McGLINCHEY STAFFORD
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Florida Real Property and Business Litigation Report

Volume XI, Issue 28
July 16, 2018
Manuel Farach

Soule v. U.S. Bank National Association, Case No. 2D16-3231 (Fla. 2d DCA 2018).

A successor service's introduction into evidence of a default letter written by a prior servicer does not constitute evidence that the letter was mailed.

Gibson v. Wells Fargo Bank, N.A., Case No. 2D16-5632 (Fla. 2d DCA 2018).

A tax refund resulting from a tax return filed by husband and wife is property rebuttably presumed to be owned as tenants by the entireties.

Griffith v. Quality Distribution, Inc., Case No. 2D17-3160 (Fla. 2d DCA 2018).

In a case of first impression for Florida courts, the Second District adopts the *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del. Ch. 2016), standard for analyzing disclosure settlements in class action litigation, and holds that supplemental disclosures "must address and correct a plainly material misrepresentation or omission and the subject matter of the proposed release must be narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process" in order for settlement to be approved.

Desulme v. Rueda, Case No. 3D17-1652 Fla. 3d DCA 2018).

A party must obtain permission from the court appointing the receiver before suing the receiver; the only exception is where the receiver has acted outside his or her authority.

Bluefield Ranch Mitigation Bank Trust v. South Florida Water Management District, Case No. 4D16-3023 (4th DCA 2018).

An economic injury combined with something more, e.g., a requirement that a competitor comply with a statute, is sufficient to confer standing the Florida Administrative Procedure Act.

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

July 13, 2018

STEVEN E. SOULE, Appellant, v. U.S. BANK NATIONAL ASSOCIATION, as trustee for BNC Mortgage Loan Trust 2007-1 Mortgage Pass-Through Certificates, Series 2007-1, Appellee.	)	Case No. 2D16-3231

BY ORDER OF THE COURT:

Appellant's motion for rehearing is granted, the prior opinion dated May 2, 2018, is withdrawn, and the attached opinion is issued in its place. Because full relief has been granted by the panel's ruling on the motion for rehearing, Appellant's motion for rehearing en banc is denied as moot. Appellee's motion to reconsider or strike the court's order granting appellant's appellate attorneys' fees is denied.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STEVEN E. SOULE, Appellant, v. U.S. BANK NATIONAL ASSOCIATION, as trustee for BNC Mortgage Loan Trust 2007-1 Mortgage Pass-Through Certificates, Series 2007-1, Appellee.	)	Case No. 2D16-3231

Opinion filed July 13, 2018.

Appeal from the Circuit Court for Pasco County; Kemba Lewis, Judge.

Mark P. Stopa of Stopa Law Firm, LLC, Tampa; and Latasha Scott of Lord Scott, PLLC, Tampa, for Appellant.

David S. Ehrlich of Blank Rome LLP, Fort Lauderdale, for Appellee.

VILLANTI, Judge.

Steven E. Soule appeals the final judgment of foreclosure entered in favor of U.S. Bank National Association, as trustee for BNC Mortgage Loan Trust 2007-1

Mortgage Pass-Through Certificates, Series 2007-1 (the Bank). While Soule raised a number of grounds for reversal of the final judgment, we reject all of his arguments except one relating to the sufficiency of the evidence to establish that the Bank complied with paragraph 22 of the mortgage by giving notice of the default to Soule. On this single basis, we reverse and remand for entry of an involuntary dismissal of the Bank's case.

In November 2013, the Bank filed its foreclosure complaint against Soule based on his alleged failure to make his March 2011 payment and all subsequent payments. In his answer, Soule denied that the Bank had complied with all conditions precedent to bringing the action and alleged as an affirmative defense the Bank's failure to comply with the notice provisions of paragraph 22 of the mortgage.

At trial, Ocwen employee Nena Kamman testified on behalf of the Bank. Ocwen was the servicer of Soule's loan at the time of trial, but Ocwen had taken over servicing of the loan from Chase, and Chase was the servicer that had prepared and allegedly mailed the default letter pursuant to paragraph 22 in May of 2011. Kamman testified that she had never worked for Chase.

During trial, Kamman testified that the default letter was part of the business records that Ocwen received from Chase. She also testified to the boarding process for new loans that Ocwen obtained. As part of that testimony, she asserted that Ocwen would not have boarded a loan if there were any "red flags" related to the loan. She testified that such a "red flag" might arise if "there was any indication that a breach letter hadn't been sent." But she did not testify to how anyone at Ocwen would know whether a default letter that was imaged into Chase's system had or had not been

mailed or what information might be in Chase's file to indicate that a default letter had not been mailed. She did testify that a default letter would not have been imaged into Chase's system if it had not been mailed, but she admitted that she had never been trained in any of Chase's procedures and she offered no testimony that would show that she had any personal knowledge of this alleged imaging procedure.

Both at trial and in this appeal, Soule argued that Kamman's testimony was insufficient to establish that the default letter prepared by Chase had actually been mailed. Soule admitted that Kamman's testimony was sufficient to permit the Bank to introduce the default letter into evidence; however, he argued that simply introducing the letter into evidence was insufficient to show that it was mailed. Relying on Eig v. Insurance Co. of North America, 447 So. 2d 377, 379 (Fla. 3d DCA 1984), Soule argued that the Bank had to introduce competent, substantial evidence of what Chase's routine business practices were in order to rely on those practices to prove conformity therewith. And because Kamman did not have personal knowledge of Chase's routine business practices concerning the mailing of default letters, her testimony could not provide competent, substantial evidence of those practices. Therefore, he argued, while the default letter itself was admissible, there was no evidence to prove that it was mailed and so the Bank's case should be dismissed. The trial court rejected this argument, as initially did we.

At the time of trial and when this case was originally heard at oral argument, there was no law from this district on the issue of what foundational testimony was required to prove that a default letter had been mailed by a prior servicer. However, we recently issued an opinion addressing this exact issue in Spencer v.

DiTech Financial, LLC, 43 Fla. L. Weekly D720 (Fla. 2d DCA Apr. 4, 2018). In that case, EverHome was the predecessor servicer to DiTech. Id. at D721. At the foreclosure trial, Ms. Knight, an employee of DiTech, testified that EverHome, as the prior servicer, had prepared and mailed the default letter to Spencer in 2010. Id. However, the testimony established that Ms. Knight had never worked for EverHome, had no personal knowledge of its practices or procedures for preparing and mailing default letters, had not read EverHome's policies and procedures for preparing and mailing default letters, and had never spoken to anyone at EverHome about how this particular letter had been generated or mailed. Id. Moreover, the evidence showed that the loan was transferred to DiTech in 2014—four years after the default letter had been created and allegedly mailed. Id. In finding Ms. Knight's testimony insufficient to prove that the default letter had been mailed, this court explained:

> This evidence was insufficient to show that the default letter was actually sent. "The fact that a document is drafted is insufficient in itself to establish that it was mailed." Allen v. Wilmington Tr., N.A., 216 So. 3d 685, 687-88 (Fla. 2d DCA 2017); see also Edmonds v. U.S. Bank Nat'l Ass'n, 215 So. 3d 628, 630 (Fla. 2d DCA 2017) (citing Allen with approval). Rather, "mailing must be proven by producing additional evidence such as proof of regular business practices, an affidavit swearing that the letter was mailed, or a return receipt." Allen, 216 So. 3d at 688.
>
> Testimony regarding a company's routine business practices may establish a rebuttable presumption that the default letter was mailed. Id. (citing § 90.406, Fla. Stat. (2014)). But the witness must have personal knowledge of the company's general mailing practice—meaning that the witness must be employed by the entity drafting the letters and must have firsthand knowledge of the company's routine practice for mailing letters. See id.; Edmonds, 215 So. 3d at 630; see also CitiMortgage, Inc. v. Hoskinson, 200 So. 3d 191, 192 (Fla. 5th DCA 2016) (holding that there was sufficient evidence to establish mailing based on routine

> business practices where witness testified that she had personally observed coworkers generate breach letters and deliver them to the mail room to be collected by the postal service). Here, Ms. Knight admitted that she was never employed by EverHome and did not have firsthand knowledge of EverHome's mailing practices as of the date the default letter was generated. Therefore, her testimony was insufficient to establish that the default letter was mailed.

Id. (emphasis added). And because Ms. Knight's testimony was insufficient to establish that the default letter was mailed, this court reversed the final judgment and remanded for entry of an involuntary dismissal. Id.

The facts of this case are essentially on all fours with Spencer. Like DiTech, Ocwen here was a successor servicer that had not prepared or mailed the default letter. And Kamman, like Ms. Knight, worked for the successor servicer and had no personal knowledge of the mailing practices of the predecessor servicer. Therefore, while Kamman's testimony was sufficient to lay the foundation to admit the letter as a business record, it was insufficient to prove that Chase had actually mailed the letter because Kamman had no personal knowledge of either that fact or Chase's policies and practices for mailing. Without testimony based on such personal knowledge, the Bank's only competent evidence was that the default letter had been prepared—not that it had been mailed. Therefore, for the same reasons we did in Spencer, we reverse the final judgment in this case and remand for entry of an involuntary dismissal.

Reversed and remanded for dismissal.

CASANUEVA and CRENSHAW, JJ., Concur.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES J. GIBSON and LORI G. GIBSON, Appellants, v. WELLS FARGO BANK, N.A., as successor by merger to Wachovia Bank, Appellee.	)	Case No. 2D16-5632

Opinion filed July 13, 2018.

Appeal from the Circuit Court for Hillsborough County; Robert A. Foster, Jr., Judge.

Jennifer E. Jones of McIntyre Thanasides Bringgold Elliott Grimaldi & Guito, P.A., Tampa; and Shyamie Dixit and Robert L. Vessel of the Dixit Law Firm, P.A., Tampa, for Appellant Lori Gibson.

Amy J. Winarksy of Marcadis Singer, P.A., Tampa, for Appellant James J. Gibson.

Ryan W. Owen of Adams and Reese, LLP, Sarasota, for Appellee.

LaROSE, Chief Judge.

Dr. Lori and James Gibson appeal the final summary judgment entered in favor of judgment creditor, Wells Fargo Bank, N.A, in proceedings supplementary. We

have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A). We must determine whether, under Florida law, a creditor may satisfy a debt incurred by one spouse by garnishing a federal tax refund issued in both spouses' names and deposited in their joint checking account. Florida law compels us to conclude that the joint tax refund is tenancy by the entirety (TBE) property not subject to garnishment. Thus, we reverse.

Background

In December 2009, Wachovia Bank sued Mr. Gibson for breach of a promissory note that he, alone, executed in March 2008. The parties stipulated to the entry of a final judgment in favor of Wachovia for over one million dollars.

Following entry of final judgment, the Gibsons filed amended joint federal tax returns for tax years 2003 through 2006, seeking retroactive reduction in their tax burden. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, at § 1211, 123 Stat. 115 (2009) (amending section 172(b)(1)(H) of the Internal Revenue Code to extend the carryback period to up to five years for 2008 net operating losses incurred by an eligible small business). Based upon these returns, the Internal Revenue Service issued two tax refund checks; one in June 2011 and the other in April 2014. Each check was payable to both Mr. Gibson and his wife, Dr. Gibson. The refund checks totaled over two million dollars. The Gibsons deposited both checks into their joint account at SunTrust Bank. The parties agree that the Gibsons held the SunTrust account as TBE property.

In October 2014, Wells Fargo Bank, as successor by merger to Wachovia, moved to garnish the SunTrust account. Wells Fargo sought proceedings supplementary under section 56.29, Florida Statutes (2014), and moved to implead Dr.

Gibson as a party. Wells Fargo alleged that it could execute on the federal tax refunds in the account to satisfy Mr. Gibson's outstanding judgment.

The trial court granted Wells Fargo's motions for proceedings supplementary and impleader. Thereafter, Wells Fargo moved for summary judgment. The Gibsons opposed the motion and filed their own summary judgment motion, arguing that they held the joint federal tax refunds as TBE. They also maintained that the refunds related to tax years prior to execution of the 2008 promissory note.

The trial court granted Wells Fargo's motion and denied the Gibsons' motion. The trial court found that the refunds "were attributable solely to [Mr. Gibson]'s economic activities." Further, the trial court was persuaded by Wells Fargo's argument that, because the IRS has the ability to apportion tax refunds to each individual spouse, issuance of the joint tax refund checks did not establish TBE property. The trial court entered a final summary judgment providing that Wells Fargo could recover from Dr. and Mr. Gibson "jointly and severally and as tenants by the entireties, the sum of $1,310,491.78" from the SunTrust Account.

Analysis

On appeal, the Gibsons argue that the joint tax refunds, issued in both of their names and deposited in their joint bank account, are TBE property. Therefore, Wells Fargo, a creditor to only Mr. Gibson, cannot reach those funds to satisfy his individual debt. Although they acknowledge that the IRS has statutory authority to attach TBE property in certain circumstances, the Gibsons contend that third-party creditors, such as Wells Fargo, lack such authority. The trial court, in their view, erred in ruling for Wells Fargo.

> A movant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Estate of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc., 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Fla. R. Civ. P. 1.510(c)). The parties agree that there are no material facts in dispute. Thus, we review the trial court's entry of summary judgment as a pure question of law. Our review is de novo. See Shaw v. Tampa Elec. Co., 949 So. 2d 1066, 1069 (Fla. 2d DCA 2007) ("The general 'standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo.' " (quoting Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001))).

Finding its origins in paternalistic ideas of property ownership, see First Nat'l Bank of Leesburg v. Hector Supply Co., 254 So. 2d 777, 779 (Fla. 1971) ("The historic basis for the [TBE] was the assumed incapacity of married women to hold property individually."), TBE's theoretical underpinnings suit a contemporary ethos. Indeed, "the distinctive feature of a tenancy by the entireties, that husband and wife hold property as an indivisible unit, renders this form of ownership equally well-suited to the concept of modern-day marriage as a partnership between equals." See Beal Bank, SSB v. Almand & Assocs., 780 So. 2d 45, 52 n.7 (Fla. 2001).

In Beal Bank, the Florida Supreme Court answered the following rephrased certified question in the affirmative:

> In an action by the creditor of one spouse seeking to garnish a joint bank account titled in the name of both spouses, if the unities required to establish ownership as a tenancy by the entireties exist, should a presumption arise that shifts the

> burden to the creditor to prove that the subject account was not held as a tenancy by the entireties?

Id. at 48. In so doing, the court eliminated any lingering distinctions between real property and personal property held jointly by wife and husband. See Cacciatore v. Fisherman's Wharf Realty Ltd. P'ship, 821 So. 2d 1251, 1253 (Fla. 4th DCA 2002) ("[Beal Bank] indicated that the time had come to eliminate that disparity and to accord to personal property in general (not just bank accounts) the same presumption of tenancy by the entireties when jointly owned by husband and wife as that accorded real property jointly owned by husband and wife."). And, the court adopted a presumption "shifting the burden to the creditor to prove by a preponderance of evidence that a tenancy by the entireties was not created." Beal Bank, 780 So. 2d at 58-59 (footnote omitted). Significantly, Beal Bank affirmed that "property held by husband and wife as tenants by the entireties belongs to neither spouse individually, but each spouse is seized of the whole." Id. at 53.

The court spoke broadly, finding strong policy considerations supporting a tenancy-by-the-entireties presumption when "a married couple jointly owns personal property." Id. at 57; see also In re Daniels, 309 B.R. 54, 59 (Bankr. M.D. Fla. 2004) ("[W]hile the court in Beal Bank explicitly addressed an issue involving only marital bank accounts, the court also discussed in detail ownership issues surrounding marital personal property in general and expressly concluded that strong policy reasons exist for extending the tenancy by the entireties presumption to jointly owned marital personal property, not just to financial accounts.").

Beal Bank noted that TBE property enjoys six unities:

> (1) unity of possession (joint ownership and control);
> (2) unity of interest (the interests in the account must be

> identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their joint names).

780 So. 2d at 52 (footnote omitted). The unity of marriage is the unique quality of TBE property. Id. ("Because of the sixth characteristic—unity of marriage—a tenancy by the entireties is a form of ownership unique to married couples."); In re Franzese, 383 B.R. 197, 201 (Bankr. M.D. Fla. 2008) ("Tenancy by the entireties, as defined by applicable Florida law, is a unique form of property ownership only married couples may enjoy.").

State law creates and defines property interests. Butner v. United States, 440 U.S. 48, 55 (1979). Federal tax law, on the other hand, "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." United States v. Nat'l Bank of Commerce, 472 U.S. 713, 722 (1985) (quoting United States v. Bess, 357 U.S. 51, 55 (1958)). Under Florida law, special protections assigned to TBE property which are not afforded to other forms of property ownership underscore the distinctiveness of TBE property. For example, and particularly relevant for us, "[f]unds owned by a husband and wife as tenants by the entireties are 'beyond the reach of a creditor of either one of the tenants. Such funds are immune from garnishment except where the debt was incurred by both spouses.' " Branch Banking & Tr. Co. v. Ark Dev./Oceanview, LLC, 150 So. 3d 817, 821 (Fla. 4th DCA 2014) (quoting Antuna v. Dawson, 459 So. 2d 1114, 1116-17 (Fla. 4th DCA 1984)).

> [I]f property is held as a joint tenancy with right of survivorship, a creditor of one of the joint tenants may attach the joint tenant's portion of the property to recover that joint tenant's individual debt. However, when property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf

> of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse.

Beal Bank, 780 So. 2d at 53 (emphasis added) (citation omitted); accord In re Benzaquen, 555 B.R. 63, 66 (Bankr. S.D. Fla. 2016) ("[P]roperty held as TBE can only be attached by joint creditors of both a husband and wife." (citing Beal Bank, 780 So. 2d at 45)).

The Gibsons filed their tax returns jointly as husband and wife. They argue that "once the check was issued, both Dr. Gibson and her husband [possessed the six unities of TBE property]." We agree. It is important, however, to focus on the antecedent act of filing joint returns. We assess, initially, whether TBE status can attach to the anticipated receipt of a tax refund.

The field of bankruptcy law provides the key. "While a debtor may not obtain a refund until the tax year closes, the predicates for receiving the refund may occur prior to filing the bankruptcy petition." In re Uttermohlen, 506 B.R. 142, 148 (Bankr. M.D. Fla. 2012) (citing In re Witko, 374 F.3d 1040, 1043 (11th Cir. 2004)). "Thus, a debtor possesses 'an existing interest [in the refund] at the time of filing even though his enjoyment of that interest was postponed.' " Id. (alteration in original) (quoting In re Witko, 374 F.3d at 1043). Naturally, therefore, by filing jointly, the Gibsons had an expectation of a refund that satisfied the requisite unities of TBE property. See id. ("The Court finds that the Uttermohlens had an interest in the prospective refund at the time of filing and the law presumes that they intended to possess that interest as TBE. They evinced that intent by filing a joint tax refund making them jointly and severally responsible for any tax liability, and received a refund check in both their names."). And once the checks were issued, because either party

could have deposited them, the unity of survivorship was satisfied. Cf. § 735.302(1)(a), Fla. Stat. (2014) (providing for the disposition of a federal income tax refund by a surviving spouse).

We are not persuaded by Wells Fargo's efforts to draw the line between the issuance of the refund checks, in the first instance, and their subsequent deposits in the Gibsons' joint account. This temporal legerdemain is insufficient to undermine our determination that the refunds were TBE property. When TBE property is established, its subsequent transfer to another asset does not terminate the unities of title or possession. See Passalino v. Protective Grp. Sec., Inc., 886 So. 2d 295, 297 (Fla. 4th DCA 2004) ("Transferring the proceeds of the sale of entireties property to a trustee for the benefit of the husband and wife does not terminate the unities of title or possession, where the parties clearly intended their property to be held as a tenancy by the entireties by exercising beneficial ownership of the property and controlling the property's disposition."). The Gibsons possessed an interest in their prospective refunds as TBE property at the time they filed their amended joint returns. That interest continued intact following issuance of the checks and their deposits into their joint back account.[1]

Wells Fargo argued to the trial court that the tax code's treatment of refunds, and the IRS's statutory authority to impose tax liens, control any determination of whether the tax refunds are TBE property. See 26 U.S.C.§§ 6321 ("If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount

[1]As underscored by Florida law, "[a]ny deposit or account made in the name of two persons who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified in writing." § 655.79(1), Fla. Stat. (2014). Our record is devoid of a writing specifying otherwise.

(including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."), 6402(a) (2012) ("In the case of any overpayment, the Secretary . . . may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall . . . refund any balance to such person."). Wells Fargo claimed that because the IRS may apportion tax refunds to each spouse, the joint tax refund checks issued to the Gibsons were not TBE property.

The argument is unavailing. Whatever rules apply to the IRS do not necessarily apply to a creditor such as Wells Fargo. "[W]e are, of course, not bound by the [Middle District]'s decisions on questions of Florida law." Liberty Am. Ins. Co. v. Kennedy, 890 So. 2d 539, 541 (Fla. 2d DCA 2005) (citing Int'l Ass'n of Bridgeworkers v. Blount Int'l, Ltd., 519 So. 2d 1009, 1012 (Fla. 2d DCA 1987), for the "holding that state courts, in construing and interpreting state law, are not bound by the decisions of federal courts"). However, we find Judge Covington's cogent analysis in Uttermohlen, which presents a similar factual scenario as that presented in our case, compelling.

Uttermohlen filed for bankruptcy protection. Uttermohlen, 506 B.R. at 144. He later amended his petition to claim a tax refund of over $10,000, issued to him and his wife jointly, as exempt property. Id. The bankruptcy trustee unsuccessfully objected to the exemption. Id. The district court affirmed the bankruptcy court's order on appeal. Id.; see also 28 U.S.C. § 158(a)(1) (2006) (conferring appellate jurisdiction upon district courts of a bankruptcy court's "final judgments, orders, and decrees").

Judge Covington began her analysis by noting that, under Beal Bank, policy considerations favored the presumption that personal property owned jointly by a married couple is TBE property. Uttermohlen, 506 B.R. at 146. She then discussed In re Sinnreich, 391 F.3d 1295 (11th Cir. 2004), and United States v. Craft, 535 U.S. 274 (2002), in a manner that undermines Wells Fargo's position:

> [In Sinnreich], a creditor sought to reach assets owned by the debtor and his non-filing spouse as TBE, applying the rationale of United States v. Craft, 535 U.S. 274, 122 S. Ct. 1414, 152 L.Ed.2d 437 (2002). In Craft, the Supreme Court held that because each spouse had certain individual rights in TBE property that fell within the meaning of property defined by the Internal Revenue Code, the IRS may attach a lien to TBE property. Id. at 282. In Sinnreich, the Eleventh Circuit declined to extend the holding in Craft to other creditors, finding that the IRS had 'unique powers' to attach a lien to TBE property. 391 F.3d at 1297. Otherwise, the TBE protection afforded by the Bankruptcy Code would be rendered superfluous. Id. at 1298.

Uttermohlen, 506 B.R. at 147; see also Sinnreich, 391 F.3d at 1298 ("Simply stated, the Craft Court announced the rule that the IRS's federal statutory powers to tax and attach liens to property trumped any state property rights afforded to a taxpayer who holds property by the entireties with her spouse. The Craft Court gave no indication that its holding could be extended beyond a tax collection context . . . . "). Judge Covington then observed that other courts, too, had found that federal law "create[d] a narrow exception allowing *only* the IRS to defeat the unity of interest that is presumed to exist under Beal Bank." Uttermohlen, 506 B.R. at 147 (quoting In re Newcomb, 483 B.R. 554, 558 (Bankr. M.D. Fla. 2012) (unpublished memorandum opinion)). Other creditors enjoy no such special status.

Some Florida bankruptcy court decisions are not in accord with Uttermohlen. See, e.g., In re Morine, 391 B.R. 480, 482 (Bankr. M.D. Fla. 2008)

("Because the refund is attributable solely to the Debtor's income and not to his non-debtor spouse, the interest in the refund check only belongs to the Debtor."); In re Kant, 21 Fla. L. Weekly Fed. B59 (Bankr. M.D. Fla. Apr. 12, 2006) ("[A] husband and wife may not have the unity of interest in a tax refund that is necessary for a tenancy by the entireties."); accord In re Ascuntar, 487 B.R. 319, 322-23 (Bankr. S.D. Fla. 2013) (reasoning that the debtor could not establish TBE ownership of the refund because there was no unity of interest and concluding that, unless the tax refund is received prepetition and deposited into a TBE account, the expected future income existing on the filing of the individual's bankruptcy petition is not owned as TBE with his or her spouse); In re Rice, 442 B.R. 140, 143-44 (Bankr. M.D. Fla. 2010). Contra In re Smith, 26 Fla. L. Weekly Fed. B111 (Bankr. M.D. Fla. Feb. 18, 2016) (finding Ascuntar's "holding inconsistent with the fact that there is a presumption in favor of ownership of a joint tax refund as TBE when owned by a married couple, as well as, the decision . . . in In re Sinnreich, 391 F.3d 1295 (11th Cir. 2004)" and "[i]nstead, . . . adopt[ing] the reasoning and holding . . . of In re Newcomb, 483 B.R. 554, 558 (Bankr. M.D. Fla. 2012) . . . find[ing] the refund is presumably held as TBE by the Debtors and the Trustee has failed to rebut this presumption").

As explained in Newcomb, however, the reasoning behind Morine and Kant and their progeny is questionable:

> If creditors other than the IRS were permitted to rely on the IRS's authority to allocate a portion of a joint tax refund to individual spouses as the basis for rebutting the tenancy by the entirety presumption, then a debtor could never establish a tenancy by the entirety in a joint tax refund. Whether a debtor contributed all (as in Kant and Morine), none, or a portion of the overpayment, the joint tax refund would always be subject to attack by any creditor of just one of the spouses, with the allocation based on 26 U.S.C. §

> 6402(a). Such a result runs contrary to the limitations imposed by Sinnreich and to the presumption of entirety property afforded by Beal Bank.

Newcomb, 483 B.R. at 558.

We agree. Under Florida law, the Gibsons were entitled to a rebuttable presumption that the tax refunds were TBE property. See Beal Bank, 780 So. 2d at 57 (recognizing that "strong[] policy considerations favor allowing [a] presumption in favor of a tenancy by the entireties when a married couple jointly owns personal property"). They demonstrated their intent to receive the refunds as TBE property by filing amended joint tax returns and receiving joint refund checks. Whether the refunds were related to Mr. Gibson's economic activity, alone, is irrelevant. See Newcomb, 483 B.R. at 558. They then deposited the checks into their joint bank account. In our view, their actions created the rebuttable presumption. See § 655.79(1), Fla. Stat. (2014); see also Beal Bank, 780 So. 2d at 58 ("[W]e hold that as between the debtor and a third-party creditor (other than the financial institution into which the deposits have been made), if the signature card of the account does not expressly disclaim the tenancy by the entireties form of ownership, a presumption arises that a bank account titled in the names of both spouses is held as a tenancy by the entireties as long as the account is established by husband and wife in accordance with the unities of possession, interest, title, and time and with right of survivorship."). Wells Fargo failed to rebut the presumption.

Wells Fargo urges us to hew to the decision in Hundley v. Marsh, 944 N.E.2d 127 (Mass. 2011). Wells Fargo's reliance on that case is misplaced. In Hundley, the United States Court of Appeals for the First Circuit certified to the Supreme Judicial Court of Massachusetts the question of how an income tax refund was to be

apportioned between a debtor in bankruptcy and his nondebtor wife with whom he had filed a joint tax return. Id. at 129. "Hundley dealt with the appropriate formula under state law for allocating the ownership of an income tax refund between spouses when the applicable state statute was silent on the issue." In re Provencal, 09-42728-MSH, 2011 WL 2470614, at *1 (Bankr. D. Mass. June 21, 2011).

Beal Bank is not silent, as was the status of Massachusetts law in Hundley. Thus, Wells Fargo's reliance upon Hundley underscores the trial court's error. Despite the TBE presumption established in Beal Bank, the trial court mistakenly allowed Wells Fargo, a creditor to only Mr. Gibson, to seek execution on TBE assets by claiming an authority reserved exclusively to the IRS. See Sinnreich, 391 F.3d at 1298. Hundley's analysis began with the observation that "[a]s a matter of Federal law, the right to a refund resulting from loss-carryback of prepetition losses constitutes property of the estate. Accordingly, any interest that the husband in this case may have in the joint refund is properly in the trustee's possession." 944 N.E.2d at 130 (citations omitted). Wells Fargo is not the IRS and lacks the IRS's special authority under the Internal Revenue Code. To allow otherwise would be to countenance the evisceration of the protections afforded TBE property discussed in Uttermohlen. Thus, Hundley is inapposite.

Conclusion

We reverse the trial court's entry of summary judgment in favor of Wells Fargo and remand for further proceedings consistent with this opinion.

Reversed and remanded.

SILBERMAN and SALARIO, JJ., Concur.

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SEAN J. GRIFFITH, Appellant, v. QUALITY DISTRIBUTION, INC.; GARY R. ENZOR; THOMAS R. MIKLICH; RICHARD B. MARCHESE; ALAN H. SCHUMACHER; ANNETTE M. SANDBERG; APAX PARTNERS LLP; APAX VII-A L.P.; APAX VII-B L.P.; APAX VIII-I L.P.; APAX VIII-2 L.P.; GRUDEN ACQUISITION, INC.; GRUDEN MERGER SUB, INC.; and RICHARD DELMAN, on behalf of himself and all others similarly situated, Appellees.	)	Case No. 2D17-3160

Opinion filed July 13, 2018.

Appeal from the Circuit Court for Hillsborough County; Steven Scott Stephens, Judge.

Adam M. Schachter and Christian G. Montelione of Gelber Schachter & Greenberg, P.A., Miami; and Anthony A. Rickey of Margrave Law LLC, Georgetown, Delaware, for Appellant.

Ernest J. Marquart of Schumaker, Loop & Kendrick, LLP, Tampa; and Peter L. Simmons of Fried, Frank, Harris, Shriver &

Jacobson, LLP, New York, New York,
for Appellees Qualify Distribution, Inc.;
Gary R. Enzor; Thomas R. Miklich;
Richard B. Marchese; Alan H. Schumacher;
and Annette M. Sandberg.

Bryan D. Hull and J. Carter Anderson of
Bush Ross, P.A., Tampa; and Edward P.
Welch and Jenness E. Parker of Skadden,
Arps, Slate, Meagher & Flom LLP, Wilmington,
Delaware, for Appellees Apax Partners LLP;
Apax VIII-A L.P.; Apax VIII-B L.P.; Apax
VIII-I L.P.; Apax VIII-2 L.P.; Gruden
Acquisition, Inc.; and Gruden Merger Sub,
Inc.

John F. Keating, Jr., of The Brualdi Law
Firm, P.C., New York, New York; and
Kenneth J. Vianale and Julie Prag Vianale
of Vianale & Vianale LLP, Boca Raton,
for Appellee Richard Delman.

MORRIS, Judge.

Sean J. Griffith appeals an order certifying a class and approving a class action settlement in a case brought by shareholders of Quality Distribution, Inc. (Quality), against the corporation for breach of fiduciary duty and failure to disclose relevant information relating to a proposed acquisition by Apax Partners, LLC (Apax). We have jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(1)(A) and 9.130(a)(3)(C)(vi). We affirm the trial court's certification of the class without further comment; however, we reverse the trial court's approval of the class action settlement and the denial of Griffith's request for fees.

I. Background

On May 6, 2015, Quality, a Florida corporation, announced that it had entered into a merger agreement whereby Apax would acquire Quality for $16 per share

of its publicly-traded stock. This price "represent[ed] an approximate premium of . . . 62% to the $9.85 closing price per share" on May 5, 2015, the day before the merger was announced. The transaction was valued at $800 million, including the assumption of Quality's debt by Apax. On June 8, 2015, Quality filed a preliminary proxy statement with the Securities and Exchange Commission (SEC).

On June 17, 2015, Richard Delman, a shareholder of Quality, filed a class action complaint against Quality, its board members, and Apax. Delman alleged a count against the board members for breach of fiduciary duties, a count against Quality and the board members for failure to disclose, and a count against Apax for aiding and abetting in the breaches of fiduciary duties. Delman alleged that Quality and its board members engaged in a flawed sale process and agreed to an inadequate sale price. Delman also alleged that Quality and its board members failed to include in the proxy statement information that is material to the shareholders' decisions on whether to approve the merger.

On July 24, 2015, Delman filed a motion for preliminary injunction. Also in July, Quality filed a definitive proxy statement with the SEC and the parties began to engage in expedited discovery. Quality and Apax agreed to produce additional documents, and Delman conducted two depositions, one of Quality's chief executive officer and one of an executive from Quality's investment banker, RBC Capital Markets, LLC (RBC). The parties engaged in settlement negotiations, and Delman notified the court that there was no need to hold a hearing on his motion for preliminary injunction in light of the settlement negotiations. By August 2015 the parties had reached a settlement agreement. The agreement required Quality to serve its shareholders with

supplemental disclosures containing information regarding the following: (1) potential conflicts of interest of Quality's senior management and Apax's expressed intention to retain Quality's management team as employees; (2) the potential conflicts of interest of Quality's investment banker, RBC, and its connection with Apax; and (3) the sale process and alternatives to the merger. On August 10, 2015, Quality filed the supplemental disclosures with the SEC.

On August 18, 2015, 98.8% of the shareholders voted to approve the merger with Apax.

On October 28, 2016, the parties entered into a formal stipulation of settlement. On December 16, 2016, the parties filed a joint motion for entry of an order granting joint motion for all parties for notice and hearing for settlement. The trial court entered the requested order on January 20, 2017. The order directed Quality to serve its shareholders with notice of the settlement, and it conditionally certified the shareholders as a class of plaintiffs. The order also designated Delman as the class representative, preliminarily approved the settlement, and set a hearing for April 24, 2017.

On April 3, 2017, Griffith filed an objection to the proposed settlement. He had purchased $160 worth of Quality's shares after the merger was formally announced. Griffith described himself as "an activist investor who has served as a watchdog in the movement to curtail abusive [merger and acquisition] litigation."[1] He

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[1]Griffith is a professor of law at Fordham University School of Law. He has coauthored various law review articles on the subject of disclosure settlements that arise in the context of litigation involving corporate mergers. See, e.g., Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform, 93 Tex. L. Rev. 557

objected to the proposed settlement and class certification on four main grounds: (1) the supplemental disclosures were not plainly material to the shareholder's decision on whether to approve the merger, (2) the released claims had not been adequately investigated by plaintiffs' counsel, (3) questions remain regarding the adequacy of class counsel, and (4) plaintiffs' fee request should be rejected because the litigation did not provide a substantial benefit to the shareholders. Griffith argued that Florida should adopt the test for approval of "disclosure settlements" set forth in In re Trulia, Inc. Stockholder Litigation, 129 A.3d 884 (Del. Ch. 2016). Last, Griffith asked the trial court to retain jurisdiction so that he could submit a request for fees he incurred in objecting to the settlement.

Delman filed memorandums of law in support of the proposed settlement and in response to Griffith's objection. He also filed an affidavit from a financial analyst, in which the analyst attested that the supplemental disclosures were material. Quality and Apax filed a joint memorandum in support of the settlement and in opposition to Griffith's objection.

On April 24, 2017, the trial court held a hearing at which the trial court considered argument from all parties and Griffith. On June 21, 2017, the trial court entered an order partially approving the class action settlement. The trial court concluded that the settlement in this case "survives the heightened scrutiny standard," citing Grosso v. Fidelity National Title Insurance Co., 983 So. 2d 1165, 1170 (Fla. 3d DCA 2008). The court also found that the four requirements for class certification are

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(Feb. 2015); Sean J. Griffith & Alexandra D. Lahav, The Market for Preclusion in Merger Litigation, 66 Vand. L. Rev. 1053 (May 2013). Griffith filed an amicus curiae brief in the Delaware case he urges Florida to adopt. See In re Trulia, Inc. Stockholder Litigation, 129 A.3d 884 (Del. Ch. 2016).

present. The court then went on to address Griffith's objection and his argument that In re Trulia should apply. The court ruled that In re Trulia "is good law in Florida, at least for the proposition that a class action settlement should not be approved when the scope of the claims released exceeds the scope of the issues litigated in the case." The trial court concluded that the release in this case is "narrowly tailored to match the scope of the issues litigated in the case." Turning to whether the supplemental disclosures were material, the trial court stated that even if they were immaterial, the settlement "is the better choice among the alternatives."

> [T]he Florida courts have such a strong policy favoring resolution of cases by jury trial that an action of this nature would almost certainly not be resolvable on summary judgment. Plaintiffs have filed an affidavit from an apparently qualified expert that would be sufficient to create an issue of fact regarding the materiality of the disclosure. Accordingly, the consequence of simply refusing to approve the settlement would most likely be to require the case to proceed to jury trial over the course of a year or two. Given the finding above that the release is properly matched to the scope of the issues litigated, the class is not damaged by the settlement even if it was all a charade, if it can be protected from excessive transaction costs. And since there is no mention of the settlement of separate payment to the class representative, transaction cos[t] issues are limited to attorney fee issues.

(Footnote omitted.) The trial court further ruled that because the settlement does not include plaintiffs' attorney's fees, the issue of fees would be determined in a true adversarial process. The trial court approved the settlement, essentially reserving jurisdiction on the issue of attorney's fees. The trial court denied Griffith's objection and his request for fees. Griffith now appeals.[2]

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[2]On June 28, 2017, Griffith filed a motion to intervene below, but the trial court did not rule on the motion. As a member of the class who objected below, Griffith

II. Analysis

On appeal, Griffith argues (1) that the trial court erred in approving the settlement without applying the standard set forth in In re Trulia, (2) that the trial court erred in certifying the class without considering whether class counsel provided the class with adequate representation, and (3) that the trial court erred in denying his request for fees. We find merit in his first argument.

"Where the parties, as here, seek certification of the class and approval of their settlement simultaneously, the trial court is required to apply heightened scrutiny and to take a more active role as a guardian of the interests of the absent class members." Grosso, 983 So. 2d at 1170 (emphasis omitted). "To approve a class action settlement, the trial court must find that the agreement was fair, reasonable, and adequate." Id. at 1173 (first citing Fed. R. Civ. P. 23(e)(1)(C); and then citing Ramos v. Philip Morris Cos., 743 So. 2d 24, 31 (Fla. 3d DCA 1999)). Some of the factors relevant to that determination include:

> (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risk of establishing liability; (5) the risk of establishing damages; (6) the risk of maintaining a class action; (7) the ability of the defendant to withstand a greater judgment; (8) the reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

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has standing to appeal the approval of a class settlement. See Addison v. City of Tampa, 33 So. 3d 742, 745 (Fla. 2d DCA 2010) ("[T]he United States Supreme Court has stated that unnamed class members are '*parties* to the proceedings in the sense of being bound by the settlement' and, therefore, are entitled to appeal the approval of a class settlement." (quoting Devlin v. Scardelletti, 536 U.S. 1, 10 (2002))).

Id. at 1173-74 (citing In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995)).[3]

An appellate court generally reviews a ruling approving a class settlement for abuse of discretion. Barnhill v. Fla. Microsoft Anti-Trust Litig., 905 So. 2d 195, 199 (Fla. 3d DCA 2005). But where the trial court applies the wrong law or the issue involves a pure question of law, the ruling is reviewed de novo. See Van v. Schmidt, 122 So. 3d 243, 246 (Fla. 2013); G4S Secure Sols. USA, Inc. v. Golzar, 208 So. 3d 204, 207-08 (Fla. 3d DCA 2016).

Griffith contends that the trial court erred in failing to either apply the full Grosso test or in failing to adopt the full In re Trulia standard, which he argues is consistent with the Grosso test. He claims that the trial court improperly used a single-factor test in ruling that a settlement may be approved as long as the proposed release is commensurate with the claims raised in the case.

In In re Trulia, the Delaware Court of Chancery discussed the proliferation of "disclosure settlements" and the problems associated with a request to approve such a settlement. 129 A.3d at 887, 891-99.[4] The court was asked to approve a proposed

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[3]Courts have also used the following six factors:

> 1) the likelihood of success at trial; 2) the range of possible recovery; 3) the point over or below the range of possible recovery at which a settlement is fair, adequate, and reasonable; 4) the complexity, expense, and duration of the litigation; 5) the substance and amount of opposition to the settlement; and 6) the stage of the proceedings at which the settlement was achieved.

Nelson v. Wakulla County, 985 So. 2d 564, 570 (Fla. 1st DCA 2008).

[4]One scholar refers to such suits as "merger objection suits" or "strike suits—meritless claims filed for their nuisance value—by entrepreneurial plaintiffs'

settlement of a class action brought by shareholders of Trulia, Inc., for breach of fiduciary duty relating to a proposed merger with Zillow, Inc. 129 A.3d at 887-88. The parties engaged in limited discovery, and within four months after the complaint was filed, the shareholders entered into an agreement to settle. Id. at 887.

> In essence, Trulia agreed to supplement the proxy materials disseminated to its stockholders before they voted on the proposed transaction to include some additional information that theoretically would allow the stockholders to be better informed in exercising their franchise rights. In exchange, plaintiffs dropped their motion to preliminarily enjoin the transaction and agreed to provide a release of claims on behalf of a proposed class of Trulia's stockholders. If approved, the settlement will not provide Trulia stockholders with any economic benefits. The only money that would change hands is the payment of a fee to plaintiffs' counsel.

Id. at 887. The agreement provided that plaintiffs' counsel could seek an award of attorney's fees and expenses up to $375,000. Id. at 889-90.

The Court of Chancery explained that "disclosure settlements" are becoming increasingly more common:

> Today, the public announcement of virtually every transaction involving the acquisition of a public corporation provokes a flurry of class action lawsuits alleging that the target's directors breached their fiduciary duties by agreeing

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attorneys." Browning Jeffries, The Plaintiff's Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals, 11 Berkeley Bus. L.J. 55, 56 (Sept. 2014).

> [I]n this new rash of suits, frequently entrepreneurial plaintiffs' attorneys are filing boilerplate complaints for the sole purpose of capitalizing on their ability to hold up the transaction and perhaps force a quick settlement. Because the litigation threatens the consummation of the deal if not resolved quickly and because corporations may view the settlement amount as a drop in the bucket compared to the overall transaction amount, defendants are motivated to settle even meritless claims.

Id. at 57-58 (footnotes omitted). Through the assessment of attorneys' fees, these suits impose "what amounts to a transaction tax" on corporate merger deals. Id. at 108.

> to sell the corporation for an unfair price. On occasion, although it is relatively infrequent, such litigation has generated meaningful economic benefits for stockholders when, for example, the integrity of a sales process has been corrupted by conflicts of interest on the part of corporate fiduciaries or their advisors. But far too often such litigation serves no useful purpose for stockholders. Instead, it serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent.
>
> . . . .
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> In just the past decade, the percentage of transactions of $100 million or more that have triggered stockholder litigation in this country has more than doubled, from 39.3% in 2005 to a peak of 94.9% in 2014. Only recently has the percentage decreased, falling to 87.7% in 2015 due to a decline near the end of the year. In Delaware, the percentage of such cases settled solely on the basis of supplemental disclosures grew significantly from 45.4% in 2005 to a high of 76.0% in 2012, and only recently has seen some decline. The increased prevalence of deal litigation and disclosure settlements has drawn the attention of academics, practitioners, and the judiciary.

Id. at 891-92, 894-95 (footnotes omitted). The court explained how such settlements are achieved in these class action lawsuits:

> In such lawsuits, plaintiffs' leverage is the threat of an injunction to prevent a transaction from closing. Faced with that threat, defendants are incentivized to settle quickly in order to mitigate the considerable expense of litigation and the distraction it entails, to achieve closing certainty, and to obtain broad releases as a form of "deal insurance." . . . .
>
> Once the litigation is on an expedited track and the prospect of an injunction hearing looms, the most common currency used to procure a settlement is the issuance of supplemental disclosures to the target's stockholders before they are asked to vote on the proposed transaction. The theory behind making these disclosures is that, by having

> the additional information, stockholders will be better informed when exercising their franchise rights. Given the Court's historical practice of approving disclosure settlements when the additional information is not material, and indeed may be of only minor value to the stockholders, providing supplemental disclosures is a particularly easy "give" for defendants to make in exchange for a release.

Id. at 892-93 (footnotes omitted). The court further explained that "[o]nce an agreement-in-principle is struck to settle for supplemental disclosures, the litigation takes on an entirely different, non-adversarial character," which the court described as problematic. Id. at 893.

> The lack of an adversarial process often requires that the Court become essentially a forensic examiner of proxy materials so that it can play devil's advocate in probing the value of the "get" for stockholders in a proposed disclosure settlement. . . . In an adversarial process, defendants, armed with the help of their financial advisors, would be quick to contextualize the omissions [in the original disclosures] and point out why the missing details are immaterial (and may even be unhelpful) given [information] already disclosed in the proxy. In the settlement context, however, it falls to law-trained judges to attempt to perform this function, however crudely, as best they can.

Id. at 894. The court opined that these dynamics and the court's willingness to approve such settlements "have caused deal litigation to explode in the United States beyond the realm of reason." Id.

The court concluded that in light of the concerns expressed above, disclosure settlements should be met with disfavor "unless the supplemental disclosures address a plainly material misrepresentation or omission[] and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently." Id. at 898. The supplemental

information will be considered plainly material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" or, in other words, if "from the perspective of a reasonable stockholder, there is a substantial likelihood that it 'significantly alter[s] the "total mix" of information made available.' " Id. at 899 (alteration in original) (first quoting Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985); and then quoting Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270, 1277 (Del. 1994)).

The court analyzed the supplemental disclosures in that case and found them to be immaterial. The court therefore declined to approve the proposed class settlement, concluding that the terms were not "fair or reasonable to the affected class members." Id. at 887, 907. In other words, "from the perspective of Trulia's stockholders, the 'get' in the form of the [s]upplemental [d]isclosures does not provide adequate consideration to warrant the 'give' of providing a release of claims." Id. at 907.

The Seventh Circuit applied the In re Trulia decision in rejecting a proposed class settlement in what the court termed a "strike suit" or "deal litigation." Hays v. Walgreen Co., 832 F.3d 718, 721 (7th Cir. 2016). The court noted that

> [o]ften the suit asks primarily or even exclusively for disclosure of details of the proposed transaction that could, in principle at least, affect shareholder approval of the transaction. But almost all such suits are designed to end—and very quickly too—in a settlement in which class counsel receive fees and the shareholders receive additional disclosures concerning the proposed transaction. The disclosures may be largely or even entirely worthless to the shareholders, in which event even a modest award of attorneys' fees ($370,000 in this case) is excessive and the settlement should therefore be disapproved by the district judge.

Id. Recognizing that "Delaware's Court of Chancery sees many more cases involving large transactions by public companies than the federal courts of [the Seventh Circuit]," the court adopted the standard set forth in In re Trulia. Id. at 725. The court emphasized that "the misrepresentation or omission that the supplemental disclosures correct must be 'plainly material.' " Id. (quoting In re Trulia, 129 A.3d at 898-99). "If immaterial their correction does nothing for the shareholders. And we add that it's not enough that the disclosures address the misrepresentation or omissions: they must correct them." Id. Because the supplemental disclosures in that case did not correct a plainly material misrepresentation or omission in the original disclosure, the circuit court reversed the district court's ruling approving the settlement. Id. at 725-76.

As noted by the trial court in its order in this case, the extent to which the In re Trulia decision applies in Florida is a question of first impression in the appellate courts.[5] In deciding whether to apply the In re Trulia standard to the instant case, we

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[5]We note that one Florida trial court has considered a disclosure settlement and reached a similar conclusion as the court did in In re Trulia. Fruchter v. Fla. Progress Corp., No. 99-6167CI-20, 2002 WL 1558220 (Fla. 6th Cir. Ct. Mar. 20, 2002). The trial court declined to certify the class, approve a stipulated settlement, and award fees to plaintiff's counsel. In declining to approve the settlement, the trial court stated the following:

> [T]he [s]tipulation of [s]ettlement contains no compensation or relief for the class members. Indeed, all of the evidence suggests that class members are in precisely the same financial and legal position today, as they would have been had this litigation never been filed. In spite of the fact that it is devoid of benefits for the class members, [c]lass [c]ounsel has urged this court to approve the settlement, grant the [d]efendants their res judicata and presumably grant him several hundred thousand dollars in attorney's fees. This action appears to be the class litigation equivalent of the "Squeegee boys" who used to frequent major urban intersections and who would run up to a stopped car, splash

recognize the complexity of merger litigation and the Delaware courts' expertise in such matters. See In re Trulia, 129 A.3d at 899 (explaining that the Delaware Court of Chancery has "extensive experience in adjudicating cases of this nature"). In the past, "[t]he Florida courts have relied upon Delaware corporate law to establish their own corporate doctrines." Connolly v. Agostino's Ristorante, Inc., 775 So. 2d 387, 388 n.1 (Fla. 2d DCA 2000) (quoting Int'l Ins. Co. v. Johns, 874 F.2d 1447, 1459 n.22 (11th Cir. 1989)).[6] In light of the above considerations and the lack of specific guidance in Florida regarding disclosure settlements, we adopt the standard set forth in the well-reasoned In re Trulia decision and clarified in the Hays decision. We conclude that when a Florida trial court is asked to approve a disclosure settlement in a class action merger lawsuit, in order for a disclosure settlement to pass muster, the supplemental disclosures must address and correct a plainly material misrepresentation or omission and the subject matter of the proposed release must be narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently.[7]

> soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off.

Id. at *10.

[6]And regarding the Hays decision, we note that "Florida courts often look to federal cases for guidance as persuasive authority on issues regarding class actions." Barnhill, 905 So. 2d at 198.

[7]The In re Trulia/Hays standard specific to disclosure settlements is not inconsistent with the more general Grosso standard. But because the In re Trulia/Hays standard is more tailored to disclosure settlements, it should be applied in such cases.

Although the trial court acknowledged In re Trulia, the trial court applied only part of the standard; the trial court focused only on the release of claims. The trial court failed to assess the value of the supplemental disclosures.[8] The danger in focusing solely on the release is that a meritless action may be settled as long as the release is related to the claims. This test permits plaintiffs in deal litigation to prevail on any settlement and seek attorneys' fees as a result, no matter how meager the consideration, as long as the plaintiffs tailor the release to the claims raised in the litigation. This methodology contributes to the spawning of this type of litigation. Further, the trial court did not consider whether the released claims, which should be narrowly tailored to the complaint, had been investigated sufficiently, as evidenced by its lack of findings on this issue.

The trial court did not consider the supplemental disclosures that Quality provided to shareholders in August 2015. In order for the settlement to be approved, those supplemental disclosures must have contained information that corrected a misrepresentation or omission in the original disclosures and that information must have been of such a nature that a reasonable shareholder would likely have considered it important in deciding how to vote on the merger. Because we now hold that the In re Trulia standard is applicable and because the trial court's ruling is based, at least in part, on an incorrect legal standard, we reverse the trial court's approval of the settlement and remand for the trial court to apply the proper standard. See Thompson v. Douds, 852 So. 2d 299, 305 (Fla. 2d DCA 2003) ("Usually when a trial court applies

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[8]We note that despite acknowledging Grosso, the trial court did not consider the supplemental disclosures under the Grosso factors generally applicable to class action settlements.

the incorrect legal standard, we reverse and remand for a new hearing at which the trial court must reconsider its decision in light of the proper legal standard."); Wilson v. Wilson, 827 So. 2d 401, 403 (Fla. 2d DCA 2002) (reversing order denying relocation that was "based, at least in part, on an incorrect legal standard" and remanding for trial court to consider issue "under the correct legal standard"). In light of our reversal on this issue, we also reverse the denial of Griffith's request for fees and remand for reconsideration of such request after the trial court determines whether to approve the settlement under the proper standard.

Affirmed in part, reversed in part, and remanded for further proceedings.

KHOUZAM and BLACK, JJ., Concur.

Third District Court of Appeal

State of Florida

Opinion filed July 11, 2018.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-1652
Lower Tribunal No. 15-2026

Edwidge Marie Desulme,
Appellant,

vs.

Miguel Rueda, etc., et al.,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Lisa S. Walsh, Judge.

Edwidge Marie Desulme, in proper person.

Law Offices of Douglas J. Jeffrey, P.A., and Douglas J. Jeffrey; American Justice, P.A., and Theresa B. Edwards (Fort Lauderdale), for appellee Miguel Rueda.

Before ROTHENBERG, C.J., and LOGUE and SCALES, JJ.

LOGUE, J.

Edwidge Marie Desulme appeals an order dismissing her complaint against a receiver without prejudice to her seeking leave in the case establishing the receivership to sue the receiver. We affirm.

Desulme owns a unit in a distressed condominium that is subject to a court-ordered receivership. In Re Petition of Countryside Village Condo. Ass'n, Inc., Case no. 2010-61776 CA 32 (Fla. 11th Cir. April 13, 2011). She alleges that the receiver took possession of her unit, displaced her tenant, altered or repaired the unit without her consent, and collected higher rents from a new tenant. Although she agreed at one point to have the rent from the unit pay her long-standing arrears in condominium assessments, Desulme ultimately sued the receiver, tenant, association, and management company for forcible entry, unlawful detainer, ejectment, and trespass. Among other things, she seeks double the rental value and punitive damages.

In the decision under review, the trial court granted the receiver's motion to dismiss. The dismissal was without prejudice to Desulme seeking leave in the case establishing the receivership to sue the receiver. The dismissal also specified that the court "has not yet taken evidence or heard whether the receiver has stepped outside the ambit of the court order appointing him or done an act for personal or private gain not in furtherance of the receivership which might subject him to

personal liability. This Court defers on this issue until it hears the Defendant's motion for leave to file separate action."

In dismissing the case without prejudice in this manner, the trial court properly applied the Barton doctrine, which requires that "before suit is brought against a receiver leave of the court by which he was appointed must be obtained." Barton v. Barbour, 104 U.S. 126, 128 (1881). Florida recognizes this doctrine. See Asset Recovery Group, LLC v. Cabrera, 233 So. 3d 1173, 1176 (Fla. 3d DCA 2017) ("Even when the receiver has been discharged . . . leave from the court that had appointed the receiver must still be obtained to file suit against the receiver. The requesting party must demonstrate a prima facie case of liability before the appointing court may grant leave to file suit.") (citation omitted); One South Ocean Drive 2000, Ltd. v. One Ocean Boca, LLC, 182 So. 3d 872, 874 (Fla. 4th DCA 2016).

An exception to this general rules exists where the receiver has acted outside his or her legal authority. See generally Murtha v. Steijskal, 232 So. 2d 53, 55 (Fla. 4th DCA 1970). However, when it is not clear from the face of the complaint whether the receiver acted outside his authority, it is proper to have that review take place in the context of a request to file suit against the receiver filed and heard in the case establishing the receivership. This process ensures that the issue is

resolved by the trial court presiding over the receivership after notice to the parties to the receivership.

Affirmed.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BLUEFIELD RANCH MITIGATION BANK TRUST,
Appellant,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT and **FLORIDA DEPARTMENT OF TRANSPORTATION,**
Appellees.

No. 4D16-3023

[July 11, 2018]

Appeal from the South Florida Water Management District; L.T. Case No. 2016-050-FOF-ERP.

Thomas E. Warner, Dean A. Morande, Matthew Z. Leopold, and Michael D. Sloan of Carlton Fields Jorden Burt, P.A., West Palm Beach, for appellant.

Marc Peoples, Assistant General Counsel of Department of Transportation, Tallahassee, for appellee Florida Department of Transportation.

Susan Roeder Martin, West Palm Beach, for appellee South Florida Water Management District.

FORST, J.

Appellant Bluefield Ranch Mitigation Bank Trust ("Bluefield") sought to challenge the South Florida Water Management District's ("District") issuance of a permit to the Florida Department of Transportation ("FDOT") for a road-widening project. The District dismissed Bluefield's petition for a formal administrative proceeding ("petition") with prejudice, determining Bluefield lacked standing to challenge the permit. The District's decision was based on its determination that the only injury specifically alleged by Bluefield was economic. We disagree, and conclude that Bluefield has demonstrated standing beyond mere economic injury. We thus reverse the District's dismissal order and remand for a formal administrative proceeding on Bluefield's petition.

Background

The District is an executive branch agency that has the responsibility to conserve, protect, manage, and control water resources within its geographic boundaries. *See* §§ 373.016, .036, Fla. Stat. (2016). Bluefield is a privately-owned mitigation bank, established pursuant to section 373.4136, Florida Statutes, for the purpose of operating and managing the Bluefield Ranch Mitigation Bank. Mitigation banking is the practice in which a mitigation bank sells "credits" in exchange for conducting environmental enhancement and preservation to offset unavoidable adverse impacts to the wetlands and to other property within its mitigation service area caused by development or construction projects requiring a permit from the District. *See* §§ 373.403(19), .4136(1), Fla. Stat.

At the time of receiving a mitigation bank permit, a mitigation bank is granted a certain number of mitigation credits. § 373.4136(4), Fla. Stat. Each credit is a unit of measure representing the increase in ecological value to offset adverse impacts within the bank's service area. *See* § 373.403(20), (21), Fla. Stat. A mitigation bank sells its credits to the permittee of the proposed project, who applies them to meet its mitigation requirements. Bluefield is a permitted mitigation bank, with property situated within the service area and watershed of the project at issue. Mitigation service areas can overlap, and mitigation service areas for two or more mitigation banks may be approved for a regional watershed. § 373.4136(6), Fla. Stat.

FDOT applied for a permit, which the District issued, for its project to widen a section of State Road 710/Beeline Highway. Per the permit, FDOT was required to purchase mitigation credits as a means of offsetting the environmental impact to the wetlands from the road-widening project. FDOT purchased some of the required mitigation credits from Bluefield, but most of the mitigation was to be provided by Dupuis Reserve ("Dupuis").

In its petition challenging the use of mitigation credits from Dupuis, Bluefield argued that Dupuis did not meet certain statutory criteria to be considered for mitigation on the project. Therefore, FDOT was required to consider Bluefield for the mitigation credits that would otherwise be provided by Dupuis. The petition asserted that Bluefield has standing to challenge FDOT's permit because, as a mitigation bank, it has a substantial interest in the enforcement of statutory compliance for mitigation within its service area and within the same watershed as the project. That "substantial interest," the petition contends, is to prevent environmental harm caused by unlawful mitigation. Bluefield further argued that it had standing because, as a landowner in the affected area, it has a substantial interest in the protection of the environment and the

continued restoration, enhancement, and preservation of wetlands within its watershed and service area.[1]

The District dismissed Bluefield's petition with prejudice, concluding that Bluefield failed to (and could not) allege facts demonstrating it had substantial interests (other than purely economic interests) that would be affected by the issuance of the permit. On appeal, Bluefield requests a reversal of the dismissal and an opportunity to present its challenge at an administrative hearing.

Analysis

In reviewing agency determinations on issues which do not require special agency expertise, such as standing, we accept the allegations in the petition as true, and are not required to give any deference to the agency's legal conclusions. *See S. Broward Hosp. Dist. v. State, Agency For Health Care Admin.*, 141 So. 3d 678, 680-81 (Fla. 1st DCA 2014). As such, we review whether a party has standing de novo. *See Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 796 (Fla. 1st DCA 2006); *see also Save Our Creeks v. State of Fla. Fish & Wildlife Conserv. Com'n*, 112 So. 3d 128, 129-30 (Fla. 1st DCA 2013) (an agency's dismissal of a petition for an administrative hearing is reviewed de novo).

A. The *Agrico* test for standing

Bluefield asserts that it has standing under the Florida Administrative Procedure Act ("FAPA"), which defines "party," in pertinent part, as:

> Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

§ 120.52(13)(b), Fla. Stat. (2016).

A two-part test to determine standing to participate in an administrative proceeding under this subsection of FAPA was established in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). The *Agrico* test looks to whether there is an injury in fact with sufficient immediacy, and a substantial injury of the type which the proceeding is designed to protect. *Id.* at 482. The first

[1] A third proffered rationale for standing, that Bluefield had "preferred status," is rejected without further discussion or analysis.

element pertains to the degree of injury and the second element deals with the nature of the injury. *Id.*

It is well established that mere economic interests and the general interests of citizens are insufficient to establish standing. *See Mid-Chattahoochee River Users*, 948 So. 2d at 796-99; *City of Sunrise v. S. Fla. Water Mgmt. Dist.*, 615 So. 2d 746, 748 (Fla. 4th DCA 1993). The reason, in part, is because we seek to "limit unwarranted use of judicial resources in challenges involving discretional decisions of legislative bodies." *Rosenzweig v. Dep't of Transp.*, 979 So. 2d 1050, 1053 (Fla. 1st DCA 2008). However, we are also cognizant that "one of the major legislative purposes of the Administrative Procedure Act was the expansion of public access to the activities of governmental agencies." *Id.* (citing *Fla. Home Builders Ass'n v. Dep't of Labor*, 412 So. 2d 351, 352-53 (Fla. 1982)).

Agrico's intent was not to preclude participation by parties who stand to be affected by the actual and foreseeable results of agency action. *See Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082-83 (Fla. 2d DCA 2009) ("[S]tanding is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." (quoting *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006)). Instead, *Agrico*'s intent was to "preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." *Mid-Chattahoochee River Users*, 948 So. 2d at 797 (citing *Gregory v. Indian River Cty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992)). Examples of parties that have been "preclude[d] from intervening in a proceeding" per this *Agrico* "substantial interest" test are *Mid-Chattahoochee River Users*, 948 So. 2d at 797, and *City of Sunrise*, 615 So. 2d at 748—two cases where the petitioners lacked standing for alleging mere economic injury, and not the kind of injury for which the proceeding was designed to protect, namely, the protection and conservation of water and related land sources.

B. Bluefield's alleged "injury"

Addressing transportation projects with unavoidable impact to wetland areas, the Florida Legislature expressed its intent that "mitigation to offset the adverse effects of these transportation projects be funded by [FDOT] and be carried out by the use of mitigation banks and any other mitigation options that satisfy state and federal requirements in a manner that promotes efficiency, timeliness in project delivery, and cost-effectiveness." § 373.4137(1), Fla. Stat. To effectuate this intent, FDOT "*must consider* using credits from a permitted mitigation bank" and "*must consider* the

availability of suitable and sufficient mitigation bank credits within the transportation project's area." § 373.4137(2)(c), Fla. Stat. (emphases added). Once it has met its "must consider" obligation, FDOT can "purchase credits for current and future use directly from a mitigation bank, purchase mitigation services through the water management districts or the Department of Environmental Protection, conduct its own mitigation, or use other mitigation options that meet state and federal requirements." § 373.4137(3)(a), Fla. Stat.

To qualify as a permitted mitigation bank, thereby qualifying for "must consider" status, a mitigation bank is obligated to provide reasonable assurance that it will meet applicable statutory and regulatory standards, including its ability to manage and improve the mitigation service area, and maintain the financial ability to do so, into perpetuity. *See* § 373.4136(1), Fla. Stat. As such, a mitigation bank provides assurance that there is "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Cty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

Here, Bluefield's petition alleges that using Dupuis for mitigation violated the section 373.4135(1)(b) prohibition of the use of property previously purchased for conservation. Bluefield maintains that Dupuis was previously purchased by the District with funding reserved for conservation projects and was already being utilized for conservation purposes and thus disqualified for "must consider" status.

The petition further contends that Dupuis has not provided the appropriate reasonable assurances for the mitigation of this project that are required by the statutory provisions governing this process. Particularly, Bluefield contends Dupuis failed to meet the public interest criteria set forth in section 373.414(a), such as whether the use of the Dupuis acreage would "adversely affect the public health, safety, or welfare or the property of others," including Bluefield's own watershed and service area.

Whether Dupuis is qualified to be considered for the project's mitigation is a disputed question of fact on the merits of Bluefield's petition. We take Bluefield's petition as true for the purposes of reviewing the District's dismissal. Whether Bluefield will be successful on the merits is irrelevant to our inquiry. *See Palm Beach Cty. Envtl. Coal. v. Fla. Dep't. of Envtl. Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009).

C. Bluefield's "substantial interest"

Assuming Dupuis is not qualified to provide mitigation on the project, the question becomes whether Bluefield has a substantial interest in

challenging the permit issued by the District to FDOT, in order to contest the latter's choice of Dupuis to be the recipient of the majority of the mitigation.

Mere economic injury is not enough, but when a party alleges "economic injury, in combination with other factors, [it] may provide a basis for standing in an administrative proceeding." *Fla. Police Benevolent Ass'n, Inc. v. Fla. Dep't. of State, Div. of Licensing*, 450 So. 2d 283, 284 (Fla. 1st DCA 1984) (citing *Fla. Med. Ass'n v. Dep't of Prof'l Reg.*, 426 So. 2d 1112, 1115 (Fla. 1st DCA 1983)); *see also Ybor III, Ltd. v. Fla. Hous. Fin. Corp.*, 843 So. 2d 344, 346 (Fla. 1st DCA 2003).

In *Ybor*, a housing developer (Ybor) and its competitor applied for limited funding to provide affordable housing in Florida. *Id.* at 345. Ybor's application was denied and its competitor's was accepted. *Id.* Ybor's petition challenged its competitor's accepted application, and asserted that its competitor's application was scored in a manner inconsistent with the agency's mandate. *Id.* Ybor argued that, if it's competitor's application had been properly scored, then Ybor, rather than the competitor, would have been entitled to the funding. *Id.*

Taking the petition as true, the First District held that Ybor had a substantial interest in ensuring that the agency was "provid[ing] and promot[ing] the public welfare by administering the governmental function of financing . . . housing . . . in Florida." *Id.* (quoting §§ 420.504(1), .502(7), Fla. Stat.). "Common sense and logic dictate that if such a program of economic incentives . . . is to succeed, the process of determining who is qualified . . . must be administered fairly, honestly, and consistently according to the rules that [the agency] is charged with implementing." *Id.* at 346. If Ybor lacked standing, "[a]n agency could act fraudulently, illegally, arbitrarily, dishonestly, or inconsistently with impunity." *Id.*

Following the logic of *Ybor*, an economic interest in the outcome does not disqualify Bluefield from standing. Bluefield, like Ybor, is a for-profit company. The purpose of the statute in *Ybor* was to provide affordable housing through financing affordable housing to low income applicants, provided by private companies that were the recipients of government grants. The purpose of the statute at issue here is the protection of water resources and the ecosystem through the use of mitigation, funded by the sale of mitigation credits. Bluefield's interests are greater than purely economic: mitigation banks were created and are regulated for the very purpose of mitigating the adverse impacts to wetlands caused by construction and development. Bluefield argues that, by choosing an unlawful mitigation option, FDOT and the District are subverting the statutory scheme. Bluefield is a mitigation bank located within the same

watershed and service area as the project, creating a substantial interest in the enforcement of statutory compliance for mitigation for this project.

Another case applicable to the instant situation is *Town of Palm Beach v. State Department of Natural Resources*, 577 So. 2d 1383 (Fla. 4th DCA 1991). There, we reversed an agency determination that certain property owners did not have a substantial interest in an agency's eventual determination that certain landscaping activities on the beach were outside of its jurisdiction, thereby not requiring a permit. *Id.* at 1384-85. The petitioning parties included the Town of Palm Beach, which owned Phipps Ocean Park within 1000 feet of the condominium and alleged that the Park would suffer damage if the landscaping activity continued, and Dave Darwin, who owned a property within 1000 feet of the condominium and alleged that his property would be damaged by the continued disruption of the dune system. *Id.* at 1385. We found that both of these petitioners had a substantial interest in challenging the agency's determination because

> the statute and administrative proceedings are designed to protect the entire beach/dune system of the state of Florida, and [the petitioners] allege that [the landscaping activities] will harm the dune system in the area of [the condominium's] property. Therefore [the petitioners] have made sufficient allegations to meet the test of standing under *Agrico* and are entitled to a hearing to present evidence to support their allegations of standing.

Id. at 1388.

As in *Town of Palm Beach*, the distance from the petitioning party to the point of environmental damage (here, the FDOT road-widening project) was sufficiently close that the harm alleged can be reasonably expected. That is to say, Bluefield, like the petitioners in *Town of Palm Beach*, are within the "zone of interest" of the proposed environmental permit. *See Vill. of Key Biscayne v. Dep't of Envtl. Prot.*, 206 So. 3d 788, 790 (Fla. 3d DCA 2016) (citing *Hamilton Cty. Bd. of Cty. Comm'rs v. State Dep't of Envtl. Regulation*, 587 So. 2d 1378 (Fla. 1st DCA 1991)). An argument of potential environmental injury to Bluefield's conservation acreage is reasonable based on Bluefield's location within the same watershed and mitigation service area. That is not to say that mitigation banks within a service area will have standing to challenge a permit on that fact alone, but Bluefield is also located in close proximity to the project within the same watershed, and it could reasonably be affected by the issuance of a permit to allow Dupuis, without the statutory compliance required, to provide mitigation in the same service area and watershed.

In *Rosenzweig*, the First District used the *Agrico* test to determine whether a bicyclist organization had standing to challenge FDOT's interpretation of a statute specifically relating to bicycle lanes. *Rosenzweig*, 979 So. 2d at 1053. The First District noted that the first prong of the *Agrico* test was satisfied because the organization's members "will not have a delineated path on which to ride their bicycles if bicycle lanes are not constructed pursuant to [FDOT's] standards." *Id.* at 1054. The second prong was satisfied because: "Reason dictates that a bicyclist organization . . . can demonstrate that a substantial number of its members will be affected by [FDOT's] decisions relating to the construction of bicycle paths." *Id.* In finding the organization had standing, the First District stated that "it is clear that if *anyone* has the ability to challenge [FDOT's] interpretation of section 335.065, which specifically relates to bicycle lanes, it would be those seriously involved in bicycling." *Id.*

Similarly here, should mitigation by Dupuis be unlawful, it subjects the shared service area and watershed to harm—degradation of the service area Bluefield is entrusted to protect and manage into perpetuity. Harm to the wetlands is the injury in fact, and Bluefield has a substantial interest in ensuring compliance with the statutory scheme. Here too, it can be reasonably argued that if *anyone* has the ability to challenge FDOT's compliance with the "must consider" provision, it would be those permitted mitigation banks like Bluefield, which seek to challenge a permit that purportedly allows unlawful mitigation within its service area and watershed.

Conclusion

As set forth above, we reverse the District's dismissal, and find that the four-corners of the petition adequately alleged standing because it was reasonably foreseeable that Bluefield's conservation acreage could be adversely affected by the degradation of the watershed and ecosystem caused by the selection of a purportedly unlawful mitigation option. We thus remand for a formal administrative proceeding on Bluefield's petition.

Reversed and remanded.

TAYLOR and KLINGENSMITH, JJ., concur.

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Not final until disposition of timely filed motion for rehearing.