IN THE UNITED STATES COURT OF FEDERAL CLAIMS

REINALDO CASTILLO, *et al.*, and NELSON MENENDEZ, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Nos. 16-1624L, 17-1931L
	)	
UNITED STATES OF AMERICA,	)	Judge Marian Blank Horn
	)	
Defendant.	)	

LANDOWNERS' MOTION TO RECONSIDER THIS COURT'S ORDER GRANTING THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

ARENT FOX, LLP

MARK F. (THOR) HEARNE, II
LINDSAY S.C. BRINTON
MEGHAN S. LARGENT
STEPHEN S. DAVIS
ABRAM J. PAFFORD
ARENT FOX, LLP
1717 K Street, NW
Washington, DC 20006
(202) 857-6000
(202) 857-6395 (facsimile)
Thor@arentfox.com
lindsay.brinton@arentfox.com

112 South Hanley, Suite 200
Clayton, MO 63105
(314) 296-4000

Attorneys for Plaintiffs

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These owners ask this Court, under RCFC 59(a) and 60(b), to reconsider its Opinion of June 29, 2018 (ECF No. 40) and its Judgment (ECF No. 41) denying these owners' summary judgment and granting the government summary judgment.

INTRODUCTION

For reasons we explain more fully below, this Court should reconsider its conclusion that "the Zena Garden subdivision owners [*i.e.*, those owners of the fee estate who established and dedicated the Zena Gardens subdivision] did not intend to pass title to [the fee estate in the land under the railroad corridor] to the grantees of the subdivision parcels adjacent to the railroad corridor." And this Court should reconsider its holding that "the grantors of the Princess Park Manor subdivision plat did not intend to pass title [to the fee estate in the land under the railroad right-of-way] to the grantees of the subdivision adjacent to the railroad corridor." ECF No. 40 (Opinion of June 29, 2018), pp. 42, 44. This Court's conclusion on these two points is contrary to established principles of Florida law and contrary to the factual record before this Court. Reconsideration is necessary to correct "clear error" and to "prevent manifest injustice" to these landowners. Summary judgment in the government's favor was also inappropriate given the lack of an undisputed factual premise upon which to enter judgment for the government.

In support of this request that the Court reconsider its decision, we include the declaration of Professor Dale A. Whitman, a distinguished professor of property law and author of the leading text on property law, and the declaration of Christopher Smart, an expert on Florida property and land title and Chair of the Real Property and Probate Trust Law Section of the Florida Bar's Title Issues and Standards Committee. We also include a copy of the relevant provisions of the Florida Uniform Title Standards describing how the centerline presumption as properly applied would find these owners hold title to the land under the former railway easement. We also include the deeds by which the platted lots were conveyed by the owners of the land to the subdivision corporations.

BACKGROUND

In the 1920s the Florida East Coast Railway obtained a right-of-way easement through a series of condemnation actions in Dade County Circuit Court.[1] All agree that the interest the Florida East Coast Railway and its successor railroads obtained was an easement, and all agree the railroad did not obtain title to the fee estate in the land. "The parties in both *Castillo* and *Menendez* also stipulate that the rights-of-way the Florida East Coast Railway obtained through the four final judgments in condemnation proceedings were each an '[e]asement.'" ECF No. 40, p. 12 (citing the parties' Joint Stipulations Regarding Title). Thus, it is undisputed that the railroad did not own the fee estate in the land across which the railroad subsequently built its railway line.[2] This Court also noted, "Nowhere in its response and opposition to plaintiffs' cross-motion for partial summary judgment does defendant allege that 'some other party owned the land under the abandoned railroad right-of-way.'" *Id.* at 30, n.10.

The parties also agreed the condemnation orders limited the railroad's interest to an easement for railway purposes. ECF No. 40, p. 12. Thus, when the railroad no longer operated, the easement terminated and the owner of the underlying fee estate regained his unencumbered right to use and possess the land. See *id.* at 26-27 (citing *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (*Preseault II*); *Ellamae Phillips Co. United States*, 564 F.3d 1367,

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[1] The Court refers to the court as the "United States Circuit Court for Dade County, Florida." But the court was a Florida state court acting under Florida state law, not a federal court. The relevant point is that the railroad's condemnation action was initiated in Florida state court and governed by Florida state law, not federal law.

[2] As to that portion of the original right-of-way established by the conveyance from G.F. and Mary J. Holman in 1923, this Court concluded "the Holmans granted fee simple title to the Florida East Coast Railway in the strip of land underlying the railroad corridor." And, "This court, therefore, finds that in 1923, G.F. and Mary J. Holman conveyed fee simple title to the Florida East Coast Railway…" ECF No. 40, pp. 32-33. The owners of these eight properties subject to the original Holman conveyance do not ask this Court to reconsider this Court's decision on this point.

1373 (Fed. Cir. 2009); *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010), *reh'g and reh'g en banc denied*, 646 F.3d 910 (Fed. Cir. 2011); *Caldwell v. United States*, 391 F.3d 1226, 1229 (Fed. Cir. 2004); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004); and *Marvin M. Brandt Rev. Trust v. United States*, 134 S.Ct. 1257, 1265 (2014).

After the railroad acquired its right-of-way easement in the 1920s and after the railroad built its railway line across the land in the 1930s, the owners of the land then-encumbered by the railroad right-of-way easement recorded two subdivision plats called Zena Gardens and Princess Park Manor. See ECF 40 (Order), pp. 7-9. Louis and Rebecca Merwitzer recorded the Zena Gardens subdivision plat in September 1947, and Erving and Harriett Moss recorded the Princess Park Manor plat in November 1949. The present-day owners bringing this action acquired their title by conveyances referencing the property by lot number referencing the recorded Zena Gardens and Princess Park Manor plats. All agree the specific lots conveyed to each owner show the platted lot as adjoining the then-existing railroad right-of-way. In other words, there is no intervening property owned by a third party. See *id.* at 40-42 (discussing Zena Gardens plat); *id.* at 42-44 (discussing Princess Park Manor plat). See also ECF No. 25-3 (Zena Gardens plat); ECF No. 25-1 (Princess Park Manor plat).

This motion for reconsideration asks this Court to reconsider whether this Court correctly applied Florida law and, specifically, whether this Court correctly applied the centerline presumption and the strips-and-gore doctrine to the facts of this case. Stated another way, did the government (as the party opposing the centerline presumption) demonstrate by a "contrary showing" that the Moss and Merwitzer families "clearly reserved title" to the fee estate in the land

beneath the railroad right-of-way when the land was platted in the 1940s?[3] The government admits the railroad does not own the fee estate in the land and the government has not (and cannot) identify any present-day owner of this strip of land other than the landowners bringing this action. See ECF 40 (Order), pp. 14-17, 30 n.10. Rather the government takes the agnostic position that it doesn't know, or care, who owns the fee estate but, on the basis of the supposition that the present-day owners cannot affirmatively disprove that the Moss and Merwitzer families reserved title to the fee estate in the land beneath the abandoned railroad right-of-way, the present-day owners have, therefore, failed to prove they own the fee estate. See Gov't. reply brief, ECF No. 34, pp. 4-5. And, if these present-day owners do not own the land, who does?

This Court premised its conclusion that the centerline presumption and strips-and-gore doctrine did not apply for two reasons. First, the Zena Gardens plat included the phrase, "*excepting* therefrom a strip of land off the westerly side which is the right of way of [the railroad]" and (in the case of the Princess park Manor plat) the phrase "*less the Florida East Coast Right-of-Way….*" ECF No. 40, pp. 41, 43. And, second, this Court assumed the centerline presumption has been overcome (or rebutted) when a recorded plat depicts the lots as adjoining the right-of-way easement but does not explicitly depict the boundary as extending to the center of the adjoining right-of-way. Both these reasons are incorrect as a matter of Florida law.

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[3] This motion raises the related question of whether, under Florida property law, the owner of a platted lot bounded by a public right-of-way must *affirmatively* disprove the grantor who platted the subdivision did not intend to retain title to the fee estate in the strip of land under the right-of-way or whether the burden of proving the grantor who dedicated the plat "clearly reserved title" to the land under the right-of-way. This Court wrote that the owners of the lots "assume throughout their replies … without any supporting evidence, that the original subdivision owners … owned the land underlying the railroad corridor and did not intend to reserve title to the land under the railroad corridor." ECF No. 40, p. 43. Thus, this Court assumed, the owners of the lots have the obligation to disprove the centerline presumption with some "supporting evidence" and, failing that, this Court assumed the presumption does not apply. As explained below, this is an incorrect understanding of Florida law.

STANDARDS OF REVIEW

A. A motion to reconsider is appropriate.

"The three primary grounds that justify reconsideration are: '(1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice.'" *Lucier v. United States*, 2018 WL 3583969, at *4 (Fed. Cl. July 26, 2018) (quoting *Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1383 (Fed. Cir. 2010)). "A motion under Rule 60(b) is appropriate to correct substantive errors that are not clerical in nature." *Dynacs Engineering Co. v. United States*, 48 Fed. Cl. 240, 241 (2000). Motions for reconsideration made to cure manifest injustice may be based upon deposition testimony or other evidence, whether or not formally part of the record. See WRIGHT & MILLER 9A FED. PRAC. & PROC. CIV. §2416 (3d ed.) (motions for new trial "based on facts not appearing of record may be heard on affidavits"); see also *Spurlock v. Lawson*, 881 F. Supp. 436, 438 (E.D. Ark. 1995) (in considering a motion for new trial, courts are not limited to matters which were a part of the record); *Anaheim Gardens v. United States*, 109 Fed. Cl. 33, 35-36, 38 (Fed. Cl. 2013) (CFC reconsidered and reversed its prior summary judgment ruling on issue of ripeness based on plaintiffs' argument that they had proffered particular calculations by referencing their expert's report in their proposed findings of fact); *Williams v. Home Depot USA, Inc*., 2012 WL 1098358, *5 (S.D. Tex. 2012) (court reviewed deposition testimony submitted with motion for summary judgment in partially granting motion for reconsideration correcting obvious error); *Pinckney v. United States*, 82 Fed. Cl. 627, 633 (2008) (CFC reviewed deposition testimony in denying motion for reconsideration alleging factual errors in Court's opinion); *Rodriguez v. United States*, 2007 WL 5161772, *1 (Fed. Cl. 2007) (CFC considered deposition testimony proffered by plaintiffs in considering and denying motion for reconsideration); *Osage Tribe of Indians of Oklahoma v. United States*, 97 Fed. Cl. 345, 348 (2011) (Court granted motion for reconsideration on the basis

of its prior "admission of the relevant evidence") (quoting *Matthews v. United States*, 73 Fed. Cl. 524, 525 (2006), and *Griffin v. United States*, 96 Fed. Cl. 1, 7 (2010) (internal quotations omitted).

This Court should reconsider and modify or amend its prior decision because new evidence is available and there is a need to correct clear error and avoid manifest injustice.

B. Summary judgment for the government is improper.

As this Court explained, "The judge must determine whether the evidence presents a disagreement sufficient to require submission to fact finding, or whether the issues presented are so one-sided that one party must prevail as a matter of law." Slip op., p. 19 (citing, *inter alia*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52 (1986)). This Court continued, "if the nonmoving party produces sufficient evidence to raise a question as to the outcome of the case, then the motion for summary judgment should be denied." *Id.* at 20.

This Court also rightly stated, "Even if both parties argue in favor of summary judgment and allege an absence of genuine issues of material fact, the court is not relieved of its responsibility to determine the appropriateness of summary disposition in a particular case, and it does not follow that summary judgment should be granted to one side or the other. Slip op., p. 21 (citing, *inter alia*, *Prineville Sawmill Co. v. United States*, 859 F.2d 905, 911 (Fed. Cir. 1988)).

The record in this case does not support summary judgment for the government. The government has failed to provide evidence demonstrating the Moss and Merwitzer families "clearly reserved title" to the narrow strip of land under the former railroad right-of-way.

ARGUMENT

This Court recognized Florida law holds that the owner of land described as a platted lot abutting a right-of-way is presumed to hold title to the fee estate in the land extending to the centerline of the adjoining right-of-way. See ECF No. 40 (Order), p. 36. This is a long-recognized doctrine of Florida law. In *Smith v. Horn*, 70 So. 435, 436 (Fla. 1915), the Florida Supreme Court held that where the owner of land platted the same and sold subdivisions in accordance with such plat, the title of the grantees of the platted lots presumably extended to the center of the street subject to the easement. Similarly, in *Servando Building Co. v. Zimmerman*, 91 So. 2d 289, 292 (Fla. 1956), the Florida Supreme Court held,

> "[T]he title of the grantees of [lots] abutting on such streets, in the absence of a contrary showing, extends to the center of such highway, subject to the public easement." In *Florida Southern Ry. Co. v. Brown*, 1 So. 512, 513 [(Fla. 1887)], decided nearly seventy years ago, this court observed that the rule "seems to be based on the supposed intention of the parties, and the improbability of the grantor desiring or intending to reserve his interest in the street when he had parted with his title to adjoining land." And it was further said in that case that such intention will never be presumed.[4]

When a railroad no longer uses a right-of-way for the operation of a railway, the easement terminates and the owner of the fee estate enjoys unencumbered title and exclusive use and possession of the land. See ECF No. 40 (Order), pp. 26-27. See *Brandt*, 134 S.Ct. at 1265-66 ("[B]asic common law principles resolve this case. When the [railroad] abandoned the right of way in 2004, the easement … terminated. Brandt's land became unburdened of the easement, conferring on him the same full rights over the right of way as he enjoyed over the rest of [his property].").

[4] See also *Seaboard Air Line Ry. v. Southern Investment Co.*, 44 So. 351 (Fla. 1907), and *Rawles v. Tallahassee Hotel, Co.*, 31 So. 237 (Fla. 1901) (in the absence of evidence to the contrary, abutting owner is presumed to own the soil to the center of the street).

This Court recognized that, under the centerline presumption, the "Supreme Court of Florida presumed that an owner of a parcel of land that was adjacent to a street within a subdivision owned to the center of the street because there was no 'contrary showing' that the original subdivision owner or his grantees clearly reserved title to the [fee estate in the land beneath] the street.'" ECF No. 40, p. 36 (citing *Smith*, 70 So. at 436).

Given these recognized (and undisputed) principles of law, the question is whether the government – as the party seeking to overcome the centerline presumption – has made a "contrary showing" with evidence that the grantee of these subdivision plats "clearly reserved title" to the land under the right-of-way. The owners who hold prima facie title to the fee estate in the platted lots adjoining the railroad right-of-way do not have to prove some unnamed hypothetical third party does not claim title to the narrow strip of land under the former right-of-way.

I. A plat depicting lot boundaries as adjoining an existing right-of-way does not "clearly reserve" title to the land under the right-of-way in the grantor of the plat.

A. The "except for" and "less" references in the plat are the recognition of an existing right-of-way easement, not a reservation of title in the grantor.

This Court concluded the grantors of the Princess Park Manor and Zena Gardens plats reserved title to the fee estate in the narrow strip of land under the former railroad right-of-way because the plats referenced the railroad right-of-way with the words "excepting" and "less." "The plat makes a specific point to exclude the railroad corridor…. Thus, based on the language of the [Princess Park Manor] plat, the railroad corridor is not included in the platted subdivision." ECF No. 40, pp. 43-44. And this Court wrote, "[t]he plat makes a specific point to 'except[ ]' the railroad corridor from the description of land platted in the Zena Gardens subdivision." *Id.* at 41.

The Court's conclusion is incorrect as a matter of Florida law. The description of the property conveyed in the Zena Garden and Princess Park Manor plats is rightly understood under Florida law and land title standards as a conveyance of the *entire* fee estate *subject to* the existing

railroad easement. See **Exhibit 4** (Decl. of Christopher Smart) ¶5 ("the centerline presumption … in Florida means that a conveyance by lot and block number carries with it the interest in any abutting right of way subject to the right of way easement or dedication. When the right-of-way easement or dedication is vacated, then the owner of the lot owns to the centerline of the right-of-way free and clear of any easement or dedication.").

The depiction of the two plats depicting lots bordering the existing railroad right-of-way easement does not mean the Merwitzer and Moss families "clearly reserved title" to the fee estate in the strip of land underlying the railroad right-of-way. In both plats the respective use of the words "except" or "less" explicitly references the then-existing "Florida East Coast [railroad] Right-of-Way" and not title to the fee estate. See **Exhibit 1** (Princess Park Manor plat); **Exhibit 2** (Zena Gardens plat). Thus the text of the legal description and the plat, read as a whole, does not clearly *reserve* title to the fee estate but simply means the fee estate is conveyed is *subject to* the existing railroad right-of-way easement.

Compare the language of the Princess Park Manor and Zena Garden plats with the language of the plat in *Peninsular Point, Inc. v. South Georgia Co-Op*, 251 So.2d 690, 691 (Fla. Ct. App. 1971). In *Peninsular Point* the Florida Court of Appeals held, "The recorded plat of the subdivision dedicating the street in question bore on its face a dedication which stated the following material language: '…and does hereby dedicate to the perpetual use of the public, as public highways, the streets as shown hereon, *reserving unto itself*, its heirs, successors, assigns, or legal representatives, *the reversion or reversions of the same, whenever abandoned by the public or discontinued by law*.'" *Id.* (emphasis added).

The Zena Park and Princess Park Manor plats contain no such specific and clear reservation of a expressly identified reversionary right. *Peninsular Point* is an example of the explicit and

unambiguous language a grantor must use to reserve a reversionary interest necessary to overcome the centerline presumption. Again, the Moss and Merwitzer families made no such reservation of a reversionary interest in the narrow strip of land under the railroad right-of-way. In fact, when the Moss and Merwitzer families each conveyed their interests in the land to the subdivision corporations, they did not reserve any interest in the land under the railroad right-of-way. See **Exhibit 6** (Moss indenture to Princess Park Manor, Inc.) and **Exhibit 7** (Merwitzer indenture to Zena Gardens, Inc.).

In the parlance of real estate conveyance documents it is likewise important to note the distinction between an "exception" and a "reservation." An "exception" to title excludes from the interest conveyed a pre-existing interest the grantor (or the grantor's predecessors-in-title) previously granted a third-party. A "reservation" on the other hand is an interest in the property the grantor himself retains at the time of the conveyance. See Jon W. Bruce & James W. Ely, Jr., THE LAW OF EASEMENTS & LICENSES IN LAND §3:7 ("Technically, a grantor who wishes to retain an easement should use the word 'reserve' because reservation implies the creation of a new interest in the grantor.

On the other hand, the term 'exception' suggests that the right withheld from the operation of the grant already exists in the grantor."); THOMPSON ON REAL PROPERTY §22.04(c). Thus a conveyance describing the property the grantor conveys to a grantee as "a forty-acre tract of land *less and except* the 100-foot wide right-of-way granted the Florida East Coast Railway" would convey the grantee title to the fee estate in the entire tract of land (including the land encumbered by the right-of-way) but the grantee's interest is subject to the existing railroad right-of-way. Contrast this with a conveyance describing the property interest conveyed as "a forty-acre tract of land, *reserving* to the grantor title to a 200-foot-wide strip of land along the western boundary of

the property." These are very different conveyances and, in the latter case, the grantor specifically, explicitly, and clearly reserved ownership of the fee estate in the separately described strip of land. That situation is not present here.

This Court erroneous concluded that "[b]ecause the original Zena Gardens [and Princess Park Manor] subdivision owners did not include the railroad corridor as part of their platted subdivision, the Zena Gardens [and Princess Park Manor] subdivision owners did not intend to pass title to the railroad corridor to the grantees of the subdivision parcels adjacent to the railroad corridor." ECF No. 40, pp. 42, 44.

This is wrong as a matter of Florida law. The comment to Section 11.5 of the Florida Uniform Title Standards states, "When the street is on the periphery of the plat and the dedicator does not, at the time of the plat, own the land on the other side of the street outside of the plat and does not reserve title to, or the 'reversionary interest' in, the street, the abutting lot owner will take the entire width of the street upon vacation of the street, subject to any private easement rights." See **Exhibit 5** (Florida Uniform Title Standards).

As discussed and clarified in the Florida Title Standards, "the centerline presumption … in Florida means that a conveyance by lot and block number carries with it the interest in any abutting right of way subject to the right of way easement or dedication. When the right-of-way easement or dedication is vacated, then the owner of the lot owns to the centerline of the right-of-way free and clear of any easement or dedication. **Exhibit 4** (Decl. of Christopher Smart) ¶5. Standard 11.4 relies upon Florida Statute section 177.085(1), which provides as follows:

> 177.085 Platted streets; reversionary clauses.—
>
> (1) When any owner of land subdivides the land and dedicates streets, other roadways, alleys or similar strips on the map or plat, and the dedication contains a provision that the reversionary interest in the street, roadway, alley or other similar strip is reserved unto the dedicator or his or her heirs, successors, assigns, or legal

> representative, or similar language, and thereafter conveys abutting lots or tracts, the conveyance shall carry the reversionary interest in the abutting street to the centerline or other appropriate boundary, unless the owner clearly provides otherwise in the conveyance.

Id. ¶6.

"Although Standard 11.4 and Florida Statue section 177.085(1) apply to dedicated rights-of-way on plats, the same centerline doctrine analysis applies to periphery rights-of-way." *Id.* ¶7. "Pursuant to the principals set forth in Florida Statute section 177.085(1) and Standard 11.4, a provision in the dedicatory language of a plat lessing out, excepting, or even reserving from the dedication a right-of-way will not prevent title to the centerline of the right of way from passing with title to an abutting lot, unless otherwise clearly provided for in the deed used to convey the lot." *Id.* ¶8.

Christopher Smart continues, "The provision in the dedicatory language of the Princess Park Manor plat lessing out the right-of-way of the Okeechobee-Miami extension of the Florida East Coast Railway is not a *reservation* to the Mosses. Instead it is an expression that the right-of-way *is not part of* the plat. Pursuant to the principals set forth in Florida Statute section 177.085(1) and Standard 11.4, the provision in the dedicatory language of the Princess Park Manor plat did not prevent title to the centerline of the right-of-way from passing with title to the lots abutting it." **Exhibit 4** (Decl. of Christopher Smith) ¶10 (emphasis added). Furthermore, the "provision in the dedicatory language of the Zena Gardens plat excepting the right-of-way of the Okeechobee-Miami extension of the Florida East Coast Railway is not a reservation to the Merwitzers. Instead it is an expression that the right-of-way is not part of the plat. Pursuant to the principals set forth in Florida Statute section 177.085(1) and Standard 11.4, the provision in the dedicatory language of the Zena Gardens plat did not prevent title to the centerline of the right-of-way from passing with title to the lots abutting it." *Id.* ¶11.

Smart concluded that under Florida law and land title standards, "Unless title to the right-of-way of the Okeechobee-Miami extension of the Florida East Coast Railway has been expressly and clearly reserved to the grantor in the deeds to the lots in the Princess Park Manor and Zena Gardens subdivisions, then the current owners of those lots abutting the right-of-way of the Okeechobee-Miami extension of the Florida East Coast Railway holds title to the centerline of the right-of-way." *Id.* ¶12.

Thus, since the landowners' interest in their lots is depicted as extending to the right-of-way, the title to the fee estate they acquired extended to the centerline. There is no evidence to find the Moss and Merwitzer families expressly and clearly reserved title to the narrow strip of land under the railway to themselves. See *Capels v. Taliaferro*, 197 So. 861, 862 (Fla. 1940). See also **Exhibit 6** (Moss indenture to Princess Park Manor, Inc.) and **Exhibit 7** (Merwitzer indenture to Zena Gardens, Inc.).

B. The government did not show that the Merwitzer and Moss families "clearly reserved title" to the fee estate in the land under the railroad right-of-way.

1. It is the government's burden to make a "'contrary showing' that the original subdivision owner or his grantees clearly reserved title to the [fee estate]."

The Moss and Merwitzer families owned the fee estate in the land referenced in the respective plats. The government does not dispute this point. The government acknowledges the railroad's interest was an easement to operate a railway across the land. See ECF No. 40 (Order), pp. 14-17. The government, however, claims these owners are not entitled to compensation because the recorded plat depicts the lot boundary line as the edge of the, then existing, railroad right-of-way and not the center line of the right-of-way. The government offers no evidence that any third party held title to the fee estate in the land once encumbered by the abandoned railroad right-of-way. Rather, the government's position is that these landowners have failed to disprove

that some hypothetical third party does not hold title to the fee estate in the land. See discussion, *supra*, pp. 3-4.

Greenleaf's Lessee v. Birth, 31 U.S. 302 (1832), required the Supreme Court to address this same issue. *Greenleaf* involved a dispute between a lessee claiming title to a lot in the District of Columbia under conveyances from James Greenleaf and James Birth. Greenleaf's lessee relied upon a deed by which Greenleaf acquired title to the fee estate. Birth attacked this claim by contending the lot at issue (lot 506) was excluded from the conveyance and, thus, Greenleaf could not have owned the property. The Supreme Court, in a decision written by Justice Story rejected Birth's proposition. The Court held that Greenleaf's lessee had shown that Greenleaf acquired title to the property and held that Birth's challenge to that title by arguing some supposed hypothetical third party may have title was insufficient to defeat Greenleaf's title. Justice Story explained this point in *Greenleaf's Lessee*, 31 U.S. at 311.

> [T]he plaintiff has shown, prima facie, a good title to recover. The defendant sets up no title in himself, but seeks to maintain his possession as a mere intruder, by setting up title in third persons, with whom he has no privity. In such a case it is incumbent upon the party setting up the defense, to establish the existence of such an outstanding title beyond controversy. It is not sufficient for him to show that there may possibly be such a title. If he leaves it in doubt, that is enough for the plaintiff. He has a right to stand upon his prima facie good title; and he is not bound to furnish any evidence to assist the defence [*sic.*]. It is not incumbent on him negatively to establish the non-existence of such an outstanding title; it is the duty of the defendant to make its existence certain.

So too here. These owners have unequivocally demonstrated (and the government admits) that they hold prima facie title to the land described in the recorded plat. Florida law presumes this prima facie title includes the land extending to the centerline of the right-of-way. The government offers no evidence (nor does the government even allege) that some third party owns the land under the former railroad right-of-way. Rather, the government simply claims it is not sufficient that these owners establish prima facie title to the lot. According to the government, the

owners must also disprove the hypothetical possibility some unknown third party holds title. This is not a sufficient basis under Florida law (or the law of any state) to dispute title.

Furthermore, there is no explicit statement in the plat nor in any related conveyance by which the grantors of the plats (the Moss and Merwitzer families) explicitly reserved title to the land under the adjoining right-of-way, nor is there any subsequent conveyance by Louis and Rebecca Merwitzer or by Erving and Harriett Moss (or their estates) suggesting they retained title to the fee estate in the narrow strip of land underlying the railroad right-of-way. In fact, when the Moss and Merwitzer families each conveyed their interests in the land to the subdivision corporations, they did not reserve any interest in the land under the railroad right-of-way. See **Exhibit 6** (Moss indenture to Princess Park Manor, Inc.) and **Exhibit 7** (Merwitzer indenture to Zena Gardens, Inc.).

2. The government presents no "specific evidence" supporting a "contrary showing" that the Merwitzer and Moss families "clearly reserved title."

If the Merwitzer and Moss families "clearly reserved title" to the narrow strip of land under the right-of-way, the government must make that "contrary showing." The government has not made such a showing. The government has not come forward with *any* evidence supporting a contrary conclusion. See Gov't. reply brief, ECF No. 34, p. 5. See also Order, ECF No. 40, p. 30 n.10 ("Nowhere in its response and opposition to plaintiffs' cross-motion for partial summary judgment does defendant allege that 'some other party owned the land under the abandoned railroad right-of-way.'").

The government fails to establish (or even allege) who now owns the fee estate in the narrow strip of land under the former Florida East Coast Railway right-of-way easement. If title to the strip of land was, in fact, reserved to the Merwitzer and Moss families, the government must establish this with some specific evidence to overcome the centerline presumption. These original

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plats were executed in the 1940s. Erving A. and Harriett E. Moss and Louis and Rebecca Merwitzer have since died. There is no known document (recorded or unrecorded) by which the Mosses or Merwitzers reserved title to the narrow strip of land under the right-of-way or conveyed title to some third party. The government fails, as a matter of Florida law, to satisfy the government's burden to refute the centerline presumption.

So, who holds title to the fee estate in the narrow strip of land formerly encumbered by the railroad right-of-way easement? The railroad doesn't. The government doesn't. And there is no record in the Florida land title records identifying anyone other than the owners of the platted lots who claims title to this land.

II. The centerline presumption is not overcome by a plat depicting a lot as bounded by a right-of-way.

This Court concluded, "[f]urthermore, as depicted on the Princess Park Manor plat, none of the parcels … extended onto the railroad corridor but, instead, end at the edge of the railroad corridor." ECF No. 40, p. 44. And, this Court noted, "as depicted on the Zena Gardens plat, none of the parcels … extend onto the railroad corridor but, instead, end at the edge of the railroad corridor." *Id.* at 41.

The Court's premise appears to be that the centerline presumption is inapplicable or is rebutted whenever the relevant boundary is described or depicted as the edge (and not the center) of the adjoining right-of-way. The Court's premise is incorrect because it effectively nullifies the centerline presumption and the strip-and-gore doctrine. The Court's premise is also contrary to how Florida courts apply the centerline presumption and contrary to established Florida land title standards.

A. This Court incorrectly applies the centerline presumption and the strip-and gore-doctrine in a manner that nullifies these principles of state property law.

Before he was President and before he was Chief Justice, then-Judge William Howard Taft explained the strips-and-gore doctrine. In *Paine v. Consumers' Forwarding & Storage, Co.*, 71 F. 626, 629-30, 632 (6th Cir. 1895), Judge Taft wrote,

> The existence of "strips or gores" of land along the margin of non-navigable lakes, to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are "strips and gores" of land along highways or running streams. The litigation that may arise therefrom after long years, or the happening of some unexpected event, is equally probable, and alike vexatious in each of the cases, and that public policy which would seek to prevent this by a construction that would carry the title to the center of a highway, running stream, or non-navigable lake that may be made a boundary of the lands conveyed applies indifferently, and with equal force, to all of them. It would seem, also, that whatever inference might arise from the presumed intention of the parties against the reservation of the land underlying the water would be as strong in one case as in either of the others….
>
> The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases.

The intent of this doctrine, as Taft explained, is to avoid the "evil" of "valueless" "gores and strips" of land. *Id.* at 632.

More recently, in *Penn Central Corp. v. U.S.R.R. Vest. Corp.*, 955 F.2d 1158 (7th Cir. 1992), Judge Posner applied the concepts underlying this doctrine to find a railroad's interest in a strip of land used for a railway is presumed an easement not a fee estate. Judge Posner explained:

> The presumption is that a deed to a railroad or other right of way company (pipeline company, telephone company, etc.) conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple…. Transaction costs are minimized by undivided ownership of a parcel of land, and such ownership is facilitated by the automatic reuniting of divided land once the reason for the division has ceased. If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its neighbor –

> that or the gradual extinction of the railroad's interest through the operation of adverse possession. It is cleaner if the railroad's interest simply terminates upon the abandonment of railroad service. A further consideration is that railroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property – more, that is, than a right of way.

955 F.2d at 1160 (citations omitted).

In *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979), the Supreme Court noted, there is a "special need for certainty and predictability where land titles are concerned, [and this Court is] unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." The centerline presumption is a foundational tenant of property law dating back before Blackstone. "It is a familiar principle of law, that a grant of land bordering on a road or river, carries the title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines." *Banks v. Ogden*, 69 U.S. 57, 69 (1864). See also Professor Kratovil's article, *Easement Draftsmanship and Conveyancing,* 38 CALIF. L. REV. 426, 432 (1950), "The general rule is that a conveyance of land which is bounded by a private way carries title to the center of the way, unless there is a clear expression to the contrary."

The entire point of the strips-and-gore doctrine and the related centerline presumption, as Taft explained in *Paine*, is to address the situation where a property boundary is described as being the edge of an existing right-of-way or other physical feature such as a stream. The doctrine holds that the conveyance of title describing the property *boundary* as being the edge of the referenced right-of-way or monument actually conveys title to the land extending to the center of the reference right-of-way, *even when the description only references one edge of the right-of-way*. See William B. Stoebuck & Dale A. Whitman, THE LAW OF PROPERTY (3rd ed.) §11.2. As Professors Stoebuck and Whitman explain, "public streets and highways are usually easements in favor of some public

agency, with the so-called 'underlying fee' remaining in private ownership." *Id.*

Professors Stoebuck and Whitman explain that the centerline presumption applies even where the deed or plat describes the property as ending at a street or railroad corridor. "Where [the corridor is an easement], the usual rule of construction is that a conveyance describing land with a call 'to Main Street' *will actually convey title to the center of the street*, subject to the street easement." THE LAW OF PROPERTY § 11.2 (emphasis added) (citing *Haggart v. United States*, 108 Fed. Cl. 70, 83 (2012)[5] ("This presumption applies even when 'the deed refers to the grantor's right of way as a boundary without clearly indicating that the side of the right of way is the boundary.'"); 2 R. Patton & C. Patton, LAND TITLES §143 (1957); 49 A.L.R.2d 982 (1956)). "The policy ground for the rule is obvious," they continue, because "if the street easement is someday vacated, it makes little sense to hold that some former owner or developer can take possession of a strip of land 20 or 30 feet wide." *Id.*

This centerline "rule," Professors Stoebuck and Whitman continue, "is sometimes applied, although not as consistently, *even if* the instrument describes the boundary as running along one side or edge of the street." LAW OF PROPERTY §11.2 (emphasis added). "A *very clear expression of intention* is necessary for the grantor to exclude the street from the document's coverage. A similar rule making the center line the boundary is applied to railroad and other rights of way …." *Id.* (emphasis added). Thus, even when a deed or plat describes the property as extending "to Main Street," or as here, "to the railroad corridor," without specifically identifying the land underlying the corridor, the underlying fee owner will be presumed to own to the centerline of the street or corridor, unless a "very clear expression" of intending otherwise is stated.[6]

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[5] *Haggart* is cited in the forthcoming 4th edition to THE LAW OF PROPERTY.

[6] Professors Stoebuck and Whitman note, "The same principle is applied when the property is described by reference to a recorded map or plat showing the street…." LAW OF PROPERTY §11.2.

This Court recognized that Florida follows the centerline presumption. ECF No. 40, p. 36 ("In *Smith v. Horn*, the Supreme Court of Florida presumed that an owner of a parcel of land that was adjacent to a street within a subdivision owned to the center of a street because there was no 'contrary showing' that the original subdivision owner or his grantees clearly reserved title to the street."). The error this court made, however, was the mistaken belief that the centerline presumption was overcome whenever a plat depicts lot boundaries as the edge of a right-of-way instead of explicitly extending to the center of the right-of-way.

Professor Whitman reviewed the plats at issue in this case. As Professor Whitman opines, "Even though the Zena Gardens and Princess Park Manor plats do not describe the plaintiffs' properties as extending onto the railroad corridor, the plaintiffs should be deemed to own the fee estate underlying the railroad corridor to the center of the corridor under the centerline rule, subject to the railroad's easement." **Exhibit 3** (Decl. of Dale A. Whitman) ¶5. "The plats do not include any clear expression of intention of the grantor to exclude the land underlying the railroad corridor from the lots' coverage." *Id.* "The evidence for excluding the railroad right-of-way cited by the court is completely unpersuasive, in my opinion. Specifically: [1]) The fact that the lots of the private owners are not depicted as extending onto the railroad corridor *is completely typical, and is precisely the situation in which the centerline presumption is designed to operate*[; 2]) The language in the Zena Gardens plat 'excepting' the railroad corridor is merely stating that the railroad corridor is not part of the subdivision – which of course, it is not. But this language sheds no light on whether the developers intended to rebut the centerline presumption. The fact that the subdivision (and each lot's) formal description does not include the railroad corridor is to be expected, and in no way rebuts the centerline presumption[; 3]) The absence of any mention of the railroad corridor in the 'dedication' language of the plats likewise sheds no light on any intention

to rebut the centerline presumption. The terms 'dedication' is technically appropriate only to describe land being given to public bodies – in this case, presumably to the City of Miami or Miami-Dade (then-Dade) County. It would have been inappropriate to refer to the railroad right-of-way as a 'dedication.' And in any event, the railroad right-of-way was not technically part of the subdivisions, and therefore could not have been created as an easement by the subdivision plats. None of this has any bearing at all on the application of the centerline presumption." *Id.* (emphasis added).

This Court's conclusion that the centerline presumption is rebutted or overcome unless the plat specifically depicts the property boundary as extending to the centerline of the referenced right-of-way would render the presumption a nullity. If the centerline presumption is rebutted when the relevant conveyance references the edge of a right-of-way boundary instead of explicitly referencing the center of the right-of-way, then the centerline presumption would never apply.

B. This Court applied the centerline presumption contrary to how Florida courts apply this presumption.

Florida has long followed the strip-and-gore doctrine and the centerline presumption. See *Smith*, 70 So. at 436; *Servando*, 91 So.2d at 293; *Florida Southern Ry. Co. v. Brown*, 1 So. 512, 513 (Fla. 1887). Florida codified this presumption as to land described in recorded subdivision plats and with regard to a county's abandonment of a road. See *Servando*, 91 So.2d at 293; Fla. Stat. §§177.085, 336.12. See also **Exhibit 4** (Decl. of Christopher Smart) ¶¶5-8; **Exhibit 5** (Florida Uniform Title Standards), §11.4. In *Seaboard*, 44 So. at 353 (citing and quoting *Rawls*, 31 So. 237), and *Jacksonville, T. & K.W. Ry. Co. v. Lockwood*, 15 So. 327 (Fla. 1894)), the Florida Supreme Court noted the longstanding principle of Florida property law that "the proprietor of lots abutting on a public street is presumed, in the absence of evidence to the contrary, to own soil to the center of the street." In *Servando*, the Florida Supreme Court, interpreting its prior decisions

in both *Horn* and *Florida Southern*, held that the owner of the lot abutting road easements took title to the land under the easement to the centerline. 91 So.2d at 293. The court reasoned that a ten-foot-wide alley on a subdivision plat would serve no "practical use or service," and that an "isolated piece of land of such proportion could be of no use to anyone except owners of property it touched and persons dealing with them." *Id.* In *United States v. 16.33 Acres of Land in Dade County*, 342 So.2d 476 (Fla. 1977), the Florida Supreme Court reaffirmed this doctrine. The owner who had originally subdivided the property claimed he still owned the strips of land under the roads. The Florida Supreme Court, following *Horn*, *Florida Southern*, and *Servando*, held the owners of the lots abutting the easements took title to the centerline of the easements. *No Florida Supreme Court decision has ever applied the centerline presumption as this Court did*.

C. This Court must interpret these two plats in the same manner the Florida Supreme Court would.

This Court must apply Florida property law in the same manner Florida's Supreme Court would apply Florida law. Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court cannot presume to independently declare state law; it must defer to the interpretation of the highest state court. Particularly when state law is unsettled, federalism concerns strongly favor certifying questions of state law to a state's highest court instead guessing how the state's highest court would decide the question. In the decades since *Erie* and *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941), almost all states adopted procedures allowing federal courts to certify unsettled questions of state law directly to the state's highest court for resolution. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U. PA. L. REV. 1459, 1548 (1997). The Supreme Court has urged federal courts to use certification to resolve unsettled questions of state law. See *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (reversing a lower federal court's failure to certify an unsettled question of state law).

In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), the Supreme Court admonished a lower federal court for deciding a challenge to a novel Arizona constitutional amendment without first certifying the meaning of the Arizona law to the Arizona Supreme Court. "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans*, 520 U.S. at 78-79. Justice O'Connor (sitting by designation on the Second Circuit) reiterated this Court's direction that interpretation of state law is a "job surely best left to the state courts, especially when they 'stand willing to address questions of state law on certification from a federal court.'" *Osterweil v. Bartlett*, 706 F.3d 139, 142 (2nd Cir. 2013) (citing *Arizonans*, 520 U.S. at 79, and quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J.)).

Rule 9.150 of the Florida Rules of Appellate Procedure grants the Florida Supreme Court jurisdiction to answer questions certified to it by the "the Supreme Court of the United States or a United States court of appeals." Florida does not provide for the certification of a question by this Court or even a federal district court. However, 28 U.S.C. §1292(d)(2) provides that this Court may issue "an interlocutory order, [that] includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order.…"

Under these rules, should this Court certify this question to the Federal Circuit asking the Federal Circuit to, in turn, certify this question to the Federal Supreme Court, that may provide a

route to obtain a dispositive ruling of Florida law.

We believe Florida law is clear and that, under Florida law, the owners of these plats held title to the centerline of the land encumbered by the right-of-way easement. However, to the extent this Court believes "there is a substantial ground for difference of opinion" on this point, we ask this Court to consider issuing an interlocutory order to the Federal Circuit with a request that the Federal Circuit certify this question to the Florida Supreme Court. This would provide the most judicially-efficient manner to obtain a final resolution to this question of Florida state law.

The Florida Supreme Court's decision in *Rogers v. United States*, 184 So.3d 1087 (Fla. 2015), does not support this Court's conclusion. *Rogers* involved an entirely different matter. *Rogers* did not involve the application of the centerline presumption, nor did it involve interpretation of Florida property law applicable to this litigation. *Rogers* involved a deed from the landowner to the railroad that both this Court and the Federal Circuit held to be a conveyance of the fee estate to the railroad and not an easement. Unlike here, *Rogers* was a "fee versus easement" case. The landowners in *Rogers* argued that, even though the deed purported to be a conveyance of title to the fee estate, the railroad was limited under a Florida statute to acquiring an interest no greater than an easement to operate a railroad. The statute was an older Florida law in effect at the time of the conveyances at issue in *Rogers*. Florida had since repealed the law. *Rogers* held simply that, when a landowner granted a railroad a deed purporting the convey title to the fee estate in a strip of land, the Florida statute at issue did not prohibit the railroad from acquiring title to the fee estate. The Florida Supreme Court's decision in *Rogers* has no relevance here.

As its past opinions and precedent demonstrate, if the Florida Supreme Court was asked to resolve this question, the Florida Supreme Court would conclude these present-day owners of lots

in the Zena Gardens and Princess Park Manor subdivisions whose lots adjoin the former railroad right-of-way hold title to the fee estate in the land under the former railroad right-of-way extending to the centerline.

III. Departing from settled principles of Florida property law undermines the rule-of-property doctrine.

In *Preseault v. ICC*, the Supreme Court reminded us that property is defined by state law. 494 U.S. 1, 20 (1990) (O'Connor, concurring) ("we are mindful of the basic axiom that '[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'") (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

And as the Supreme Court held in *Brandt* and *Leo Sheep*, the Court is especially sensitive to recognizing and affirming settled rules of state property law. Accordingly, this Court is called upon to faithfully apply Florida law and construe the relevant conveyances deferential to Florida state law in the same manner as the Florida Supreme Court would decide this matter. This case turns upon the application of fundamental Florida state rules-of-property. In such cases, judicial innovation or departure from settled precedent (especially by a federal court) is especially inappropriate.

"A venerable legal principle stresses the importance of reliance interests when dealing with property rights." THE LAW OF JUDICIAL PRECEDENT (2016), p. 421.[7] The authors of JUDICIAL PRECEDENT explain, "[t]he rule-of-property doctrine embodies reliance principles affecting property, including its creation, ownership, transfer, and devolution.. The doctrine holds that stare

[7] The co-authors of JUDICIAL PRECEDENT include Justice Gorsuch and, *inter alia*, Judge Brett Kavanaugh, Diane Wood, Jeff Sutton, and others, with a forward by Justice Breyer.

decisis applies with 'particular force and strictness' to decisions governing real property [and] vested rights…." *Id.* The authors continued, "[a]s the Supreme Court explained in a mid-19th century case: 'Where questions arise which affect title to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change." *Id.* at 422 (citing *Minnesota Mining Co. v. National Mining Co*., 70 U.S. 332, 334 (1865)).

The authors of JUDICIAL PRECEDENT illustrate this point with an example of particular relevance to this litigation.

> A classic example applying the rule-of-property doctrine came in a 1966 New York case.[8] The petitioner, Heyert, held title to land that extended underneath the town road running over her property. She had presumptively granted the town an easement under the relevant highway law. When the town authorized a utility company to install gas pipes under the street, Heyert brought a takings claim, arguing the town's easement for highway purposes didn't include the right to install gas mains. The court first observed that a series of past decisions had held that easements for highway purposes were only "reservations[s] of a mere 'right of way' and so, without more, 'included only the right of passage over the surface of the land' … Although the use of public streets had evolved, 'thousands of deeds conveying rights of way … ha[d] been made on this rule, which ha[d] existed since the common law began in [New York]'…."

Id. at 423.

CONCLUSION

These owners and their counsel have great respect for this Court. This is why we bring this matter to the Court's attention and ask this Court to reconsider its earlier decision. We ask this Court to reconsider its decision and find that, under Florida law, these present-day owners of the lots in the Zena Gardens and Princess Park Manor whose platted lots adjoin the former Florida East Coast railroad right-of-way easement hold title to the fee estate in the land to the centerline

[8] Discussing *Heyert v. Orange & Rockland Utils., Inc.*, 218 N.E.2d 263, 266-69 (N.Y. 1966).

of the adjoining right-of-way. Alternatively, we ask this Court to issue an interlocutory order to the Federal Circuit and request the Federal Circuit to certify the question to the Florida Supreme Court.

Respectfully submitted,

/s/ Lindsay S.C. Brinton

Mark F. (Thor) Hearne, II
Lindsay S.C. Brinton
Meghan S. Largent
Stephen S. Davis
Abram J. Pafford
ARENT FOX, LLP
1717 K Street, NW
Washington, DC 20006
(202) 857-6000
(202) 857-6395 (facsimile)
Thor@arentfox.com
lindsay.brinton@arentfox.com

112 South Hanley, Suite 200
Clayton, MO 63105
(314) 296-4000

Attorneys for Plaintiffs