review of any decision denying such a waiver.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Department's Motion to Dismiss be denied, in addition to such other and further relief as the Court deems just and proper. The Department's assertion that despite its conduct in this case, including express waivers by counsel, the admission in its answer years ago that this Court has jurisdiction over this proceeding, and active litigation of this case for almost three years, it can raise an alleged lack of jurisdiction only after it realized it would receive an adverse merits ruling, should not be countenanced. To the extent this Court is inclined to grant the Department's motion, Plaintiffs alternatively request that such dismissal be without prejudice and with leave to amend, and that any such decision be stayed pending a determination by the Department's executive director, or his designee, as to the requested waiver, and appropriate review of any decision denying such a waiver, including appropriate discovery if necessary.

Respectfully submitted this 6th day of March, 2023,

/s/ James A. McKee
James A. McKee
Fla. Bar. No. 638218
Primary Email: jmckee@foley.com
Secondary Email: bhurn@foley.com
Foley & Lardner LLP
106 E. College Avenue, Suite 900
Tallahassee, FL 32301
(850) 222-6100 (Telephone)
(850) 561-6475 (Fax)

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Florida Courts E-Filing Portal on March 6, 2023, which will serve the foregoing on the following:

J. Clifton Cox
Christopher Baisden
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 488-5865 (fax)
Clifton.Cox@myfloridalegal.com
Christopher.Baisden@myfloridalegal.com
Lorann.Jennings@myfloridalegal.com
Jon.Annette@myfloridalegal.com

Counsel for Defendant
State of Florida, Department of Revenue

/s/ James A. McKee

AFFIDAVIT OF JAMES A. MCKEE

STATE OF FLORIDA

COUNTY OF LEON

BEFORE ME, the undersigned authority, personally appeared James A. McKee, who, upon being duly sworn, deposes and says as follows:

1. My name is James A. McKee. I am over 18 years of age and am competent to testify as to all matters set forth in this Affidavit. All of the facts stated in this Affidavit are true, accurate, and based upon my personal knowledge.

2. I am a partner at the law firm of Foley & Lardner LLP, and have been with the firm for 16 years. I have been a member in good standing of the Florida Bar since 2003. Prior to my current position I worked in the Executive Office of the Governor, Florida Attorney General's Office, and the Florida Supreme Court.

3. I have personal knowledge of all matters set forth in this Affidavit by virtue of my representation of the Plaintiffs in this proceeding

4. This case relates to six tax assessments issued against the various Plaintiffs.

5. Following issuance of the tax assessments, I contacted then Department of Revenue Deputy General Counsel George C. Hamm, whom I have known and worked with for eighteen years, having first met Mr. Hamm when I served as counsel for the Florida Office of the Attorney General representing the Department in litigation. After leaving the Florida Office of the Attorney General I worked with Mr. Hamm on a number of cases over the years, both aligned with the Department and adverse to the Department. Mr. Hamm and I had a very good working relationship, and I have known Mr. Hamm to be a good and honorable man.

EXHIBIT A

6. I discussed with Mr. Hamm the subject of the tax assessments, (which solely related to the Department's interpretation of its service revenue apportionment methodology and was the source of much Department discussion), and the potential for reaching an amicable resolution of the tax assessments, as I had in past cases.

7. Following issuance of the tax assessments, and in the lead up to the deadline for filing a circuit court complaint challenging such assessments, the COVID pandemic and related uncertainty was reaching its height. The federal government declared a public health emergency due to COVID on January 31, 2020.

8. It became apparent that a resolution of the tax assessments could not be completed prior to the deadline for filing a circuit court complaint with respect to the tax assessments. Mr. Hamm and I further discussed the status of the tax assessments and Mr. Hamm advised me to file a circuit court complaint to bring the case into the general counsel's office where it could be resolved, as we had done in past cases. During that same conversation, Mr. Hamm and I specifically discussed the section 72.011(3) security requirements. Mr. Hamm advised me not to worry about the security requirements, and to just to get the complaint filed. The clear message was "we'll get it worked out," which was consistent with our long-term working relationship and past dealings.

9. But for the discussion I had with Mr. Hamm and my reliance on such representations, I would have advised the Plaintiffs of other options to ensure compliance with the requirements of section 72.011(3).

10. I filed a circuit court complaint on behalf of the Plaintiffs on March 3, 2020, just as the COVID pandemic and related uncertainty was reaching its height, and two days after Governor

DeSantis issued executive order number 20-51, declaring a public health emergency in Florida due to COVID-19, on March 1, 2020.

11. Plaintiffs' complaint challenged the entirety of the tax assessments issued to each of the Plaintiffs, as all such assessments involved a single issue of law pertaining to the Department's interpretation of Florida Administrative Code Rule 12C-1.10155(2)(l), and there were no uncontested portions of the assessment.

12. The Department filed its answer in this case on August 31, 2020, expressly admitting that this Court has jurisdiction in this case pursuant to sections 72.011 and 86.011, Florida Statutes. The Department's answer was, therefore, consistent with my past discussions and agreement with Mr. Hamm.

13. Following the filing of Plaintiffs' Complaint, the parties continued to work for quite some time toward a potential resolution of the tax assessments. The issue that remained unresolved, and delayed a potential resolution, was the Plaintiffs' need for clarification from the Department as to how they should interpret the apportionment rule prospectively, as the Department's various interpretations of the apportionment rule appeared to be directly contrary to the plain language of the rule. Based on my conversations with the Department's various counsel in this case it was apparent that they were aware that the Department's interpretation of the apportionment rule was not consistent with its plain language, and the Department's counsel were not able to provide guidance as to the Department's interpretation of the apportionment rule.

14. One of the Department's current counsel, Christopher Baisden, was subsequently substituted as counsel of record for Mark Urban, the Department's first counsel of record, on March 16, 2021. *See* March 16, 2021, Notice of Substitution of Counsel and Designation of E-mail Addresses.

15. Counsel for the parties mutually agreed to the setting of trial on August 30 and 31, 2022, and the Court set trial for those days. *See* March 23, 2022, Order Scheduling Non-Jury Trial. By order entered that same day, the Court directed the parties to conduct and complete non-binding arbitration no later than July 13, 2022, and to mutually select an arbitrator by April 22, 2022. *See* Order Referring Case to Non-binding Arbitration. As detailed in "Plaintiffs' Response to Order Referring Case to Non-binding Arbitration," the Department declined to mutually agree to the selection of an arbitrator. *See* April 22, 2022, Plaintiffs' Response to Order Referring Case to Non-binding Arbitration.

16. Several days later, the Department filed its initial and amended "Motion for Relief from Order Referring the Parties to Non-binding Arbitration." *See* April 28, 2022, Amended Motion for Relief from Order Referring the Parties to Non-binding Arbitration. The Department's motion repeatedly asserted its strong desire to obtain judicial precedent on the issues involved in this case, stating that "judicial efficiency could be best served by completing discovery and moving the case before the Court on cross motions for summary judgment," that "the parties require judicial guidance on the matters raised in the Complaint (sales factor apportionment)," that "the Department has several cases with similar legal claims, and is seeking guidance in administering the law, as opposed to a ruling issued in non-[binding] arbitration," and that "[d]ue to tax implications going forward for both the Department and Plaintiffs, the need for judicial precedent is significant and the chance of settlement are remote (as demonstrated by the party's inability to secure an agreement on a settlement)." *Id.* Finally, the Department stated in its motion:

> 7. Pursuant to Section 213.21, Florida Statutes, the Department has authority to compromise disputes relating to assessment of taxes, interest, and penalties and the denial of refunds. The Department declines to exercise that discretion in this case as it is now clear that because similar cases exist, and the Department needs a binding precedent.

> 8. *The Department in good faith requires a binding precedent in this case*, arbitration will not produce results, and the grounds identified by the Department are "other good cause [] shown" under Rule 1.700(b)(4), Florida Rules of Civil Procedure, from non-binding arbitration. This matter should be heard before the Court.

Department's Amended Motion for Relief from Order Referring the Parties to Non-binding Arbitration. (Emphasis added). Based on the representations made by the Department, Judge Layne Smith granted the Department's motion and dispensed with arbitration.

17. The Court subsequently rescheduled trial for November 28 and 29, 2022. *See* May 18, 2022, Amended Order Setting Non-jury Trial.

18. The Plaintiffs initiated and completed the limited discovery they needed. Plaintiffs' counsel and counsel for the Department worked cooperatively to complete such discovery, and move forward to the merits ruling the Department's counsel repeatedly indicated the Department was seeking.

19. Thereafter, the Department's counsel requested a one-month extension of time to complete the Department's discovery. As had been my course of practice throughout this case, I represented that Plaintiffs had no objection to the requested extension. However, the Department did not undertake any discovery.

20. The Department requested a continuance of the November 28 and 29, 2022, trial dates and the Plaintiffs did not oppose such continuance. *See* Department of Revenue's Motion to Continue Trial. The Court granted the continuance and rescheduled trial for March 29-30, 2023. *See* Order Granting Motion to Continue Trial.

21. I understand that Mr. Hamm, the Department's former Deputy General Counsel, retired from state service in late 2022.

22. In accordance with the timeline established in the Court's Amended Trial Order, Plaintiffs filed their Motion for Summary Judgment on January 5, 2023. *See* Plaintiffs' Motion for Summary Judgment. The Department did not move for summary judgment, and did not file a response to Plaintiffs' Motion for Summary Judgment.

23. On January 5, 2023, the Department filed written discovery requests, despite the fact that the discovery cut-off date had expired six months previously, on June 30, 2022. On February 3, 2023, the Department moved to compel depositions of certain plaintiff witnesses, again even though the discovery cut-off date expired on June 30, 2022.

24. Presumably because of my discussions and agreement with Mr. Hamm prior to the filing of Plaintiffs' Complaint, from the filing of the Plaintiffs' Complaint through February 16, 2023, no concerns regarding this Court's jurisdiction, or the security requirements of section 72.011(3), were raised by any of the Department's in-house, or outside counsel.

25. On February 15, 2023, J. Clifton Cox filed a notice of appearance as co-counsel on behalf of the Department. On February 17, 2023, Mr. Cox telephoned me to ask if the Plaintiffs had complied with the security provisions of section 72.011(3). I relayed to Mr. Cox the history of this case, the conversation I had with Mr. Hamm years ago prior to the filing of the Complaint, and the agreement we reached. I also relayed the Department's course of conduct in this case, including the repeated insistence by the Department and its counsel that a decision on the merits was needed. That same day I related the same facts to Chief Assistant Attorney General Timothy Dennis.

26. Almost a week later, on February 22, 2023, the eve of this Court's hearing on Plaintiffs' Motion for Summary Judgment, I was advised the Department intended to file a motion to dismiss for lack of jurisdiction despite such conversations. Although the Department did not

file a response to Plaintiffs' Motion for Summary Judgment, late in the afternoon on February 22, 2023, the Department filed its "Department's Motion for Compulsory Judicial Notice and Motion to Dismiss for Lack of Subject Matter Jurisdiction." The Motion asserted for the first time, almost three years after the initiation of this action, two and a half years after admitting in writing that this Court has jurisdiction in this case, after actively litigating this case for years, and only after the retirement of Mr. Hamm, that the Plaintiffs have not complied with the requirements of section 72.011(3)(b), Florida Statutes, and that this Court therefore lacks jurisdiction over this case.

27. On February 23, 2023, prior to the hearing on Plaintiffs' Motion for Summary Judgment, Plaintiffs filed their Motion for Alternative Security Arrangement in an abundance of caution given the Department's apparent change of position on the bond requirement in this case, and its apparent reversal of its previous representation and admission that this Court has jurisdiction in this case.

28. A hearing on Plaintiffs' Motion for Summary Judgment was held on February 23, 2023. On February 28, 2023, this Court entered its order granting Plaintiffs' Motion for Summary Judgment, determining that the tax assessments issued to the Plaintiffs are invalid and abated in full. The Order recognized that final judgment will be entered via a separate order, subject to this Court's ruling on Plaintiffs' Motion to Dismiss.

FURTHER AFFIANT SAYETH NOT.

JAMES A. MCKEE

The foregoing instrument was acknowledged before me by means of ☒ physical presence or ☐ online notarization, this 10th day of March by James A. McKee, who is personally known to me or who has produced _____ as identification.

Mariah D. Barfield

Notary Public

MARIAH D. BARFIELD
MY COMMISSION # HH 229117
EXPIRES: March 14, 2026

Print name: Mariah D. Barfield

My commission expires: March 14, 2026

Florida Department of Revenue
Office of General Counsel

Jim Zingale
Executive Director

5050 West Tennessee Street, Tallahassee, FL 32399

floridarevenue.com

December 17, 2021

Mr. Michael J. Bowen
Akerman LLP
50 N. Laura Street., Ste 3100
Jacksonville, FL 32202

Re: Target Enterprise, Inc.
FEI#: [redacted]
Bond Waiver Request
Audit# 200281875
Tax years ending 01/31/17, 01/31/18 and 01/31/19
Tax Type: Corporate Income Tax

Dear Mr. Bowen:

I am in receipt of your letter requesting a waiver of the provisions of s. 72.011(3)(b), F.S., on behalf of Target Enterprise, Inc. Ms. Isabel Nogues, an Assistant General Counsel with the Department, has reviewed the financial statements and executed guaranty of the parent company, Target Corporation, that were provided to our office. Based on that review and Isabel's recommendation, the Department is willing to waive the requirements of s. 72.011(3)(b), F.S., with respect to an action by Target Enterprise, Inc.

A copy of this letter should be attached to your complaint filed with the circuit court.

Should you have any questions, please give Isabel or me a call.

Sincerely,

Mark S. Hamilton
General Counsel

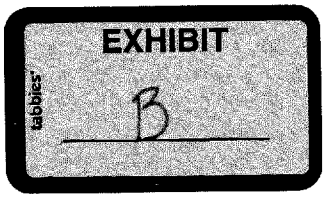

EXHIBIT B